STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL N. FRASIER,

APPELLANT

RECEIVED
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SC Court of Appeals

APPELLATE CASE NO 2017-000802

FINAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to suppress evidence obtained when the police unlawfully seized Appellant, a passenger in a car stopped for having an inoperable third brake light, by exceeding the scope of the initial traffic stop and lacking a reasonable suspicion of criminal activity to support the extension of the stop?

2. Did the trial judge err in refusing to suppress a bus ticket, a straw and a small bag of cocaine found on Appellant's person as a result of a nonconsensual search conducted without probable cause?

3. Did the trial judge err in refusing to suppress Appellant's statements to police when the statements were involuntary and in violation of the rule established in Missouri v. Seibert, 542 U.S. 600 (2004)?

STATEMENT OF THE CASE

In October of 2013, the Charleston County Grand Jury[1] indicted Appellant Frasier for trafficking cocaine, indictment #2013-GS-10- 06360. (R. p. 364). On March 22, 2017, Appellant proceeded to jury trial before the Honorable Deadra L. Jefferson. Jason T. King and Jessica L. Birt represented Appellant at trial. E. Culver Kidd, IV and Scott Maynor prosecuted the case. The jury returned a verdict of guilty and Judge Jefferson sentenced Appellant to twenty-five (25) years in prison. A timely notice of intent to appeal was served on March 30, 2017. This appeal follows.

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[1] It is unclear who testified before the Charleston County Grand Jury as the indictment lists the North Charleston Police Department.

FACTS OF THE CASE

On the morning of August 14, 2013, narcotics officers with the North Charleston Police Department saw Appellant leave the bus station in North Charleston, get into a car and leave. (R. p. 28, lines 9-19). During the pre-trial hearing on Appellant's motion to suppress Officer Pritchard testified, "It appeared to me that he was clearing the area for threats, i.e., whether it be law enforcement, enemies, something of the sort. He was uncomfortable, it appeared to me." (R. p. 28, line 24 – p. 29, lines 1-2). Based on this purported suspicious behavior, the officers followed the car in which Appellant was a passenger. Officer Pritchard testified, "Commonly, this happened multiples where we had to get the vehicle stopped leaving certain areas due to the fact that we have no lights. And we've had to – it's easier for us to follow in an unmarked vehicle where we can get a violation. On this particular date, we did follow the vehicle and were able to get a violation on the vehicle, which was a third brake light." (R. p. 30, lines 12-19). After the narcotics officers "got a violation" they contacted a patrol officer to stop the car for the brake light violation. (R. p. 37, lines 1-12).

Officer Hall, the patrol officer who was contacted by the narcotics officers, stopped the car. Cheryl Jones was the driver, Appellant was a passenger in the front seat and there was a child in the backseat. (R. p. 172, lines 16-21; p. 48, line 23 – p. 49, lines 1-2). Once Officer Hall determined that Ms. Jones had a valid driver's license and neither Jones nor Appellant had outstanding warrants, the officer decided to write a warning ticket and "try to get consent." (R. p. 64, lines 20-23). Another officer, Officer Deaton, provided backup at the traffic stop. (R. p. 174, lines 10-18). According to Officer Hall, Ms. Jones gave consent to search the car. (R. p. 66, lines 18-19). The officers asked both Ms. Jones and Appellant to step out of the car.

Officer Hall testified that he asked Appellant "if he minded if I checked him out or searched him, and he said, 'I do, but', and just kind of put his hands on top of the car." (R. p. 46, lines 23-25). Officer Hall searched Appellant and found a small bag containing cocaine, a straw and a bus ticket. (R. p. 232, lines 1-3; p. 237, line 11 – p. 238, 239, 240 lines 1-2). At this point Officer Hall arrested Appellant. (R. p. 47, lines 16-20). Officer Hall and another officer searched the car and found more cocaine in a jacket in the backseat. (R. p. 48, lines 12-22). The officers also found Superior B, a substance used to cut cocaine, in a bag in the backseat. (R. p. 77, lines 13-15).

Prior to *Miranda* warnings, Officer Hall questioned Appellant about the jacket where the cocaine was found. (R. p. 49, lines 12-19). Officer Hall testified that Appellant stated that the jacket was his. (R. p. 49, lines 20-21). Eight minutes later, Officer Hall advised Appellant of his *Miranda* rights. (R. p. 76, lines 7-11). Officer Hall again asked Appellant about the jacket found in the car. (R. p. 76, lines 15-19) Officer Pritchard, one of the narcotics officers who arrived at the stop later, also asked Appellant, post *Miranda* warnings, about the cocaine found in the jacket in the car. According to the officer, Appellant responded, "I'm responsible." (R. p. 159, lines 19-21). Ms. Jones was given a warning ticket for the inoperable third brake light but was not arrested or charged with any drug offense.

