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S.C. Supreme Court

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHENO JEMAIN ALSTON,

APPELLANT

APPELLATE CASE NO. 2013-002089

RECORD ON APPEAL

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

STATE’S EXHIBIT #2 (DVD OF TRAFFIC STOP)

STATE’S EXHIBIT #3 (PHOTOGRAPH)

STATE’S EXHIBIT #4 (PHOTOGRAPH)

STATE’S EXHIBIT #5 (PHOTOGRAPH)

STATE’S EXHIBIT #6 (PHOTOGRAPH)

STATE’S EXHIBIT #7 (PHOTOGRAPH)

STATE’S EXHIBIT #8 (PHOTOGRAPH)

STATE’S EXHIBIT #9 (PHOTOGRAPH)

STATE’S EXHIBIT #10 (PHOTOGRAPH)

STATE’S EXHIBIT #11 (PHOTOGRAPH)

STATE’S EXHIBIT #12 (PHOTOGRAPH)

STATE’S EXHIBIT #14 (ENTERPRISE RENTAL CONTRACT)

DEFENSE EXHIBIT #1 (COPY OF WARNING)

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,)
)
 PLAINTIFF,)
)
 -VS-)
)
 STEPHENO ALSTON,)
)
 DEFENDANT.)
 _____)

2011-GS-42-03090

TRANSCRIPT OF RECORD

MARCH 18 - 20, 2013
SPARTANBURG, SOUTH CAROLINA

BEFORE:

THE HONORABLE J. DERHAM COLE

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

J. EDWARD HUNTER, ASSISTANT SOLICITOR

ATTORNEY FOR DEFENDANT:

ANDREW J. JOHNSTON, ESQUIRE

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
S-1	Cocaine -----	8	227
S-2	CD of Traffic Stop -----	8	173
S-3	Photo -----	8	X
S-4	Photo -----	8	171
S-5	Photo -----	8	190
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S-15	Walgreens Receipt -----	14	X

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
D-1	Copy of Warning -----	46	X
C-1	Redacted CD of Traffic Stop ----	273	

1 **THE COURT:** Are y'all ready to pick?

2 **MR. JOHNSTON:** Yes, sir. I'm just getting in line
3 here.

4 (Whereupon a bench conference was held off the record)

5 (Whereupon court was in recess at 11:46 AM)

6 (Whereupon court resumed at 12:35 PM)

7 (Pause)

8 **THE COURT:** Let me ask y'all to step up here for a
9 minute.

10 (Whereupon a bench conference was held off the record)

11 (Whereupon State's exhibits 1 - 14 were marked for
12 identification)

13 **THE COURT:** The first case for trial is the State
14 versus Stepheno Alston.

15 **MR. HUNTER:** I believe it's Stepheno. That's how he
16 pronounces it on the video.

17 **THE COURT:** All right. Mr. Hunter, you're here on
18 behalf of the State?

19 **MR. HUNTER:** (Affirmative nod).

20 **THE COURT:** Mr. Johnston, you represent the Defendant?

21 **MR. JOHNSTON:** Yes, sir, I do.

22 **THE COURT:** Is the Defendant present?

23 **MR. JOHNSTON:** No, sir.

24 **THE COURT:** Do you know where he is?

25 **MR. JOHNSTON:** No, sir. I can report to you that he

1 the event he failed to attend the court for the trial of the
2 case that the trial would proceed in his absence. And that
3 acknowledgment was dated and it was signed by the Defendant.

4 And, Mr. Johnston, have you or has someone notified Mr.
5 Stribling, who's the surety, of the need for Mr. Alston's
6 presence here today?

7 **MR. JOHNSTON:** Your Honor, Mr. Hunter told me that he
8 had attempted to reach Mr. Stribling by telephone after it
9 became apparent that Mr. Alston was not going to be
10 appearing.

11 **THE COURT:** Okay. Mr. Hunter.

12 **MR. HUNTER:** Your Honor, after Mr. Johnston explained
13 to me that Mr. Alston had left the courthouse or believed
14 that he had left the courthouse, we called Mr. Stribling. I
15 personally left a message on his phone instructing Renee
16 Poole of our office, who is an administrative assistant
17 dealing with bond estreatments, who has better knowledge of
18 the bondsman to call. And just received an email that Mr.
19 Stribling has been notified that his client has absconded
20 and is currently looking for him.

21 **THE COURT:** Okay. Do we have any pretrial matters we
22 need to address?

23 **MR. HUNTER:** Nothing from the State.

24 **MR. JOHNSTON:** Your Honor, we have a motion to
25 suppress.

1 **THE COURT:** Okay. Mr. Bogan, would you call Stepheno
2 Alston's name outside, please.

3 (Pause)

4 **THE BAILIFF:** No response, Judge.

5 **THE COURT:** All right. There being no response to the
6 name of Mr. Alston being called, I'll ask the clerk to issue
7 a bench warrant for the arrest of Mr. Alston. All right.

8 With respect to the motion to suppress, what's the
9 first evidence that the State would offer to present?

10 **MR. HUNTER:** The evidence would be the testimony of
11 Donnie Gilbert. And he is the person who made the traffic
12 stop on Mr. Alston. We would have the video of the traffic
13 stop. I believe his motion to suppress is based on an
14 unlawful detention on the side of the road.

15 **THE COURT:** And how long do you anticipate the
16 testimony to take to accomplish?

17 **MR. HUNTER:** The video's about thirty minutes long.
18 The testimony on the State's behalf, between twenty and
19 thirty minutes. However, we could - - if the Defense would
20 stipulate, we can put the video into evidence and allow you
21 to watch it in your chambers, if you'd like.

22 **THE COURT:** All right. Well, it's lunchtime. Let's
23 just recess for lunch and we'll begin with the presentation
24 of evidence at 2:30 this afternoon. All right. Court is in
25 recess until 2:30.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

14

1 (Whereupon court was in recess at 12:57 PM)

2 (Whereupon State's exhibit 15 was marked for

3 identification)

4 (Whereupon court resumed at 2:36 PM)

5 **THE COURT:** All right. Y'all ready to proceed?

6 **MR. HUNTER:** Yes, Your Honor.

7 **THE COURT:** Okay.

8 **MR. JOHNSTON:** Yes, sir.

9 **MR. HUNTER:** The State would call Donnie Gilbert to the
10 stand.

11 **Donnie Gilbert,** being
12 duly sworn testified as follows:

13 **MADAME CLERK:** Thank you. Please be seated.

14 **Direct Examination by Mr. Hunter:**

15 Q. Can you please state your full name for the record.

16 A. Donnie Leland Gilbert.

17 Q. And how are you employed?

18 A. I work for the Spartanburg County Sheriff's Office.

19 Q. And how long have you been in law enforcement?

20 A. I was hired by the South Carolina Highway Patrol in
21 July of 1999.

22 Q. And give a brief overview from '99 until March 28, 2011
23 of your employment.

24 A. In July of '99 I attended the South Carolina Highway
25 Patrol's basic academy. Graduated from there in December of

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

15

1 '99, was assigned to Richland County, which is the Greater
2 Columbia area from December of '99 until August of 2004.
3 What I did there is I just basically worked the road for the
4 Highway Patrol working wrecks and enforcing traffic laws.

5 In August of 2004 I transferred from Richland County to
6 the Aggressive Criminal Enforcement Team for the Department
7 of Public Safety and the Highway Patrol. I was assigned to
8 the Midstate Team, which was covered by I-20, I-77 and I-26
9 as a K-9 officer.

10 In March of 2005 I transferred within the Aggressive
11 Criminal Enforcement Team to the Upstate Team, which covered
12 the thirteen areas or thirteen counties in the upstate as a
13 K-9 officer there as well.

14 In September of 2009 I transferred from the Aggressive
15 Criminal Enforcement Team to Spartanburg County for the
16 Highway Patrol. And in January of 2010 I left the Highway
17 Patrol completely and came to work at the Spartanburg County
18 Sheriff's Office where I was assigned to the traffic
19 division and have been there since.

20 Q. What are your duties at the Spartanburg County
21 Sheriff's Office?

22 A. Under the traffic division, to enforce traffic laws of
23 this State.

24 Q. Are you on a specific team?

25 A. Yes, sir.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

16

1 Q. And what is that team?

2 A. That is called the Interstate Criminal Enforcement
3 Team.

4 Q. What's the purpose of that team?

5 A. To eliminate criminal activity from any roadway that I
6 patrol at that time.

7 Q. And what type of criminal activity are you talking
8 about?

9 A. Criminal activity could consist of anything from
10 kidnapping, child rapists, murderers, money launderers, drug
11 traffickers, gun traffickers, metal thieves, pretty much
12 anything that you can insert into that sentence that is a
13 crime. And that's about it.

14 Q. Would it also include traffic laws?

15 A. Yes, sir, enforcing traffic laws of this State.

16 Q. Okay. What type of specific training have you had in
17 reference to enforcement of the traffic laws and
18 interdiction in this State?

19 A. I have had somewhere between five hundred and six
20 hundred hours of interdiction training through the National
21 Criminal Enforcement Association and also Desert Snow. What
22 this training consists of is usually - - if it's a week
23 long, it'll be a four-day class. The training in that
24 consists of covering many areas of locating, detecting
25 hidden compartments in vehicles, roadside interviews.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

17

1 What they will do is they will take vehicles that is
2 found that other people have found throughout this nation
3 hidden compartments in. They will put you through a
4 scenario to use that training and let you search that
5 vehicle at the end of that training. It covers bus
6 interdiction. It covers interdiction from the sky. Some
7 classes I've had as far as marine interdiction, too.