ARGUMENTS

1. The trial judge erred in refusing to suppress evidence obtained when the police unlawfully seized Appellant, a passenger in a car stopped for having an inoperable third brake light, by exceeding the scope of the initial traffic stop and lacking a reasonable suspicion of criminal activity to support the extension of the stop.

Prior to trial Appellant filed a written motion to suppress and moved to suppress all evidence, including a small amount of cocaine, a straw and a bus ticket found on Appellant's person, cocaine found in the car, cutting agent found in the car, the dash cam video of the traffic stop and statements of the Appellant, obtained as a result of an illegal seizure in violation of the Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution. (R. pp. 91-125; R. p. 350- 355). The trial judge denied the motion finding that the police had reasonable suspicion of criminal activity to justify the extension of the initial traffic stop. (R. pp. 109-135). The trial judge erred. The State failed to establish that the police officers had reasonable suspicion to prolong the traffic stop. There is no evidence to support the trial judge's finding of reasonable suspicion.

Narcotics officers with the North Charleston Police Department ordered a traffic stop of the car in which Appellant left the bus station as a passenger based on the fact that Appellant scanned the parking lot as he left the bus station. (R. p. 35, line 6 – p. 36, 37, lines 1-12). The inoperable third brake light violation was a mere pretext for the stop. As the trial judge stated, "We know that they called to have him stopped because they saw his behavior at the bus station. They felt it was suspicious, and that they were just looking for a reason to stop the car so that they could search him and find out if there were illegal drugs in the car." (R. p. 92, lines 12-17). When Officer Hall, the patrol officer called to make the traffic stop, was asked what information he received form the narcotics officers, Officer Hall testified, "I was told that they had – they

were watching the bus station and observed the subject exit the bus station, enter a car. They didn't give me – run through all the particulars. They just believed that something was funny about it and asked if I would conduct a traffic stop on the vehicle." (R. p. 55, lines 1-6). A video of the traffic stop was introduced in evidence and marked as State's Exhibit #6. The video reflects that Officer Hall reached a speed of up to 87 miles per hour in order to catch up with the car. (R. p. 56, lines 7-14).

At 8:07 AM Officer Hall initiated his blue lights while the car was on the Cosgrove Bridge where the driver, Cheryl Jones, could not immediately pull over. (R. p. 56, line 18 – p. 57, line 1; p. 81, lines 10-11). Within forty-nine seconds of the initiation of the blue light Ms. Jones pulled over. (R. p. 58, lines 15-18). When the officer approached the car he noticed that Ms. Jones' zipper was down and her pants were "kind of undone." (R. p. 41, lines 9-12). Jones told the officer that she had just gotten out of the shower before coming to the bus station and she must have forgotten to zip her pants. (R. p. 63, lines 1-12). As noted by the trial judge in discussing Ms. Jones' attitude, "And you can see her attitude to the video. Like, I just got out of the shower, why is it your business that my zipper is down, which I don't know is necessarily unreasonable." (R. p. 96, line 23 – p. 97, line 1).

The officer testified that Appellant, the passenger, appeared to be nervous. "He was sweating profusely, did not want to really interact with me a whole lot as far as eye contact, something like that." (R. p. 43, lines 3-5). As noted by the trial judge, "Everybody sweats profusely in August in Charleston." (R. p. 82, line 25 – p. 83, line 1). The video of the traffic stop shows an officer wiping his brow. Complaints about the heat and concerns about getting Ms. Jones and the child out of the heat can also be heard on the tape. (R. p. 61, line 6 – p. 62, lines 1-22).

At 8:11 AM Officer Hall ran a driver's license check. (R. p. 81, lines 11-12). The information checks on both Ms. Jones and Appellant came back clear at 8:13 AM. (R. p. 64, lines 2-19). At this point Officer Hall decided to issue a warning ticket for the inoperable third brake light and to "try and obtain consent to search." (R. p. 64, lines 20-24). The officer testified that while he was writing the warning ticket, the driver's side door opened. (R. p. 73, lines 22-25).

Instead of giving Ms. Jones the warning ticket, Officer Hall asked her to step out of the car. After a few questions Officer Hall stated, "You don't mind if I take a quick look do you?" Jones responded, "No." (See State's Exhibit #6, video of traffic stop). The following questioning of Officer Hall took place during the suppression hearing:

Q. So doesn't look like you actually gave her the ticket at that point?

A. No.

Q. But you have the ticket written out and ready to give to her, right?

A. Yes, sir.

Q. At that point, you are basically done with the traffic part of it, right? You are still concerned about there may be something in the car.

A. Correct.

Q. But the traffic portion of it, you've written the ticket out. And instead of giving it to her, you get her out and start talking to her about whether you can search the car?

A. Yes, sir.

(R. p. 66, lines 3-17). At this point, the purpose of the initial traffic stop for an inoperable third brake light had ended. According to the officer, Jones then gave consent to search the car. (R. p. 66, lines 18-19). The prosecutor asserted that consent was given at 8:19 AM. (R. p. 81, lines 13-

15). When asked how long a typical traffic stop lasts Officer Hall testified, "Ten minutes, fifteen minutes maybe. I would say ten probably." (R. p. 55, lines 22-25).

Officer Hall did not have a basis to suspect that there were drugs in the car. The officer testified at the pretrial hearing, "Just with the totality of everything, with what I was relayed from the detectives and almost evasiveness – well, not evasiveness, but the length they pulled over, her zipper being undone, just not being very direct with their answers with me, my interested was piqued highly that something was amiss or – I don't know." (R. p. 45, lines 2-7). The officer admitted, however, that neither Jones nor the Appellant provided false or conflicting statements. (R. p. 59, lines 8-23). Officer Hall agreed that within the first two minutes of the stop Appellant told the officer he was coming from New York and Jones told the officer she was coming from the bus station. (R. p. 59, lines 8-15).

The prosecutor told the judge, "This traffic stop was extended based on a reasonable articulable suspicion." (R. p. 81, lines 20-21). The prosecutor argued that Appellant's scanning the parking lot at the bus stop, the fact that the driver's pants were unzipped, Appellant's nervous behavior and inability to answer questions directly, the driver's delay in stopping and opening the door during the traffic stop amounted to reasonable suspicion to justify the extended traffic stop. (R. p. 85, lines 6-18).

Appellant, citing State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), moved to suppress the evidence found on Appellant's person and the evidence found in the car. (R. p. 91, lines 7-19). Appellant argued that any purported consent to search was invalid because it was the product of the illegal prolonged detention. (R. p. 93, lines 10-24; p. 101, lines 3-14). Appellant argued that the officer did not have reasonable suspicion to prolong the traffic stop. (R. p. 97, lines 4-9; p. 100, line 8 – p. 102, lines 1-2).

The trial judge, without discussing what particular factors constituted reasonable articulable suspicion, found that the officer had an objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring. (R. pp. 131-135). The trial judge appears to acknowledge that the determination of whether the State presented evidence of reasonable suspicion to justify the extended traffic stop was a close call stating, "The next, and I've shared this with counsel, the next issue is the stop, which really is at best a 50/50 call based on the facts as they have been presented in the testimony." (R. p. 131, lines 9-12). The judge went on to state, "And I think the parties would agree that the initial purpose of the stop was the taillight[2] being out, that clearly the purpose of that stop had been concluded. And then there was a second extension of the stop." (R. p. 132, lines 13-16). The judge then discussed the narcotics officer's observation of alleged suspicious behavior at the bus stop. (R. p. 132, line 17 – p. 133, lines 1-18). The trial judge acknowledged that the patrol officer was justified in questioning Jones and the Appellant during the traffic stop. (R. p. 133, lines 19-22). The trial judge acknowledged that nervousness alone is not enough to justify extending a traffic stop. (R. p. 133, line 23 – p. 134, line 1). The judge then stated:

> Now, the officers have articulated many factors. And just in the interest of time, because the jury now has been waiting since 1:30 on us and it's now 2:12. It's not their fault. It took us a little bit longer. And I needed to give you all a reasonable chance to eat as well before we proceeded with the trial. But in the interest of time, I'm just going to cut to the chase on it, which is that the officers articulated what they believed to be the basis of a reasonable and articulable suspicion to extend the stop. And I find that testimony is reasonable and supported by the facts.

(R. p. 134, lines 14-24). The trial judge found that the purported delay in stopping, however, was reasonable and did not contribute to reasonable suspicion. (R. p. 134, line 25 – p. 135, lines 1-17). The trial judge's finding that the officer had a reasonable articulable suspicion to justify

[2] The third brake light was out, not the taillight.

the extended traffic stop and detention is not supported by the record and constitutes clear error requiring reversal.

During trial Appellant renewed his objection to the admission of the dash cam video. (R. p. 168, lines 5-9). Appellant also renewed the objection to the admission of the small amount of cocaine found on Appellant's person. (R. p. 231, lines 23-24). Additionally, Appellant renewed his objection to the bus ticket and the straw found on Appellant's person. (R. p. 237, line 14 – p. 238, 239, 240, lines 1-10). Appellant renewed his objection to the admission of the cocaine found in the car. (R. p. 232, line 15; p. 263, lines 22-25; p. 266, lines 1-18). Appellant also renewed his objection to the admission of the Superior B cutting agent. (R. p. 236, lines 21-23). Appellant renewed his objections to a post *Miranda* statement attributed to Appellant. (R. p. 156, line 23 – p. 157, lines 1-6; p. 158, lines 16-18, p. 159, line 6, p. 240, lines 19-20). All evidence subject to the suppression motion was admitted over objection. The objections were again renewed at the close of the State's case and after the jury reached a verdict. (R. p. 278, lines 16-20; p. 346, lines 5-6).