8 Q. All right. We've both used the word interdiction.
9 What does that mean?

10 A. To impede.

11 Q. And specifically with your criminal enforcement - - -

12 A. Yes, sir. To stop the flow of criminal activity.

13 Q. Okay. Were you employed by the Spartanburg County
14 Sheriff's Office on March 28, 2011?

15 A. Yes, sir.

16 Q. And what were you doing that day?

17 A. I was monitoring traffic on Interstate 85.

18 Q. Where exactly?

19 A. Should've been somewhere around the 71 mile marker.

20 Q. Okay.

21 A. On the northbound side.

22 Q. Explain exactly where your car was situated.

23 A. Where I was sitting is on the northbound side just
24 north of where 26 - - where 85 crosses over 26.

25 Q. Now is this business 85 or ...

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

18

1 A. This is Interstate 85, yes, sir.

2 Q. Okay.

3 A. Where I was sitting is if you're on 26 going west
4 towards - - -

5 Q. Going towards - - -

6 A. Towards Inman, towards Asheville. If you get onto 85
7 north - - -

8 Q. Going towards Charlotte?

9 A. Yes, sir. Going towards Charlotte. I'm at that
10 intersection where that ramp runs into Interstate 85.

11 Q. Which way were you facing?

12 A. I was sitting sideways on the northbound side.

13 Q. What did you observe?

14 A. I observed a Hyundai Santa Fe pass my location and
15 failed to maintain its lane of travel.

16 Q. And when you say failed to maintain its lane of travel,
17 what do you mean?

18 A. Basically after it passed me, the Hyundai, let's see,
19 it was traveling in the middle lane, and where I was sitting
20 is a three lane interstate on the northbound side and three
21 lanes on the southbound side. It was traveling in the
22 middle lane.

23 And after it passed me its left side tire struck the
24 dotted line that divides the middle lane, which it was
25 traveling in, and the fast lane, which would've been to its

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

19

1 left. Then it drifted back into the middle of that middle
2 lane. And it did that several times in the time that it
3 took me to catch up to the vehicle.

4 Q. And is this location in Spartanburg County?

5 A. Yes, sir, it is.

6 Q. And what did you do once you noticed this traffic
7 violation?

8 A. Once I caught up to the vehicle I activated my blue
9 lights to signal him to pull over to the right emergency
10 shoulder, which he did.

11 Q. And can you identify the person who was driving that
12 vehicle?

13 A. I identified him by a driver's license at that time.

14 Q. Have you seen him this morning?

15 A. Yes, sir.

16 Q. And was he in this courtroom before we began this?

17 A. Yes, sir, he was.

18 Q. Okay. Have you seen State's exhibit 2?

19 A. Yes, sir, I have.

20 **MR. HUNTER:** Your Honor, at this time I'd seek to admit
21 State's exhibit 2 for the purpose of this hearing only.

22 **MR. JOHNSTON:** Without objection.

23 **THE COURT:** It's admitted.

24 (Whereupon State's exhibit 2 was admitted into evidence
25 for this hearing)

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

20

1 Q. This State's exhibit 2, is this the in-dash or video
2 camera from your vehicle?

3 A. Yes, sir, it is.

4 Q. Showing this traffic stop?

5 A. Yes, sir.

6 Q. And that's the vehicle in front of you?

7 A. Correct.

8 Q. I'm going to let it play for a few minutes and just
9 sort of watch it until about the two minute mark.

10 (Whereupon the video was played)

11 Q. That's the first two minutes and thirty seconds of that
12 traffic stop, correct?

13 A. Yes, sir.

14 Q. And before you pulled the vehicle over and exited your
15 vehicle you call in the tag. Why do you do that?

16 A. That's procedure for stopping a vehicle - - -

17 Q. Okay.

18 A. - - - with the Sheriff's Office.

19 Q. All right. And then you approach the vehicle and touch
20 the vehicle. Why do you do that?

21 A. It's basically just in case the vehicle drives away or
22 in case there's a shooting incident, something of that
23 nature, I can transfer my fingerprints from me to that
24 vehicle so in a future reference or a future case that the
25 investigators needed to - - to check and make sure that

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

21

1 that's the vehicle that I did stop, they can fingerprint it
2 and prove that it is.

3 Q. When you first approached the vehicle what's the first
4 thing you noticed?

5 A. The first thing I noticed was in the rear cargo area
6 there was some luggage covered up by a blanket. When I got
7 up there to the passenger's window, I noticed that the
8 driver was a black male. And he immediately asked me
9 basically why he was being stopped.

10 Q. I'm going to show you what's been premarked as State's
11 exhibit 10. Do you recognize this?

12 A. Yes, sir.

13 Q. What is it?

14 A. That is going to be what was located in the rear cargo
15 area of the vehicle. It was covered up by a black and white
16 blanket or a black, and white and gray blanket.

17 Q. Does that picture fairly and accurately depict what you
18 remember seeing that day?

19 A. Yes, sir.

20 **MR. HUNTER:** Your Honor, at this time the State would
21 move State's exhibit 10 into evidence for the purposes of
22 this hearing.

23 **MR. JOHNSTON:** Without objection, Your Honor.

24 **THE COURT:** It's admitted.

25 (Whereupon State's exhibit 10 was admitted into

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

22

1 evidence for this hearing)

2 Q. You said he asked why he was stopped. Is that normal?

3 A. Not necessarily. It's not consistent with the innocent
4 motoring public. Ninety-nine percent of the time they will
5 let - - they will let me explain why, basically get to that
6 point.

7 Q. Okay.

8 A. Number one, what I like to do is to figure out who they
9 are first, get their license. That way I can address them
10 respectfully by their last name or their first name, either
11 one. Then I will explain why I stopped them.

12 Q. Okay. And who was the driver identified as?

13 A. Mr. Stepheno J. Alston from Rome, Georgia.

14 Q. And you asked him where Rome, Georgia is, correct?

15 A. I believe I did, yes, sir.

16 Q. And why did you ask him that?

17 A. Number one, I wanted to see if what he was going to
18 tell me would be what I thought was correct, which I knew
19 from training and experience Rome, Georgia is south of
20 Atlanta, near the Forest Park area.

21 Q. Did the fact that he was from near Atlanta cause any
22 concern for you?

23 A. Yes, sir. Me being involved in the interdiction
24 community, Atlanta is a major hub for criminal activity in
25 the southeast.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

23

1 Q. Okay. And what about the fact that he was on I-85, did
2 that cause any concern?

3 A. Well, yes, sir. Again, me being involved in the
4 interdiction community, Interstate 85 is a major criminal
5 activity corridor connecting Atlanta to many routes to the
6 south and to the north of that.

7 Q. Did you ask him for his paperwork?

8 A. Yes, sir, I did.

9 Q. License, registration?

10 A. I asked him for his license. And then once I figured
11 out who he was I explained why I stopped him. And then I
12 believe I asked him for the paperwork to the vehicle at that
13 time. And he produced a rental contract.

14 Q. Let me show you what's been premarked as State's
15 exhibit 14. Do you recognize that?

16 A. Yes, sir, I do.

17 Q. How do you - - -

18 A. That's going to be - - -

19 Q. - - - recognize that?

20 A. That's going to be the rental contract that Mr. Alston
21 had in his possession that day.

22 Q. Is that the exact rental contract that he gave you?

23 A. Yes, sir.

24 **MR. HUNTER:** Your Honor, at this time the State would
25 offer State's exhibit 14 for the purposes of this hearing.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

24

1 **MR. JOHNSTON:** No objection.

2 **THE COURT:** It's admitted.

3 (Whereupon State's exhibit 14 was admitted into
4 evidence for this hearing)

5 Q. Now you sit at the car for a good thirty seconds after
6 he hands it to you. Why are you doing that?

7 A. What I'm doing is I'm looking at the rental contract.
8 The rental contract can give you a lot of information
9 without even having to ask anyone anything about it. It
10 gives you the information as far as where it was rented and
11 when - - -

12 Q. Okay. Where was it rented?

13 A. This one's going to be rented on the Harris Parkway,
14 Cartersville, Georgia on the - - -

15 Q. Is that also in the Atlanta area?

16 A. Yes, sir.

17 Q. What other type of information can you learn from that?

18 A. It'll also tell you when it was rented, which was, in
19 this case, March the 26th of 2011 at 11:21 AM. It will also
20 tell you when it's due back and where.

21 Q. March 26th, 2011, what day was that?

22 A. That would've been a Saturday, which would've been two
23 days before the stop.

24 Q. And so this stop happened on a Monday?

25 A. Correct. Yes, sir.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

25

1 Q. Approximately around 1:00, give or take - - -

2 A. Yes, sir.

3 Q. - - - in the afternoon? Okay. What other information
4 can you learn?

5 A. It'll also cover when it's due back and where it's due
6 back. And ninety-nine percent of the time it's going to be
7 due back where it's rented and which is consistent with this
8 case here.

9 It also tells you who rented the vehicle, who's also an
10 additional driver on the vehicle. And these rental
11 agreements with Enterprise will also tell you where that
12 vehicle is allowed to be operated.

13 Q. And who rented this vehicle?

14 A. By the way this one here, the rental agreement, it's
15 Tomeka Harris.

16 Q. Okay. Was there anybody in the vehicle other than Mr.
17 Alston?

18 A. No, sir.

19 Q. All right. And what raised your suspicion about the
20 fact that it was a third-party vehicle without the third
21 party present in the vehicle?

22 A. Well, in my training and experience, that is very
23 common when it comes to criminal activity. They will have a
24 third-party rental in their possession. That way if they
25 are involved in criminal activity they're not in their

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

26

1 vehicle. So that vehicle won't get seized when they get
2 caught.