"In Fourth Amendment cases, the trial court's factual rulings are reviewed under the 'clear error' standard." State v. Provet, 391 S.C. 494, 498, 706 S.E.2d 513, 515 (citing State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000)). "Under the clear error standard, an appellate court will not reverse a trial court's findings of fact simply because it would have decided the case differently." *Id.* (internal quotations omitted) (citing State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct.App.2005)). "Therefore, we will affirm if there is any evidence to support the trial court's rulings." Id. (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002)).

The Fourth Amendment to the Constitution of the United States grants citizens the right to be secure against unreasonable search and seizure. (U.S. Const. amend. IV). Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but where probable cause exists to believe that a traffic violation has occurred, such a seizure is reasonable per se. See Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation. See United States v. Sullivan, 138 F.3d 126, 131 (4th Cir.1998). However, "[a]ny 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." *Id.* (emphasis added); see Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."). The initial pretextual traffic stop for the inoperable third brake light is not being challenged. The prolonged detention by Officer Hall after he wrote the warning ticket, however, required additional reasonable suspicion.

In State v. Moore, 415 S.C. 245, 252, 781 S.E.2d 897, 900–01, cert. denied, 136 S. Ct. 2473, 195 L. Ed. 2d 809 (2016) the South Carolina Supreme Court wrote:

> "Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop." Id. (citing Pennsylvania v. Mimms, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)). "A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the purpose of the traffic stop has been completed." *Id.* (citing Arizona v. Johnson, 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009)); see Rodriguez v. United States, ––U.S. ––, 135 S.Ct. 1609, 1616, 191 L.Ed.2d 492 (2015) (holding that even a *de minimis* extension of a traffic stop is unconstitutional absent reasonable suspicion). However, "[o]nce the underlying basis for the initial traffic stop has concluded, it does not automatically follow that any further detention for questioning is unconstitutional." Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. " '[T]he officer may detain the driver for questioning unrelated to the initial stop if

he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring.' " *Id.* (quoting United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir.1998)).

Officer Hall's continued detention of Appellant and Jones **after** checks on both of them came back clear and the officer wrote the warning ticket, exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment. At the time Officer Hall returned to the car the purpose of the traffic stop had been accomplished except for the issuance of the warning. Instead of issuing a warning the officer continued to question Appellant and Jones and asked both to step out of the car. The officer still had Appellant's license and there was another officer present on the scene. (R. p. 65, lines 9-12). A reasonable person in Appellant's position would not have felt free to terminate the encounter. Officer Hall admitted that he never told them that they were free to leave. (R. p. 66, lines 20-25).

The prosecutor admitted that the traffic stop had been extended beyond the scope of the initial traffic stop for an inoperable third brake light but argued that the officer had an objectively reasonable and articulable suspicion illegal activity had occurred or was occurring. The prosecutor told the judge, "This traffic stop was extended based on a reasonable articulable suspicion." (R. p. 81, lines 20-21). Officer Hall, however, did not have an objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring, rendering the prolonged detention unconstitutional.

"[I]n evaluating whether an officer possesses reasonable suspicion, this Court must "consider 'the totality of the circumstances—the whole picture.' " Sokolow, 490 U.S. at 8, 109 S.Ct. 1581 (quoting United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). State v. Moore, 415 S.C. 245, 253, 781 S.E.2d 897, 901, cert. denied, 136 S. Ct. 2473,

195 L. Ed. 2d 809 (2016). In State v. Spears, 420 S.C. 363, 802 S.E.2d 803, 808 (Ct. App. 2017), reh'g denied (Aug. 18, 2017) the South Carolina Court of Appeals wrote:

> "Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.' " State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see also Robinson, 407 S.C. at 182, 754 S.E.2d at 868 ("Reasonable suspicion is something more than an 'inchoate and unparticularized suspicion' or hunch." (quoting Terry, 392 U.S. at 27, 88 S.Ct. 1868)). It is "a particularized and objective basis for suspecting legal wrongdoing." Anderson, 415 S.C. at 447, 783 S.E.2d at 54 (quoting United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002)). "Reasonableness is measured in objective terms by examining the totality of the circumstances. As a result, the nature of the reasonableness inquiry is highly fact-specific." State v. Pichardo, 367 S.C. 84, 101, 623 S.E.2d 840, 849 (Ct. App. 2005).

The factors argued by the State in support of reasonable suspicion were: 1.) the purported vague suspicious activity observed by the narcotics officers at the bus station and generally relayed to Officer Hall; 2.) a lane change and forty-nine second delay in stopping to get across the bridge; 3.) the fact that the driver's zipper was undone; 4.) Appellant's nervous behavior and delay in directly answering questions about where they were coming from; and 5.) the driver door opening during the traffic stop. The judge correctly found that the lane change and purported delay in stopping was reasonable. (R. p. 134, line 25 – p.135, lines 1-17). The judge incorrectly found that other non-specified factors provided Officer Hall with objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring. (R. p. 134, lines 14-24). Viewing the factors above as a whole and considering the totality of the circumstances the record does not support the trial judge's finding of reasonable suspicion. There is no evidence of reasonable suspicion in the present case.