3 There's also something else that brings - - throws a
4 red flag with me is that it's rented by a female. In my
5 training and experience, again, and through the classes and
6 the training that I've been through, a lot of your criminal
7 organizations will rent a vehicle in a woman's name for the
8 simple fact that law enforcement does not - - they are not
9 threatened by a woman. They don't recognize criminal
10 activity with a female. At least that's what the drug
11 trafficking organizations think.

12 Q. Also you mentioned that it tells where this vehicle's
13 allowed to be operated.

14 A. Yes, sir.

15 Q. Does this rental agreement have those states?

16 A. Yes, sir. This one states that it's allowed to operate
17 in Georgia, Tennessee, Kentucky, Virginia and West Virginia
18 and those states only. One, two, three, four, five states
19 in all.

20 Q. And, of course, where is this vehicle located at this
21 time when you stopped it?

22 A. We're in Spartanburg County here in South Carolina when
23 I stopped him, which that's not on the rental agreement as
24 the state that it's allowed to be operated in.

25 Q. You also asked him about the no smoking and no pet hair

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

27

1 down at the bottom. Why are you asking him about that?

2 A. At the time Mr. - - I distinctly remember Mr. Alston
3 watching me and trying to figure out what I'm doing. And
4 what I'm doing at that point in time, I don't know how long
5 it took me, maybe ten to fifteen seconds, I'm looking at all
6 the information that this rental agreement tells me.

7 And I don't want to tip him off to what I've already
8 saw that causes concerns to begin with. And instead of
9 letting him know what I'm looking at, I'll refer to the no
10 smoking and no pet hair down at the bottom that's stamped on
11 there real big to make him think that that's what I'm
12 looking at as well.

13 Q. Did you notice anything about the keys in the vehicle?

14 A. Yes, sir. There was a rental key in the - - I'm sorry.
15 There was a key in the ignition that is consistent with the
16 car being a rental, just one key. And on the keyring there
17 was two house keys on the keyring, which is very odd. I
18 mean, - - -

19 Q. Why is that odd?

20 A. - - - you don't see that. Anytime somebody rents a
21 vehicle, in my training and experience and in the fourteen
22 years of being involved in law enforcement, you don't see
23 other people took or take their house keys and put on the
24 keyring for the rental. To us, and in my training and
25 experience, they're trying to personalize the vehicle.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

28

1 Q. What did you notice about the driver's side door?

2 A. When Mr. Alston got out, when I asked him to exit the
3 vehicle and meet me back at the patrol car I noticed that
4 there was an air freshener in the driver's door pocket,
5 which is located right close to where his legs would be.
6 And I noticed that it was one of those old mushroom
7 household air fresheners like your mom used to get when you
8 were a child back in the 80s.

9 Q. Let me show you what's been premarked as State's
10 exhibit 11 and 4. Do you recognize those pictures?

11 A. Yes, sir.

12 Q. How do you recognize those pictures?

13 A. The first one's going to be just a picture of the
14 interior.

15 Q. When you say the first one, identify it - - -

16 A. Okay. That's State's exhibit 11. It's going to be
17 just an overall picture of the interior with the bookbag in
18 the right floorboard, the drinks in the center console and
19 what appears to be a Crown Royal bag in the middle console.

20 And State's exhibit 4 shows fully the mushroom air
21 freshener that I'm referring to.

22 Q. All right. Do those pictures fairly and accurately
23 depict the scene as you remember them?

24 A. Yes, sir, it does.

25 **MR. HUNTER:** Your Honor, at this time the State would

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1 offer State's exhibit 4 and 11 into evidence for the
2 purposes of this hearing.

3 **MR. JOHNSTON:** No objection.

4 **THE COURT:** They're admitted.

5 (Whereupon State's exhibits 4 and 11 were admitted into
6 evidence for this hearing)

7 Q. State's exhibit 11, would that be best described as the
8 view that you had when you first approached the vehicle?

9 A. Yes, sir.

10 Q. When did you notice the air freshener?

11 A. When he got out. You could actually see it peeking up
12 -- he was in the way. I couldn't see it.

13 Q. When you first -- when you first observed him because
14 his leg was in the way, you can't see the air freshener?

15 A. No, sir. I didn't see that until he actually exited
16 the car. I actually waited, I don't know, a couple of
17 seconds after he had gotten out and I could see it at that
18 point. To me, that's also odd because in a rental vehicle
19 you just don't see people go straight to a store and buy an
20 air freshener and put in a rental vehicle if it's not yours.

21 Q. Now, why would an air freshener raise your suspicion?

22 A. It could be used as a masking agent to hide odors of
23 other things, which could be drugs, could be anything that
24 he's trying to hide that he doesn't want you to smell.

25 Q. Now, have you seen that in your training, your

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1 experience, and learned that through your training?

2 A. Absolutely.

3 Q. Let me play a little more of the video.

4 (Whereupon the video was played)

5 Q. Now, in that short little clip you'd gone back to the
6 vehicle and you asked him about his license. Why did you do
7 that?

8 A. Number one, to see if his license is suspended, if he's
9 had any suspensions in the past with it.

10 Q. Okay. Had you - - did you run his license at that
11 point?

12 A. I waited - - I think it's going to be just a couple of
13 more minutes or a couple more seconds, I'm not sure exactly
14 when it is in the stop that I run his license.

15 Q. Okay. And you asked him who rented the vehicle?

16 A. Yes, sir. He - - -

17 Q. What did he tell you?

18 A. He told me that it was Tomeka Harris, which matched
19 what was on the rental agreement by - - a letter off, but he
20 basically told me exactly who rented the vehicle.

21 Q. Okay.

22 A. But I think that was his girlfriend, is what he told
23 me.

24 Q. Did you ask him where he was going?

25 A. Yes, sir. He stated that he was going to pick his mom

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1 up in New Jersey. And I think I asked - - -

2 Q. Now, why would that raise your suspicion in this case?

3 A. That's also another state that's not listed on the
4 rental agreement to where he advised Enterprise where he was
5 going.

6 Q. So - - -

7 A. Again, we're in two different - - we're in South
8 Carolina that's not listed on the rental contract and his
9 destination's also not listed on it either.

10 Another thing that raised a big red flag with me is why
11 he's putting the states on here like Georgia, Tennessee,
12 Kentucky, West Virginia and Virginia.. In my mind that
13 automatically makes me think that from the beginning of the
14 trip he was trying to avoid Interstate 85.

15 Q. Did you ask him where he was going?

16 A. Yes, sir.

17 Q. And what he was going to do there?

18 A. Yes, sir. He advised that he was going to pick up his
19 mother in New Jersey. And I believe I asked him what part
20 of New Jersey. And I believe it was Newark. That's exactly
21 where he was going.

22 Q. Did he say why he was going to pick up his mother?

23 A. He told me that, quoting him, he was going to stay
24 there about a week or so and that his mom was depressed and
25 that he was going to bring her home for Mother's Day and

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1 all.

2 And, again, another red flag to me is we're in March,
3 we're at the end of March, and Mother's Day isn't until May,
4 which is another month and a half. So, you know, to me
5 that's raising another red flag. You've got Mother's Day,
6 an event that's a month and a half away.

7 Q. Now, approximately how far away is this stop hour-wise
8 from Atlanta, Georgia?

9 A. I guess you're looking at about two and a half hours.

10 Q. Okay. And this vehicle rental was for how many days?

11 A. I believe a week. I believe seven days.

12 Q. Okay. And this is a Monday. So this is the third day
13 of the rental?

14 A. Yes, sir.

15 Q. Is it a little odd where he's going and the time he's
16 taking to get there?

17 A. Yes, sir.

18 Q. And why?

19 A. You're asking - - it's a little odd on the simple fact
20 of the matter that he's going to Newark, New Jersey and he's
21 already on the third day of the rental. He stated to me
22 that he was going to stay about a week or so and that would
23 put him having to be back in Atlanta or in Cartersville
24 where the vehicle was rented the Saturday after.

25 Q. Okay.

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1 A. So the length of stay is where I was going with that.

2 Q. So according to him he had to get up there and pick his
3 mother up and turn right around and come back?

4 A. Correct. Yes, sir. And he was originally from
5 Georgia, I think, is another thing we covered in that
6 conversation.

7 Q. Originally from New Jersey? Lives in Georgia?

8 A. Yes, sir. I'm sorry. He's from Georgia and originally
9 from New Jersey.

10 Q. Let me ask you one final question. We see your hand
11 here in the video, your right hand, are you right handed?

12 A. Yes, sir.

13 Q. And what are you doing right there?

14 A. I'm starting to begin to write a warning for the
15 violation that he was stopped for.

16 Q. Okay.

17 (Whereupon the video was played)

18 Q. What were you doing just then?

19 A. I was checking his license through dispatch, the status
20 of his license.

21 Q. Okay. And at this point we're five minutes and forty-
22 one seconds into the traffic stop?

23 A. Yes, sir.

24 Q. It's kind of hard to see - - -

25 A. Yes, sir.

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- 1 Q. - - - the bottom there, but I believe it's five ...
- 2 A. If you say so, I'll agree with that.
- 3 Q. If we can pull that back for a second so you can see.
- 4 If you'll look down by your hand. Still can't see it.
- 5 That's what it is, not showing a thing. But it's five
- 6 minutes and forty-one seconds into the traffic stop?
- 7 A. Okay. Yes, sir.
- 8 Q. And approximately two minutes - - three minutes since
- 9 he's come back to your vehicle?
- 10 A. Yes, sir.
- 11 Q. Okay. Why did you ask him about his license being
- 12 suspended?
- 13 A. The second time?
- 14 Q. Yes.
- 15 A. Is that what you're referring to?
- 16 Q. Right before you ran the license.
- 17 A. I wanted to see if he was going to tell me the truth
- 18 about whether it had been suspended or not. And when it
- 19 came back - - he advised me that he had been arrested for
- 20 DUI several years ago, that it had been suspended then.
- 21 That was a different answer than what he had given me
- 22 initially when I asked him - - when I first got him out of
- 23 the vehicle I asked him if he had any problems with his
- 24 license, and he said no.
- 25 Q. What's the typical time on checking the license through

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1 dispatch?

2 A. It depends on how busy they are. Typical time, I don't
3 know. It just - - it varies.

4 Q. Would it take a little longer for an out-of-state
5 license as opposed to a South Carolina license?

6 A. It just depends on how long or if the files are slow
7 coming back from Georgia.

8 Q. Okay.

9 (Whereupon the video was played)

10 Q. Who were you talking to at that point?

11 A. I believe at that point in time I'm calling Deputy
12 Carraway, who's a teammate on the Ice Team with me.

13 Q. I believe the response came back, I haven't picked up
14 the package yet. What does that mean?

15 A. Yes, sir. We had just eaten lunch, and Deputy Carraway
16 was in a spare car. He didn't have his K-9 with him at the
17 time. So after we got done eating lunch he was going to go
18 to the house and pick up a dog, and then we were going to
19 come to work. And what he means by that is - - when he says
20 package, he's just trying to tell me that he hasn't made it
21 to the house yet to pick up a dog.

22 (Whereupon the video was played)

23 Q. Now, eleven minutes and eleven seconds into the traffic
24 stop at the time of this pause. After you call in his
25 license what did he do?

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1 A. When I checked his license I went back to my vehicle
2 and called - - and talked to Jason there for a second or
3 Deputy Carraway, and asked where he was to figure out if he
4 was close to me or not. And once I figured out that he had
5 to go to his house to pick up his dog and then come back, I
6 went ahead and switched to channel 1 to see if anybody on
7 uniform patrol was close to me at that point in time.

8 Q. Was anybody close to you?

9 A. They had somebody coming to me, but I think it was - -
10 they didn't say how long it was going to be, but he wasn't
11 necessarily in the same area as me.

12 Q. Now, I noticed you holding his license. Is there
13 anything interesting you found about his license?

14 A. It was a paper license.

15 Q. Well, explain what you mean by a paper license.

16 A. It wasn't laminated and it wasn't a license like what
17 we normally get when we go to the DMV.

18 Q. So it's not something you had seen very much of?

19 A. No, sir.

20 Q. Did that - - -

21 A. It's not something you - - -

22 Q. - - - raise your suspicion at all?

23 A. - - - run into a lot. Well, yes, sir. It's kind of
24 odd, but I never asked him about it. He went ahead and
25 offered to me when he saw me trying to figure out what was

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1 going on with it, he went ahead and explained to me that
2 they gave him a paper license until he got it renewed. And
3 he did that without me even asking him about it.

4 Q. It looks like in those two minutes that we just watched
5 -- who's making the conversation at this point? Are you
6 asking him questions or is he asking you questions?

7 A. He's kind of covering some things with me, especially
8 with his license. I asked him, let's see, I asked him if
9 anybody had had access to the rental since he rented it.
10 And he basically told me, he says, I have no idea. And that
11 again raises a red flag with me because if my girlfriend and
12 I are going to rent a vehicle, I'm going to make sure that
13 nobody else has access to it besides us.

14 Q. But you asked him again, didn't you, if anybody had had
15 access to the vehicle?

16 A. Yes, sir.

17 Q. Well, what did he state at that point?

18 A. He said, nah, you don't let anybody use those cars
19 nowadays.

20 Q. And what did that statement mean to you?

21 A. That's odd because to me he understands why I'm asking
22 that question. Because, number one, I want to see if
23 anybody else has had access to the car besides him because
24 next what I'm going to do is try to ask him if everything in
25 there belongs to him, if there's anything in the vehicle

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1 that's not his.

2 And to me, you know, what that does is it gives him a
3 chance to distance himself from the vehicle. He doesn't do
4 that at this time. But he - - the answer lets me know that
5 it's a little odd for me - - for him to answer in that way
6 because he's aware of why I'm asking that question.

7 Q. He then starts talking about his kids. How did that
8 conversation come about?

9 A. He stated he had to - - well, I asked him what he did
10 for a living. And he said he's got a clothing store in
11 Rome. He stated he had to make a living somehow, he had six
12 kids to feed. And then I just asked him how old they were.
13 And he gave me ages of seven kids.

14 Q. What were the ages he gave you?

15 A. As you can hear on the tape it was thirteen, fourteen,
16 ten, five, four, three and the little one's about six
17 months.

18 Q. And so - - -

19 A. And when he started - - -

20 Q. He told you he had six kids, - - -

21 A. Right.

22 Q. - - - and gave you seven ages. What does that mean to
23 you?

24 A. He's not keeping up with - - it's the stress of the
25 situation. He's not even being able to keep up with how old

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1 the kids are and how many he's got.

2 Q. Okay.

3 A. And, plus, the way he answered it to me, he just kind
4 of rattled it off a little bit there, you know, in the
5 monotone answer and the rhythm he had thirteen, fourteen,
6 ten, five, four, and he hesitated a little between ten and
7 five like he's trying to think about this for a little bit.

8 And that's not something - - when you ask me how old my
9 children are or stepchildren, I can look at you straight and
10 tell you fourteen and sixteen. I don't have to think about
11 it. So to me, that's odd.

12 (Whereupon the video was played)

13 Q. You're about to start asking for consent. I'm going to
14 go ahead and stop it right there just to finish this
15 portion.

16 About sixteen minutes into the traffic stop at this
17 point. You've already talked about kids, what he did for a
18 living. At this point he starts talking about his mother.
19 What do y'all discuss?

20 A. He basically told me that he's just going to go up
21 there and check on her, that she's - - I asked if she was in
22 bad health. And - - well, first of all, I asked him, you
23 know, how long he planned on staying again. And he advised
24 somewhere around a week, yeah, something like that, just
25 whenever she gets ready to leave, when I get rested up.

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1 And when I asked him if his mother was in bad health,
2 because he had alluded to that earlier in the conversation,
3 well, she don't tell nobody, but it seems bad. I don't know
4 what's wrong with her. I figured I would go up there and
5 see what's going on.

6 Q. Did you specifically ask if he was going to stay until
7 Monday?

8 A. Yes, sir.

9 Q. And what was his answer to that?

10 A. Yeah, something like that, just whenever she gets ready
11 to leave, when I get rested up. That's what he told me.

12 Q. And he had already told you he was going up there to
13 bring her home for Mother's Day?

14 A. Yes, sir. And I had already noticed - - -

15 Q. From New Jersey?

16 A. I'm sorry. Yes, sir.

17 Q. And the state was not on the rental contract?

18 A. Correct.

19 Q. On Monday when the car was already due back on the
20 Saturday before?

21 A. Two days prior, yes, sir.

22 Q. It seems you're talking to dispatch or someone on the
23 radio. What are y'all discussing? Are you waiting for
24 someone to arrive at this point?

25 A. At this point I'm waiting on somebody to get there.

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1 Q. Okay. And why are you doing that?

2 A. What I - - and the reason I do that is because I've
3 been in a shooting. I've been shot doing this for a living.
4 I've done got to the point to where I'm not going to ask for
5 consent until I actually get somebody else there with me for
6 the simple fact that a lot of times things start getting a
7 lot - - a little tense and people start figuring out what's
8 actually going on when you start asking for consent to
9 search.

10 And that's going to be the time that foot chases occur,
11 shootings occur and things of that nature. So the best
12 thing for me to do safety-wise, officer safety-wise is just
13 wait until somebody else gets there.

14 Q. Okay. But at this point you believe you're going to
15 ask him to search the vehicle?

16 A. Yes, sir.

17 Q. You're going to ask him for consent to search the
18 vehicle?

19 A. Yes, sir.

20 Q. And you have a K-9 on the way?

21 A. Yes, sir.

22 (Whereupon the video was played)

23 Q. Can you briefly explain what that whole conversation
24 was about?

25 A. I basically asked him, number one, if there was

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1 anything in the vehicle that he wasn't responsible for or
2 that he was not responsible for. He basically stalled for a
3 second and asked - - said, excuse me, answering a question
4 with a question. It's giving him time to come up with an
5 answer. I had to ask him again, and he told me no.

6 I then asked for consent to search the vehicle. And
7 instead of answering the question, which I encounter
8 sometimes, Mr. Alston explained, I'm just trying to figure
9 all - - what all this is about. I advised him that I'm just
10 asking a question. He said, I mean, yeah, you can search
11 it, quoting him.

12 Q. But at that point you don't go search it. Why?

13 A. No, sir. He then said, and I'm asking you why you want
14 to search the vehicle? And I explained to him I'm not going
15 to answer that until everything's done. When everything's
16 done I will give him the time to explain everything to him
17 if that's what he wants.

18 Q. Did you ever give him - - did you ever tell him that he
19 had the right to refuse?

20 A. Yes, sir. That's where I was going with this. I
21 explained to him that, number one, he's got the right to
22 refuse and he's also got the right to give consent. And he
23 can do either.

24 And he asked me, he said, I have the right to refuse?

25 And I nodded my head, yes. And then he said, then go ahead

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1 as he pointed to the vehicle. And he again inquired - - -

2 Q. At that point was that a clear answer to you?

3 A. He'd already told me yes.

4 Q. Okay.

5 A. He had already told me yeah.

6 Q. Okay.

7 A. And then when I - - -

8 Q. But you're - - why are you continuing? Are you trying
9 to make sure - - -

10 **MR. JOHNSTON:** Your Honor, I object to leading the
11 witness.