In Moore the South Carolina Supreme Court found that the large amount of money found on Moore, Moore's unusual itinerary and Moore's nervousness supported the trial court's finding of reasonable suspicion. In regard to nervousness, the Court in Moore cautioned writing:

> Moore exhibited excessive nervousness in the judgment of the officer, which lends support to a finding of reasonable suspicion to prolong the traffic stop. We nevertheless comment on law enforcement's reliance on the seemingly omnipresent factor of nervousness. General nervousness will almost invariably be present in a traffic stop. At the suppression hearing, Deputy Owens gave a lengthy list of factors in support of reasonable suspicion, including many that were merely different manifestations of the element of nervousness. While nervous behavior is a pertinent factor in determining reasonable suspicion, we, like many appellate courts, have become weary with the many creative ways law enforcement attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion. Here, law enforcement's penchant for turning nervousness into a laundry list of factors was not necessary. The trial court properly focused not on the factor of nervousness, but rather upon the facts noted above which support a finding of reasonable suspicion that Moore was likely engaged in criminal activity.

State v. Moore, 415 S.C. 245, 254–55, 781 S.E.2d 897, 902, cert. denied, 136 S. Ct. 2473, 195 L. Ed. 2d 809 (2016)(footnote #3 omitted). Nervousness is simply one factor to be considered. In the present case there is no other evidence supporting a finding of reasonable suspicion. The purported vague suspicious activity observed by the narcotics officers at the bus station and generally relayed to Officer Hall, a lane change and forty-nine second delay in stopping to get across the bridge, the fact that the driver's zipper was undone and the driver door opening during the traffic stop combined with Appellant's nervous behavior does not support a finding of reasonable suspicion to justify the prolonged detention.

In Provet the South Carolina Court of Appeals affirmed the finding of reasonable suspicion by the trial court and wrote:

> 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.

State v. Provet, 391 S.C. 494, 504–05, 706 S.E.2d 513, 518–19 (Ct. App. 2011), aff'd, 405 S.C. 101, 747 S.E.2d 453 (2013)(footnotes #3, #4 omitted). Unlike in Moore, Appellant in the present case did not have a large amount of money or an unusual itinerary. Unlike in Provet, there was no evidence in the present case that Appellant had extreme shaking of the hands or accelerated breathing. The vehicle in the present case was not registered to a third party. Appellant did not provide false statements to Officer Hall. There was no testimony in the present case about fast food bags, or cell phones or several air fresheners.

In State v. Tindall, 388 S.C. 518, 523, 698 S.E.2d 203, 206 (2010)(footnotes #4, #5 omitted), the South Carolina Supreme Court wrote:

> The question therefore becomes whether the officer reasonably suspected a serious crime at the point at which he chose not to conclude the traffic stop, despite his stated intention to issue a warning ticket, instead opting to continue his questioning. *See Sullivan,* 138 F.3d at 131. At that point, the officer had ascertained the following information: (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. We find these facts did not provide the officer with a "reasonable suspicion" that a serious crime was afoot. Consequently, the continued detention was illegal and the drugs discovered during the search of the vehicle must be suppressed.

In Tindall the South Carolina Supreme Court found that the officer lacked reasonable suspicion despite the third party rental and felony stretch. In the present case there was no third party rental and no felony stretch. There was no evidence to support reasonable suspicion in the present case.

Any purported consent by either Jones or Appellant was invalid because it was the result of the illegal detention. In State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005), the South Carolina Court of Appeals wrote:

> Undoubtedly, a law enforcement officer may request permission to search at any time. However, 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. State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991); State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct.App.2002); see Wong Sun v. United States, 371 U.S. 471, 487–88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' ") (citation omitted); Brown v. State, 188 Ga.App. 184, 372 S.E.2d 514, 516 (1988) ("[I]n order to eliminate any taint from an [illegal] seizure or arrest, there must be proof both that the consent was voluntary and that it was not the product of the illegal detention.").
>
> Proof of a voluntary consent alone is not sufficient. Williams, 351 S.C. at 604, 571 S.E.2d at 710; Brown, 372 S.E.2d at 516. The relevant factors include the temporal proximity of the illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.*

Any purported consent given by Jones or Appellant was the product of the illegal detention and the taint of the unreasonable stop was not sufficiently attenuated. In State v. Williams, 351 S.C. 591, 604–05, 571 S.E.2d 703, 710–11 (Ct. App. 2002) the South Carolina Court of Appeals wrote:

> In the instant case, we need not determine whether Williams' consent was voluntary, because the record clearly reflects it was obtained through Blajszczak's exploitation of the unlawful detention. Blajszczak's testimony before the trial court revealed that a minimal amount of time passed between the seizure and ensuing consent, there were no intervening or attenuating circumstances, and, as we have already decided, Blajszczak's actions in detaining Barbour and Williams had no legal basis. Although the trial court failed to reach the issue of consent, the record unquestionably supports finding Williams' consent invalid.