12 **THE COURT:** Don't lead.

13 A. Well, I'll explain it to you this way. I needed a yes
14 or no answer. And that's where I'm going with this, I'm
15 trying to get him to give me a yes or no answer.

16 Q. Okay. After you explained the right to refuse, what do
17 you ask next?

18 A. To make sure that he understands what I'm doing. He's
19 wanting to try to - - he says I didn't do anything wrong. I
20 ask a yes or no answer, that's what I'm asking. And he says
21 yes.

22 Q. Okay. And that's when you start heading towards the
23 car here?

24 A. Yes, sir.

25 Q. Was anybody on the scene at this time?

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- 1 A. First Sergeant Barnett from the uniform patrol.
- 2 Q. Okay. But he's back behind the scene?
- 3 A. He's nowhere near us at all.
- 4 Q. Okay. Obviously we can see from the video it's
- 5 approximately 1:12 in the afternoon, somewhere around there,
- 6 if the video is correct - - -
- 7 A. Yes, sir.
- 8 Q. - - - time-wise? Dark outside?
- 9 A. No, sir, it's lit. It's daylight.
- 10 Q. Okay. And have you pulled your weapon at any point?
- 11 A. No, sir.
- 12 Q. And do you - - felt like you've coerced him at any
- 13 point for this consent?
- 14 A. No, sir.
- 15 Q. Did he seem to have the education in order to
- 16 understand what you were asking him?
- 17 A. Yes, sir.
- 18 Q. This video's going to go on for a while while you're
- 19 searching the vehicle. Does anybody else come and help you
- 20 search the vehicle?
- 21 (Whereupon the video was played)
- 22 A. Captain Hollifield - - -
- 23 **MADAME COURT REPORTER:** I can't hear.
- 24 (Whereupon the video continued playing)
- 25 **MR. HUNTER:** Your Honor, may we approach?

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1 **THE COURT:** Before you do that, let me say, I don't
2 know what his last answer was because you turned that video
3 on before he could respond, and he responded while it was
4 going. And the court reporter nor I could understand it.
5 So - - -

6 **MR. HUNTER:** I apologize. I'll ask it again.

7 Q. Did anybody else come and search the vehicle with you?

8 A. Yes, sir. Captain Hollifield and Deputy Carraway
9 arrived at the scene shortly thereafter and assisted as
10 well.

11 **MR. HUNTER:** May we approach?

12 **THE COURT:** Yes.

13 (Whereupon a bench conference was held off the record)

14 Q. Did at any time between when you start searching the
15 vehicle and when the cocaine was located under the driver's
16 column, did Mr. Alston ever tell you or anybody else around
17 him that he withdrew consent?

18 A. No, sir.

19 Q. Now, I believe we went over briefly at the beginning,
20 but when you first approached the car you saw luggage
21 covered by a blanket, is that correct?

22 A. Correct.

23 Q. Why did that raise your suspicions?

24 A. That's not common with the motoring public that I come
25 into contact with every day. You just don't see that. You

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1 don't see the people to actually take the time to cover it
2 with a blanket. They put their luggage in there and go.

3 Q. Please answer any questions Mr. Johnston might have for
4 you.

5 A. Yes, sir.

6 **MR. JOHNSTON:** Your Honor would it be possible for us
7 to take a brief restroom break?

8 **THE COURT:** Yeah. We'll take a ten minute recess.

9 **MR. JOHNSTON:** Thank you, sir.

10 **THE COURT:** Step down, but don't discuss your testimony
11 during the break.

12 A. Thank you, sir.

13 **THE COURT:** We'll be at ease ten minutes.

14 (Whereupon court was in recess at 3:32 PM)

15 (Whereupon court resumed at 3:39 PM)

16 **THE COURT:** You can take your seat.

17 (Whereupon Defendant's exhibit 1 was marked for
18 identification)

19 **MR. JOHNSTON:** May I proceed, Your Honor?

20 **THE COURT:** You may.

21 **Cross Examination by Mr. Johnston:**

22 Q. Officer Gilbert, showing you what has been marked for
23 identification as Defendant's exhibit number 1.

24 A. Yes, sir.

25 Q. I'm not really concerned about this half of it. The

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1 way this was provided to me in discovery, there's more than
2 one thing on this page. I'm really only concerned with the
3 item that appears all the way on the right as you would look
4 at it.

5 A. Yes, sir.

6 Q. Okay? Can you tell me what that photocopy - - what
7 that is a photocopy of there all the way on the right?

8 A. Mr. Johnston, that's going to be a photocopy of the
9 warning.

10 Q. Of the warning?

11 A. Yes, sir.

12 Q. In this case?

13 A. Yes, sir.

14 Q. And does that appear to be a completed copy of the
15 warning?

16 A. Yes, sir.

17 Q. Okay.

18 **MR. JOHNSTON:** Your Honor, at this time we would offer
19 it into evidence.

20 **MR. HUNTER:** No objection.

21 **THE COURT:** It's admitted.

22 (Whereupon Defendant's exhibit 1 was admitted into
23 evidence for this hearing)

24 Q. And you did have the opportunity to complete that
25 warning?

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1 A. Correct.

2 Q. That is it in its entirety completely filled out?

3 A. Yes, sir.

4 Q. Do you have like a carbon? Is that the way that works?

5 A. What do you mean? You talking about what's underneath
6 it?

7 Q. Yes, sir.

8 A. Yes, sir.

9 Q. So when you write that out you have a blue ticket for
10 the violator, right?

11 A. Correct. Yes, sir.

12 Q. Not a blue ticket, but a blue warning?

13 A. Correct.

14 Q. Then you have a copy for yourself?

15 A. Yes, sir.

16 Q. And if it's a real citation, you have a copy for the
17 court?

18 A. Correct.

19 Q. With a warning, is there a copy for the court or - - -

20 A. There's a copy that we turn into records.

21 Q. Turn into records, okay. And you cited him in that
22 warning for failing to maintain the lane?

23 A. Correct.

24 Q. I want to ask you again about what it was that Mr.

25 Alston did that you perceived to be failing to maintain his

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1 lane.

2 A. Okay.

3 Q. I believe you testified that he drove on the line. Is
4 that what you said?

5 A. Struck.

6 Q. That he struck the line?

7 A. Correct.

8 Q. And I assume from the way you characterize that that he
9 did not cross that line?

10 A. Well, a lot of times what happens is - - I'm not going
11 to say that he crossed it until the complete tire goes
12 across that white line.

13 Q. Yes, sir.

14 A. Now, when I say struck, what I would mean by that is
15 that tire could have covered that whole line, but it didn't
16 go all the way across it. But it did make contact with that
17 line and then drift back into the middle of that lane.

18 Q. All right. So what I'm hearing you say is Mr. Alston
19 never crossed that line, he - - what was the word that you
20 used?

21 A. Struck.

22 Q. Struck it.

23 A. Yes, sir.

24 Q. He rode on top of it?

25 A. Correct.

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1 Q. Okay. And then went back into his own line?

2 A. Correct. Yes, sir.

3 Q. Which, of course, is proper driving to - - -

4 A. Well, to me, that's drifting. That's a sign of
5 somebody that either could be sleepy, - - -

6 Q. Okay.

7 A. - - - they could be - - have a - - they could be having
8 a medical condition, they could be under the influence of
9 any alcohol or drugs, they could be on the phone. We don't
10 know, but he's got to operate that in due regard to the
11 safety of the others around him as well.

12 Q. So putting himself back in his own lane properly is
13 suspicious?

14 A. No, sir.

15 Q. So the only problem you have with his driving was
16 striking the middle line?

17 A. Well, he's operating in the middle of that lane when he
18 passes me.

19 Q. Right.

20 A. After he passes me - - -

21 Q. Where he's supposed to be?

22 A. Correct. Yes, sir.

23 Q. Right?

24 A. After he passes me he swerves to the left and strikes
25 that white line.

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1 Q. Okay.

2 A. And then swerves to the right into the middle of the
3 middle lane again. And another thing that it brings to my
4 attention is what I find in training and experience is the
5 common traveling public is looking back at me, okay?

6 Q. Yes, sir.

7 A. When they do that they will swerve one way or the
8 other. They're basically concerned of my presence for some
9 reason or another.

10 Q. And you're driving a marked vehicle, is that right?

11 A. No, sir.

12 Q. You're not driving a marked vehicle?

13 A. No, sir.

14 Q. What are you driving?

15 A. It's an unmarked Dodge Charger. Well, I'm sorry. At
16 this point in time it's an unmarked Chevrolet Tahoe.

17 Q. Okay. An unmarked Chevrolet Tahoe. Okay. So you say
18 that the motoring public usually observes you?

19 A. Yes, sir.

20 Q. And observes you because you're a police officer?

21 A. The way I'm sitting at that point in time, yes, sir.

22 Q. Of course, you weren't driving a marked vehicle.

23 A. When you say observe, what do you mean?

24 Q. I'm sorry, say again, please.

25 A. When you say observed, what do you mean by that?

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1 Q. Looked.

2 A. I guess you could say that, yeah. Yes, sir.

3 Q. If you weren't in a marked car the motoring public
4 wouldn't necessarily know you were a police officer, would
5 they?

6 A. Not necessarily. A lot of people are smarter than what
7 you give them credit for.

8 Q. Well, I understand that, but - - -

9 A. The way I'm sitting would let people know that that's
10 just not an innocent person sitting on the side of the
11 interstate.

12 Q. Okay. But again, it was unmarked?

13 A. Correct. Yes, sir.

14 Q. And so in this situation you would have expected what?

15 A. For him to drive into the middle of his lane the whole
16 time.

17 Q. Okay.

18 A. To stay in the center-most portion of that lane.

19 Q. You were on Mr. Alston's right, am I correct?

20 A. Yes, sir.

21 Q. When he drifted did he drift left or right?

22 A. Can I refer to - - -

23 Q. Absolutely.

24 A. Okay. He failed to maintain his lane striking the
25 dotted line between the middle lane and the fast lane, which

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1 would be to his left.

2 Q. All right. So he goes to his left?

3 A. Yes, sir.

4 Q. That's further away from you, isn't it?

5 A. I would agree with that, yes, sir. You also have to
6 take into consideration the way the curve goes after he
7 passes me as well.

8 Q. I'm sorry, say that again, please.

9 A. I said you have to take into consideration the way the
10 curve goes after he passes me because when he goes by me
11 there's a curve to the left.

12 Q. Okay.

13 A. So he's turning to his left after he passes me as well.

14 Q. All right. You initiated an official stop with your
15 blue lights, is that correct?

16 A. Yes, sir.

17 Q. Mr. Alston pulled over, correct?

18 A. Yes, sir.

19 Q. And you approached him on the passenger's side?

20 A. Correct.

21 Q. Why did you approach on the passenger's side instead of
22 the driver's side?

23 A. Well, it's safer that side. It's definitely safer that
24 way. The way we've been trained - - I like to do a
25 passenger-side approach. It gives me a bigger view of

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1 everything that's going on in the vehicle.

2 And also safety-wise, I don't know the percentage, but
3 I would figure say eighty, eighty-five percent of the public
4 is right-handed. If a person wants to shoot me or draw a
5 weapon at some point in time, if I approach on the driver's
6 side, it is much easier for a person just to lay back and
7 have that gun ready to go as I'm sitting there at the
8 driver's window.

9 When I approach the passenger's vehicle, excuse me, the
10 passenger's side, he has to come across and actually go
11 across his body and draw that gun. And it gives me a little
12 bit extra time to get away, to create some distance.

13 Q. All right, sir.

14 A. It gives me the ability to see a lot more in the
15 vehicle. It gives me the ability to surprise them a little
16 bit, so to speak, because the public is expecting me to come
17 up on that left side.

18 Q. That's right. The public - - because many law
19 enforcement agencies, maybe even most law enforcement
20 agencies, an officer making a routine traffic stop is going
21 to approach on the driver's side, is that correct?

22 A. I can't testify to that because there's nothing being
23 routine about a traffic stop.

24 Q. Okay. Well, - - -

25 A. Second of all, I can't testify to what they've been

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1 trained to do. I can only testify to what I've been trained
2 to do.

3 Q. All right. Well, you do know that officers approach on
4 the driver's side a lot of times, don't you?

5 A. If that's what they prefer, yes, sir.

6 Q. Okay. Now, the advantage to you of approaching on the
7 passenger's side is, among other things, you get a good
8 clear view of what's going on inside the car, right?

9 A. Correct.

10 Q. An unobstructed view as opposed to looking in from the
11 driver's side where you're having to peer over the door, so
12 to speak, right?

13 A. Yes, sir.

14 Q. So you got a good long look into that vehicle from that
15 passenger's side view?

16 A. Explain long.

17 Q. Well, you didn't see any guns, right?

18 A. No, sir.

19 Q. You didn't see any other weapons?

20 A. No, sir.

21 Q. You didn't see - - -

22 A. Doesn't mean they're not hid somewhere.

23 Q. Oh, I understand that.

24 A. There was no weapons seen in plain view.

25 Q. Okay. And you can even sniff inside that car from that

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- 1 vantage point, can't you?
- 2 A. Yes, sir.
- 3 Q. You didn't smell any alcohol?
- 4 A. Not at the time, no, sir.
- 5 Q. Well, did you later?
- 6 A. No, sir. I'm sorry.
- 7 Q. You didn't smell any marijuana?
- 8 A. No, sir.
- 9 Q. Does cocaine even have an odor?
- 10 A. Yes, sir.
- 11 Q. Do you know what it smells like?
- 12 A. Like cocaine.
- 13 Q. Okay. Was there anything in the more general world
- 14 that might give me an idea of what the cocaine-like smell
- 15 would be?
- 16 A. No, sir. I can't compare it to anything else other
- 17 than itself.
- 18 Q. Okay. Well, is it fair to say that cocaine doesn't
- 19 have a strong, loud odor like marijuana?
- 20 A. It's not fair to say, no, sir.
- 21 Q. It's not?
- 22 A. If you know what you're smelling. Depends on the
- 23 volume and how long it's been there.
- 24 Q. Okay.
- 25 A. So depending on - - if you're asking how easy it would

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1 be to smell cocaine.

2 Q. Yes, sir.

3 A. It also depends on how it's packaged and things of that
4 nature, too.

5 Q. You didn't smell any though, did you?

6 A. No, sir.

7 Q. All right. Now, there were no other occupants of this
8 vehicle other than Mr. Alston?

9 A. Correct. Yes, sir.

10 Q. Okay. So one of the things that I understand officers
11 will do is if there's more than one person in the car, that
12 they will separate the occupants of the vehicle and see if
13 there are conflicting stories often.

14 A. Some do that, yes, sir.

15 Q. All right. You couldn't do that in this case because
16 there was only one person there.

17 A. Correct. That would apply to this stop. There's only
18 one person in the vehicle.

19 Q. Okay. Now, you asked for the Defendant's driver's
20 license, am I correct?

21 A. Yes, sir.

22 Q. He provided them to you.

23 A. Correct.

24 Q. You were a bit disturbed because they were paper?

25 A. Yes, sir. He explained that away later on in the stop.

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1 Q. Okay. He produced the rental agreement, correct?

2 A. Yes, sir.

3 Q. And that rental agreement -- showing you now what has
4 been admitted as State's exhibit number 14, that is the
5 rental agreement, is it not, sir?

6 A. Yes, sir.

7 Q. Did the license plate on the Hyundai in this case, did
8 that license plate match up with the information in State's
9 exhibit 14?

10 A. It's not listed on there, no, sir.

11 Q. Okay. Was there a registration in the vehicle?

12 A. No, sir. He didn't give one, and I didn't ask. I
13 asked for the paperwork to the vehicle, and he produced
14 that.

15 Q. He didn't give one, you didn't ask?

16 A. No, sir.

17 Q. Sometimes that's something police ask for?

18 A. If it's not a rental vehicle, yes, sir.

19 Q. Okay.

20 A. If it's a privately owned vehicle.

21 Q. All right. Did you call the tag in?

22 A. Yes, sir.

23 Q. To dispatch?

24 A. Correct.

25 Q. And they indicated it was clear?

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1 A. Yes, sir.

2 Q. Driver's license, you called that into dispatch?

3 A. Correct.

4 Q. They indicated it was clear?

5 A. Yes, sir.

6 Q. At that point you had satisfied yourself that there
7 were no criminal violations as far as his driver's license,
8 as far as the registration of the motor vehicle, am I
9 correct, sir?

10 A. What do you mean?

11 Q. Well, - - -

12 A. You're asking had I seen any indicators of criminal
13 activity?

14 Q. No, sir.

15 A. Okay.

16 Q. We'll get to that.

17 A. Okay. Sorry.

18 Q. No, I'm asking after you did the things that we just
19 talked about, after you looked at the paperwork, looked at
20 his license, called in the tag, called in his license, you
21 had no other issues with either his license or the
22 registration, everything was clear?

23 A. Everything was clear on his license, and the tag came
24 back to that vehicle.

25 Q. All right. And you did that, you found that

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1 information out before you wrote the citation in Defendant's
2 exhibit number 1?

3 A. No, sir.

4 Q. Or while you were doing it?

5 A. While.

6 Q. Okay. Is it fair to say that you have completed the
7 citation or that you had not completed the citation until
8 you had confirmed this information that we're speaking of,
9 that he had a license, the license was clear, and that the
10 tag was appropriate and that he had a rental agreement? You
11 did not finish writing that citation until after you had
12 confirmed that all of those things were in order?

13 A. That'd be correct.

14 Q. Fair to say?

15 A. Correct.

16 Q. All right. Normally you like to have for your
17 situation an officer with a dog within a relatively short
18 distance of you?

19 A. There's a member of the team that has one, yes, sir.

20 Q. And a dog's a very useful thing?

21 A. Correct. But he's not necessary.

22 Q. Yes, sir. But he is necessary if the subject does not
23 - - does not give consent? You still have some options if
24 you have a dog, am I correct?

25 A. Yes, sir.

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1 Q. And the option would be, even if the person says, the
2 subject, I decline to give you consent, you can have your
3 fellow officer conduct what is known in the trade as a free-
4 air-sniff?

5 A. Correct.

6 Q. Basically, the free-air-sniff is he just - - and you
7 don't need consent for a free-air-sniff, right?

8 A. Correct.

9 Q. The other officer will walk the dog around and if the
10 dog hits, that is a legal basis to search the car?

11 A. Correct.

12 Q. In this situation, though, we had a little unexpected
13 situation because the officer with the dog wasn't
14 immediately available with the dog?

15 A. That's fair to say, yes, sir.

16 Q. Okay.

17 A. That's correct.

18 Q. And, moreover, I believe you indicated that it is not
19 your practice and it's probably not a safe thing to do to
20 ask for consent to search when you're the only officer on-
21 scene?