In the present case, as in Williams, the record clearly reflects that consent was obtained through Officer Hall's exploitation of the unlawful detention. A minimal amount of time passed between the seizure and purported consent and there were no intervening circumstances. Any consent was invalid. The trial judge erred in refusing to suppress the fruits of the illegal seizure.

This Court does not need to reweigh the facts or substitute its de novo judgment in order to find that the State failed to prove reasonable suspicion because the record does not support the trial judge's finding of reasonable suspicion. The officer did not have reasonable suspicion to justify the prolonged traffic stop. The prolonged detention constituted an unconstitutional seizure under both the Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution. Any evidence obtained as a result of the unlawful seizure is fruit of the poisonous tree. Suppression of the evidence is the remedy. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The trial judge erred in refusing to suppress the evidence.

2. The trial judge erred in refusing to suppress a bus ticket, a straw and a small bag of cocaine found on Appellant's person as a result of a nonconsensual search conducted without probable cause.

Without conceding that any purported consent to search was the result of an unlawful detention and therefore invalid, as argued in issue one, Appellant additionally and alternatively argued that Officer Hall's search of Appellant was not consensual. Prior to trial Appellant filed a written motion to suppress and moved to suppress a small amount of cocaine, a straw and a bus ticket found on Appellant's person by Officer Hall as a violation of the Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution. (R. p. 94, line 4 – p. 95, 196, lines 1-16 ; p. 104, 105, 106, 107, lines 1-7; R. p. 356). The trial judge found

the search to be consensual. (R. p. 128, line 5 – p. 129, 130, 131 lines 1-8). The trial judge erred. At trial Appellant renewed the objection to the admission of the small amount of cocaine found on Appellant's person. (R. p. 231, lines 23-24). Additionally, Appellant renewed his objection to the bus ticket and the straw found on Appellant's person. (R. p. 237, line 14 – p. 238, 239, 240, lines 1-10). The renewed objections were overruled. (R. p. 239, lines 14-15).

During the pre-trial motion to suppress Officer Hall testified that he asked Appellant "if he minded if I checked him out or searched him, and he said, 'I do, but', and just kind of put his hands on top of the car." (R. p. 46, lines 23-25). The interaction between Officer Hall and Appellant can be seen on the video that was introduced in evidence as State's Exhibit #6. Officer Hall searched Appellant and found a small bag containing cocaine, a straw and a bus ticket. (R. p. 232, lines 1-3; p. 237, line 11 – p. 238, 239, 240 lines 1-2). Officer Hall admitted that his request to search was more of a statement. (R. p. 70, lines 2-5). Counsel for Appellant questioned Officer Hall:

> Q. That seems to me like this is consent military style. You told him, you don't mind if I search you real quick, it's like you are going to do it anyway. And maybe that's what he's thinking, yeah, I mind, but what choice do I have. Right? You don't think you had maybe some duty to ask him follow-up question or at least get a yes from him?
>
> A. Yes, in hindsight, I could have worded it better or made the question a little bit more clear towards him.

(R. p. 72, lines 1-8). Officer Hall admitted that he and the other officer on scene were armed with a pistol, a stun gun, pepper spray and a baton. (R. p. 68, lines 3-19). Officer Hall admitted that Appellant asked, "My pockets too?" (R. p. 72, lines 14-19).

Counsel for Appellant argued:

> If anything, he's revoked his consent at that point. Even if he did consent in the beginning, once they start going in his pockets, he's protesting that and revoking any consent that I don't think he gave in the first place. I think it's a submission

> to authority and not a voluntary consent. The case I cite to is State v. Harris. In that case, the police wanted to search a guy's car, and said, we want to search your car, and the guy said, that's cool. And the court ruled that's not a voluntary consent. He said, that's cool.

(R. p. 104, line 21 – p. 105, lines 1-5). The State admitted that the voluntariness of the consent to search was a close call telling the trial judge, "He then asked for consent to search, pulls the defendant out, and asks for his consent to search. Now, I have a duty to the Court. That is a close call on the consent to search his person where the cocaine is found." (R. p. 86, lines 4-7). The State agreed that the search of Appellant's person was not a Terry frisk. (R. p. 86, line 9 – p. 87, lines 1-12).

During argument during the pre-trial suppression hearing the trial judge noted, "Now, I will conceded the video, I've watched it, and his behavior is sort of contradictory. He says, I really don't want to, but then his body language contradicts his words. Because then he immediately turns around and puts his hands on the roof of the car and basically submits to his person being searched. He said, I really don't want to, but. It's kind of what his body says." (R. p. 94, lines 11-17). A begrudging submission is not consent. The search of Appellant's person was unlawful as nonconsensual.