22 A. Correct.

23 Q. Am I right?

24 A. (Affirmative nod).

25 Q. Because it is at that point that the subject often

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1 realizes that he's in trouble?

2 A. I wouldn't say trouble.

3 Q. Well, - - -

4 A. If he's involved in criminal activity, I'd think that's
5 when he starts realizing things aren't going to go well.

6 Q. He's realizing he's going to get caught, right? Well,
7 isn't that why you bring the other officer in? Isn't that
8 what you said?

9 A. Yes, sir.

10 Q. You bring the other officer in because at that point
11 when you start asking for consent the subject's going to
12 know the jig is up, so to speak, and you want to have
13 another officer there?

14 A. For officer safety purposes I feel like it's best for
15 me and my situation, - - -

16 Q. Yes, sir.

17 A. - - - by what I've been through in the past, - - -

18 Q. Yes, sir.

19 A. - - - fights, shootings, things of that nature, it's
20 best to have someone else there - - -

21 Q. Yes, sir.

22 A. - - - when you ask for consent.

23 Q. And that's sort of the key point, the key point in the
24 scenario - - -

25 A. Correct.

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1 Q. - - - when you need the other officer there. You don't
2 need another officer there to ask the guy to step out of his
3 car and show you his paperwork, you don't need another
4 officer for that.

5 A. No, sir.

6 Q. Because you didn't have one, right?

7 A. Correct.

8 Q. It's only when you ask for consent, that's when you
9 need the other officer's presence?

10 A. It depends on how one person conducts it. Other people
11 may do it something different than what I do.

12 Q. I'm asking about you.

13 A. At times - - -

14 Q. That's what you said you do.

15 A. Correct. At times I love to have somebody else there
16 if they're available.

17 Q. Right. In this case, though, you're standing there,
18 you've checked out all of the stuff on the subject that
19 we've been over and you've written Defendant's exhibit
20 number 1, but you don't have an officer there, you don't
21 have another officer there, do you?

22 A. When are you referring to?

23 Q. You did the things, you've called in the license,
24 checked it out, we've confirmed that. You write out the
25 citation, or not the citation, but the warning.

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1 A. This warning here was not completed until someone else
2 got there.

3 Q. Okay.

4 A. If that's what you - - I'm not following where you're
5 going.

6 Q. Okay. Well, that actually helps me to understand what
7 I'm going to ask you then. You had not completed the
8 warning before the other officer arrived on the scene,
9 correct?

10 A. Correct.

11 Q. When did you give out the citation? When did you give
12 that to the - - to Mr. Alston?

13 A. I don't believe I ever did.

14 Q. You never gave it to him?

15 A. No, sir. I never returned any of his articles to him,
16 nor did I return the warning to him.

17 Q. But you did complete it?

18 A. When someone else got there, yes.

19 Q. Okay. All right. Did you complete it before you asked
20 for consent?

21 A. At this point in time, I don't know. I can't tell you
22 one way or the other because I don't remember.

23 Q. All right. Well, was there any reason that you
24 couldn't have completed it? This is a pretty simple form,
25 isn't it? Wouldn't you agree with me about that?

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1 A. Sure.

2 Q. It's hardly one of those complex accident reports or
3 something like that that you had to fill out as a highway
4 patrolman?

5 A. Correct.

6 Q. That'd take a long time.

7 A. (Affirmative nod).

8 Q. And, in fact, this is even much simpler than a uniform
9 traffic ticket, isn't it?

10 A. Yes, there's not as much to fill out if that's what
11 you're - - -

12 Q. Because with the traffic tickets you've got to figure
13 out court and all that kind of stuff. Basically there's not
14 much information on there that you have to fill out, is
15 there?

16 A. No, sir. For officer safety purposes, while I'm
17 filling that out, - - -

18 Q. Yes, sir.

19 A. - - - it's a lot harder to do on the side of the road.
20 It's easier to do if I'm sitting behind a desk talking to
21 somebody when I don't have the safety issue, when I don't
22 have - - -

23 Q. I understand.

24 A. - - - that subject engaging me in conversation. When
25 he's answering questions and I want to see his response, I

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1 look up. I want to pay attention to how he answers my
2 questions or how he's engaging me in conversation. Is he
3 making eye contact with me? Is the stress of his body
4 leaking out some way or another? Things of that nature.

5 Q. All right.

6 A. So ...

7 Q. And while you are filling this out you're doing those
8 things, aren't you?

9 A. One would think so, yes, sir.

10 Q. Okay.

11 A. Absolutely.

12 Q. And you, in fact, were asking him or you continued to
13 ask him questions while you were filling it out?

14 A. Correct.

15 Q. You're sure that it was completed as the other officer
16 arrived on the scene? Am I correct with that?

17 A. I would think so, yes, sir.

18 Q. Was there any doubt about it?

19 A. Mr. Johnston, I would most likely wait until that
20 officer got there to complete that warning.

21 Q. Okay. Well, when the officer got there did you
22 complete it?

23 A. I would assume I did.

24 Q. All right. And you don't ask for consent until the
25 other officer's there, right?

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1 A. Correct. Yes, sir.

2 Q. So we can conclude from that that you had completed the
3 warning/citation before the other officer - - before you
4 asked for consent?

5 A. I don't know.

6 Q. Well, - - -

7 A. Most of the time what I will do is go ahead and ask for
8 consent before this is completed, but there are times that I
9 will ask for consent as soon as I finish writing everything
10 on there.

11 Q. What did you do in this case?

12 A. It's not on camera, so I really don't know. If we can
13 watch the tape to try to figure that out, that's fine with
14 me, but at this point in time I can't tell you one way or
15 the other.

16 Q. All right. You did tell me, though, that you completed
17 the citation after the other officer arrived? You did tell
18 - - -

19 A. Yes.

20 Q. - - - me that? And you did tell me that you waited
21 until the other officer arrived before you asked for
22 consent?

23 A. Correct.

24 Q. So, therefore, we know that you completed it before you
25 asked for consent?

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1 A. Not necessarily.

2 Q. Well, - - -

3 A. I could have asked for consent as he was rolling up.

4 Q. Okay. Well, let's use a fancy word, contemporaneously,

5 at the same time. So either before or at the same time,

6 contemporaneously. Is that fair to say?

7 A. Mr. Johnston, I don't know.

8 Q. Well, it's no later than at the same time, is it?

9 A. I can't tell you. I don't know. For this particular
10 instance I can't tell you one way or the other because I
11 don't remember.

12 Q. All right. All right. When you had completed the
13 citation, the warning citation, did you give it to Mr.
14 Alston?

15 A. No, sir.

16 Q. Did you tell Mr. Alston before you asked for consent
17 that he was free to go?

18 A. No, sir.

19 Q. And, again, another marked police officer had come on
20 the scene at about this time, am I correct?

21 A. Correct. I believe Ohio versus Robinette addresses
22 that as well.

23 Q. All right. Well, - - -

24 A. We don't have to advise him that he's free to go.

25 Q. I'm not getting into the law with you, I'm just trying

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1 to figure out the facts.

2 A. I'm sorry.

3 Q. I mean, I don't mind if you comment on it, but I'm just
4 trying to determine the facts right now. Okay. So you
5 didn't tell him he had the right to leave because you're not
6 required to?

7 A. In my judgment he's not free to leave as it is.

8 Q. All right. He wasn't free to leave?

9 A. No, sir.

10 Q. Even though you had checked out all of his paperwork
11 and the license and all of that, and even though you had
12 written a citation, he wasn't free to leave?

13 A. No, sir.

14 Q. Okay. Would you be in any way surprised if by the way
15 you were acting towards him that that's what he believed,
16 too, that he didn't have the right to leave?

17 A. I can't tell you what he's thinking.

18 Q. Yes, sir.

19 A. I have no idea.

20 Q. All right. Well, if you were in his place, do you
21 think you would have had a right to leave?

22 A. I don't know, I've never been in that position.

23 Q. Well, just put yourself there for a second.

24 A. I can't testify to one way or the other because I don't
25 know.

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1 Q. Okay.

2 A. I can't testify for him.

3 Q. All right. Well, again, you didn't tell him he could
4 leave, and a second police officer had arrived on the scene?

5 A. That is correct.

6 Q. Am I correct?

7 A. Yes, sir. And I distinctly remember First Sergeant
8 Barnett staying away from us.

9 Q. All right, sir. Well, he did come on the scene where
10 he could help you if you had any trouble, - - -

11 A. That is correct.

12 Q. - - - right?

13 A. Yes, sir. He drove up on the scene.

14 Q. Okay.

15 A. He parked behind me.

16 Q. But he let you handle it? He - - -

17 A. Yes, sir.

18 Q. - - - was letting you handle the situation, okay?

19 A. Yes, sir.

20 Q. But surely anybody would have seen the second officer
21 come?

22 A. I don't know. A lot of times - - -

23 Q. You saw him?

24 A. - - - Mr. Alston - - yes, sir, and that's because I'm
25 facing that way.

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1 Q. All right.

2 A. Mr. Alston had his back turned to him the whole time.

3 Q. Okay. After the other officer rolled up and you

4 finished the citation, but not given it to him, you

5 basically went straight into the consent, asking for consent

6 to search? Am I correct?

7 A. Yes, sir.

8 Q. Do you remember what you said?

9 A. My report says I asked for consent to search the

10 vehicle. And common practice in my - - -

11 Q. Please, go ahead.

12 A. - - - is may I search your vehicle or can I search your

13 vehicle?

14 Q. Okay. So is the report consistent with your own

15 recollection?

16 A. What do you mean? Is it exactly how I asked the

17 question?