In State v. Harris, 277 S.C. 274, 276, 286 S.E.2d 137, 138 (1982), the case cited by counsel for Appellant, the South Carolina Supreme Court, finding the search nonconsensual, wrote:

> Consent is recognized as an exception to the general rule that searches conducted without a warrant are unreasonable. State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). However, the State bears the burden of proving the voluntariness of a consent to search from the totality of the surrounding circumstances. State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977). Also, the determination of voluntariness of consent is a question of fact for the trial judge. State v. Bailey, S.C., 274 S.E.2d 913 (1981). The trial judge determined that in view of the surrounding circumstances, "That's cool" did not constitute a consent to search. We agree. "That's cool" as a response to a declaration that the

> police officer wanted to search the vehicle at the complex was not a voluntary consent.

As argued during the suppression hearing, Appellant's statement, after being asked if he minded if the Officer searched him, that "he did mind, but . . ." is a stronger demonstration of non-consent than the "that's cool" statement found in Harris to be nonconsensual. (R. p. 106, line 19 – p. 107, lines 1-2).

In United States v. Robertson, 736 F.3d 677, 679–80 (4th Cir. 2013), the Fourth Circuit discussed the difference between "a voluntary consent to a request versus a begrudging submission to a command" finding that when Robertson walked toward the officer and raised his hands, after being silent in response to the request to search, he was merely submitting to a search rather than voluntarily consenting to the search. The Fourth Circuit wrote:

> The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. Searches without probable cause are presumptively unreasonable, but if an individual consents to a search, probable cause is unnecessary. See Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). We review for clear error a district court's determination that a search is consensual under the Fourth Amendment. See United States v. Wilson, 895 F.2d 168, 170 (4th Cir.1990). We apply a subjective test to analyze whether consent was given, looking to the totality of the circumstances. Wilson, 895 F.2d at 171–72. The government has the burden of proving consent. See United States v. Mendenhall, 446 U.S. 544, 557, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Relevant factors include the officer's conduct, the number of officers present, the time of the encounter, and characteristics of the individual who was searched, such as age and education. Lattimore, 87 F.3d at 650. Whether the individual searched was informed of his right to decline the search is a "highly relevant" factor. Wilson, 895 F.2d at 172.

Robertson, 736 F.3d at 679–80.

In the present case, Appellant's statement, after being asked if he minded if the Officer searched him, that "he did mind, but . . ." was a stronger demonstration of non-consent than Robertson's silence. Appellant's action of placing his hands on the car demonstrated that he was

merely submitting to the search, as in Robertson, rather than voluntarily consenting to the search. Viewing the relevant factors of proving consent, as discussed in Robertson, Appellant was stopped on the side of the road and was not free to leave. He was surrounded by two armed uniformed officers and was not informed of his right to decline the search. Like the search in Robertson, the search in the present case was nonconsensual. The evidence found on Appellant's person pursuant to the unlawful search must be suppressed.

> 3. The trial judge erred in refusing to suppress Appellant's statements to police when the statements were involuntary and in violation of the rule established in Missouri v. Seibert, 542 U.S. 600 (2004).

Without conceding the argument presented in issue one that statements made as a result of the unlawful prolonged detention should have been suppressed, Appellant additionally and alternatively argued that the statements were involuntary and in violation of Missouri v. Seibert, 542 U.S. 600 (2004). Prior to *Miranda* warnings, but after Appellant was placed in custody, Officer Hall questioned Appellant about the jacket where the cocaine was found. (R. p. 49, lines 12-19). Officer Hall testified that Appellant stated that the jacket was his. (R. p. 49, lines 20-21). Eight minutes later, Officer Hall advised Appellant of his *Miranda* rights. (R. p. 76, lines 7-11). Officer Hall again asked Appellant about the jacket found in the car. (R. p. 76, lines 15-19). According to Officer Hall Appellant again stated that the jacket was his. (R. p. 241, lines 6-8). Officer Pritchard, one of the narcotics officers who arrived at the stop later, also asked Appellant, post *Miranda* warnings, about the cocaine found in the jacket in the car. According to the officer, Appellant responded, "I'm responsible." (R. p. 159, lines 19-21).

Prior to trial Appellant filed a written motion to suppress and moved to suppress statements attributed to Appellant as both involuntary and in violation of Missouri v. Seibert, 542 U.S. 600 (2004). (R. pp. 107 – 114, R. p. 358). During the suppression hearing Officer Hall

testified that he should have mirandized Appellant when he placed him under arrest for the powder substance found on his person. (R. p. 47, line 16 – p. 48, lines 1-11). The judge suppressed pre *Miranda* statements provided to Officer Hall but admitted the post *Miranda* statements provided to Officer Hall and Officer Pritchard. (R. p. 125, line 18 – p. 126, 127, 128, lines 1-4). The trial judge erred. At trial Appellant renewed his objections to the post *Miranda* statements attributed to Appellant. (R. p. 156, line 23 – p. 157, lines 1-6; p. 158, lines 16-18, p. 159, line 6, p. 240, lines 19-20).

In State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841–42 (2010), the South Carolina Supreme Court wrote:

> In Seibert, the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering *Miranda* warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are:
>
> 1) the completeness and detail of the question and answers in the first round of interrogation;
>
> 2) the timing and setting of the first questioning and the second;
>
> 3) the continuity of police personnel; and
>
> 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

In the present case Officer Hall, after Appellant was arrested for the powder substance found on his person and after Officer Hall found the cocaine in a jacket in the backseat but before *Miranda* warnings, asked Appellant about ownership of the jacket. The judge suppressed Appellant's initial answer that the jacket belonged to him. Eight minutes later Officer Hall mirandized Appellant and again asked him about ownership of the jacket. The trial judge admitted Appellant's second answers to both Officers Hall and Pritchard that the jacket belonged

to him. While the questioning in regard to ownership of the jacket was not lengthy, the second post-*Miranda* questioning was within eight minutes of the first pre-*Miranda* questioning, Officer Hall conducted both interrogations and treated the second round of questioning as a continuation of the first. During the suppression hearing the following questioning of Officer Hall took place:

> Q. And after he's read his Miranda, you begin questioning him again, right –
>
> A. Yes, sir.
>
> Q. –about the jacket. And you really don't – you don't kind of start off fresh like, okay, whose jacket is it, right? You say, you are telling me the jacket is yours. That's the first thing you say after Miranda; is that right?
>
> A. That sounds correct.
>
> Q. Basically, referring back to that statement that he made eight minutes ago?
>
> A. I believe so, yes.

(R. p. 76, lines 12-22). The "question first, give *Miranda* warnings later" tactic used by Officer Hall is precisely what the Courts found to be a violation in Seibert and Navy. The statements made by Appellant after the second round of questioning should have been suppressed. The trial judge's failure to suppress the statements was not harmless. Appellant admitted ownership of a jacket containing over 100 grams of cocaine.

Appellant correctly distinguished State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016). (R. p. 110, line 19 – p. 111, lines 1-8). In Medley the second round of statements were not the result of a second interrogation, as in the present case, but rather initiated by the defendant. Appellant Frasier did not initiate the second round of statements. The statements were taken in violation of the rule announced in Seibert and discussed in Navy.

Appellant also challenged admission of his statement claiming ownership of the jacket as involuntary because it was made after a veiled threat to arrest Ms. Jones. Appellant argued:

> The next argument, which is voluntariness, the second before he claims the jacket, Officer Hall says, put her in cuffs. And puts Jones in cuffs. She's got a little toddler with her. He's already in cuffs. So he says, put her in cuffs. Asks whose jacket it is. Mr. Frasier claims the jacket, seeing her in cuffs. Officer Hall tells him, she's just being detained. She's not under arrest. Implication being, I can let her go if you tell me the right thing. And that's when he claimed the jacket.

(R. p. 112, line 20 – p. 113, lines 1-4). Appellant cited State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992), to support the argument that the statement was inadmissible as involuntary. (R. p. 113, lines 23 – p. 114, lines 1-17).

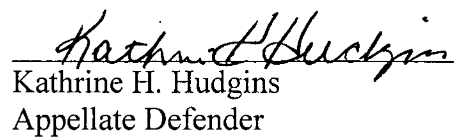
In Corns the South Carolina Court of Appeals reversed the trial court's admission of confession which was the result of veiled threats against the defendant's family. The Court wrote:

> A reading of the record as a whole with special consideration of the testimony of the officers who witnessed the oral statements leads us to the conclusion that, at the very least, the officers coerced Corns's confession on the marijuana by means of veiled threats against his family. When a defendant waives his *Miranda* rights and gives a statement, the burden is on the State to prove his rights were voluntarily waived by a preponderance of the evidence. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989). The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused. Id. 382 S.E.2d at 914. A confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). We find that the testimony of the officers conceding they informed Corns his wife could be arrested, that she could be "involved in the marijuana," and that their children could be taken from them amounted to an exertion of improper influence rendering Corns's statement involuntary. Accordingly, we find the trial judge erred as a matter of law in allowing Corns's oral statements into evidence.

State v. Corns, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992). Viewing the totality of the circumstances in the present case, the State failed to prove, by a preponderance of the evidence, that Appellant voluntarily waived his *Miranda* rights. The statements should have been suppressed.

CONCLUSION

Based on the above arguments, this Court should reverse Appellant's conviction.



Kathrine H. Hudgins
Appellate Defender

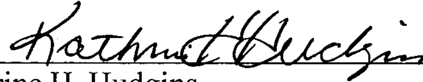
ATTORNEY FOR APPELLANT

This 23rd day of April, 2018.

CERTIFICATE OF COUNSEL FOR APPELLANT

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

April 23, 2018



Kathrine H. Hudgins
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

ATTORNEY FOR APPELLANT

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