18 Q. Not necessarily exactly, but close to it.

19 A. I would say so.

20 Q. Okay.

21 A. It states I ask for consent to search the vehicle.

22 Q. All right. And what did he say?

23 A. Says he's just trying to figure out what this is all

24 about.

25 Q. He said, I'm just trying to figure out what this is all

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1 about?

2 A. (Affirmative nod).

3 Q. Okay. What did you say then?

4 A. I just advised him that I was asking a question.

5 Q. I'm just asking a question, all right. What happened
6 next?

7 A. And then he says, I mean, yeah, you can search it.

8 Q. I mean, yeah, you can search it. And, in fact, if my
9 recollection of the video is correct, you commence to
10 walking on over to the car when he said that.

11 A. At one point in time, I do, yes, sir.

12 Q. All right. But then you - - -

13 A. Not at that point in time.

14 Q. Okay. Did you do it - - did some other exchange occur
15 between you?

16 A. I believe he asked, and I'm asking you why you want to
17 search the vehicle?

18 Q. Okay.

19 A. And I explained to him that I would explain that to him
20 when everything was done if he wanted - - -

21 Q. I'll explain that later is basically what you said?

22 A. Yes, sir.

23 Q. Okay. So then you commence to walking over to - - am I
24 right?

25 A. I'll give you that, but I don't know exactly when it

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1 was during this - - -

2 Q. Okay.

3 A. - - - during everything that happened here.

4 Q. All right. Well, the point of - - the reason I'm
5 asking is not so much to learn it at the exact chronology of
6 it. What I'm interested in is you walked toward his car and
7 then you stopped, you turned around and came back because
8 you weren't sure he had given you consent.

9 A. No. I was sure. I wanted to make sure that he
10 understood what was happening.

11 Q. Okay.

12 A. He had already gave me consent once.

13 Q. Okay. Well, you wanted to confirm - - -

14 A. I wanted to make sure that he understood what was going
15 on.

16 Q. Okay.

17 A. And I had not at that point in time told him that he
18 had the right to refuse. So that's what I went back and
19 advised him.

20 Q. All right.

21 A. If I'm not mistaken. We can watch the video again, but
22 at that point in time that's when I went back and said, you
23 do have the right to refuse, but you also have the right to
24 give consent.

25 Q. All right.

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1 A. And then he goes into he didn't do anything wrong or,
2 I'm sorry, he, again, when I advised that he had the right
3 to refuse, he says, pointing to his car, then go ahead as if
4 to give consent.

5 Q. All right.

6 A. But it still wasn't a yes or no answer.

7 Q. All right, sir.

8 A. What I wanted was a yes or no answer. And eventually
9 we got to that.

10 Q. All right. And what specifically did he say?

11 A. Yeah, go ahead and search the car.

12 Q. Now, at an earlier time in this exchange when you were
13 asking for consent isn't it true that Mr. Alston replied
14 when you were asking him for consent that you said that he
15 said, quote, nah, I'm not giving you consent, you the one
16 giving consent?

17 A. Yes, sir.

18 Q. Did he say that?

19 A. Um-hum (Affirmative).

20 Q. Now, up to the point that you had asked, that you asked
21 for consent, you had not seen any drugs?

22 A. No, sir.

23 Q. You had not smelled any drugs?

24 A. No, sir.

25 Q. You had not smelled any alcohol?

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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- 1 A. No, sir.
- 2 Q. You had not seen any weapons?
- 3 A. Correct.
- 4 Q. You had fully checked out a documented driver's license
- 5 history, the fact that he had one, the tag was clear and he
- 6 had a rental agreement, correct?
- 7 A. Yes, sir.
- 8 Q. The reason you asked him for consent to search were
- 9 things you had observed, am I correct?
- 10 A. Yes, sir.
- 11 Q. You became suspicious of him, right?
- 12 A. Yes, sir.
- 13 Q. Okay. You were suspicious of him because of where he
- 14 started from, correct?
- 15 A. What do you mean?
- 16 Q. You were suspicious - - -
- 17 A. You talking about the beginning of the trip?
- 18 Q. I'm sorry, go ahead.
- 19 A. You're talking about the beginning of the trip?
- 20 Q. Yes, sir.
- 21 A. Is that what you mean? I noted that is near Atlanta.
- 22 And Atlanta is a hub for criminal activity in the southeast.
- 23 Q. Okay.
- 24 A. It's the leading hub for criminal activity just about
- 25 in the nation.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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- 1 Q. Okay.
- 2 A. It's the second.
- 3 Q. What's the first?
- 4 A. I have no idea.
- 5 Q. You don't know the first?
- 6 A. It's got to be somewhere out west.
- 7 Q. Okay. Well, how about Newark, New Jersey?
- 8 A. What about it?
- 9 Q. Is that a hub?
- 10 A. It's a - - -
- 11 Q. It's near New York. Is that a hub?
- 12 A. I don't know how close to New York it is.
- 13 Q. Okay. Well, it's close. Is New York a hub of criminal
- 14 activity?
- 15 A. Certain parts of New York, yes, sir.
- 16 Q. Okay. So New York City is a hub of criminal activity,
- 17 right?
- 18 A. It would be safe to say. Every big city has a drug
- 19 problem.
- 20 Q. And - - -
- 21 A. Would you be safe to say that?
- 22 Q. Every big city's got a drug problem.
- 23 A. The one thing about it, though, is New Jersey is not on
- 24 the rental agreement either.
- 25 Q. Okay. Well, I understand that. We're going to get to

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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- 1 that, but right now I'm just talking about those hubs.
- 2 Charlotte a hub?
- 3 A. I would consider it so, yes, sir. Raleigh, Greensboro,
- 4 Charlotte.
- 5 Q. Raleigh, Greensboro, Charlotte, all hubs of criminal
- 6 activity in the southeast, correct?
- 7 A. Yes, sir.
- 8 Q. And if he'd continued on up I-85 he'd have run into
- 9 Charlotte, wouldn't he?
- 10 A. Yes, sir.
- 11 Q. And might have gone on up to - - where are the other
- 12 places? Raleigh, and what was the other place?
- 13 A. Greensboro.
- 14 Q. Greensboro. All those up - - they're all on 85, aren't
- 15 they?
- 16 A. Correct.
- 17 Q. Okay. Is there any large city in the United States
- 18 that is not a hub of criminal activity?
- 19 A. I can't testify to that because I - - -
- 20 Q. Okay.
- 21 A. - - - I don't work those areas.
- 22 Q. Well, you don't work Atlanta either.
- 23 A. I agree with you, yes, sir.
- 24 Q. So is it fair to say that - - you mentioned earlier
- 25 that most big cities got a drug problem.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. Correct.

2 Q. That makes them a potential to be a hub, doesn't it?

3 A. Atlanta has a lot more ability to be a criminal
4 activity hub because it has the interstate systems leaving
5 there going every direction. It's a very large city that
6 has access to all points of direction from there.

7 Q. Spartanburg's just like that, isn't it? Spartanburg's
8 got 85 going one way and 26 going another way.

9 A. Oh, - - -

10 Q. In fact, you ever heard the name Hub City?

11 A. Sure.

12 Q. And what is Hub City?

13 A. It's been referred to as Spartanburg, but I don't know
14 what it means.

15 Q. Okay. Well, I don't either. But it certainly has
16 those transportation advantages that you were talking about
17 that Atlanta does.

18 A. I wouldn't compare Spartanburg being the volume of
19 criminal activity that's in Atlanta.

20 Q. Oh, I know. I understand that. For one thing, it's
21 not as big. What I'm asking about is you had indicated that
22 Atlanta had the potential to be this hub because of the
23 transportation, the access to the major interstate highways.
24 I was merely pointing out that Spartanburg has those same
25 advantages.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. Correct. Through my training and experience we haven't
2 found a lot of criminal activity leaving Spartanburg or
3 coming to Spartanburg - - -

4 Q. Yes, sir.

5 A. - - - working 85.

6 Q. There's a lot of it here, though, isn't it?

7 A. I would agree with you there, yes, sir.

8 Q. Okay. Now, you found the states on here, on the rental
9 agreement, State's exhibit number 14, you found that to be
10 significant as forming part of your suspicion, am I correct?

11 A. Yes, sir.

12 Q. Show me on here where it talks about the states you can
13 go in.

14 A. Right here.

15 Q. Okay. Georgia, Tennessee, Kentucky, Virginia and West
16 Virginia. And you found that to be significant, why?

17 A. Because, number one, he's in South Carolina. It's not
18 on the rental agreement.

19 Q. Yes, sir.

20 A. Number two, he's going to New Jersey, which also isn't
21 on the rental agreement. And the first thing that would pop
22 into my mind, if somebody's involved in criminal activity,
23 they're well aware that Interstate 85 is patrolled by many
24 interdiction units. The first thing - - -

25 Q. Well, why do they go - - -

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. - - - that popped in my mind - - -

2 Q. Why do they go on it then?

3 A. I don't know, sir. I'd have to ask him.

4 Q. If they know that it's heavily patrolled and
5 interdicted such that they draw up their rental agreements
6 to avoid it, you're saying that because of that, the fact
7 that they're then on 85 supports that they must be
8 trafficking drugs?

9 A. No, sir.

10 Q. Okay. Isn't it possible that someone else is the
11 person who got this vehicle, isn't it? Mr. Alston didn't
12 rent the vehicle, did he?

13 A. Correct.

14 Q. Somebody else rented the vehicle.

15 A. Correct.

16 Q. Isn't it certainly possible that the person who rented
17 the vehicle either wasn't sure what Mr. Alston's travel
18 plans were or that Mr. Alston's travel plans changed
19 thereafter? Isn't that certainly possible?

20 A. Anything's possible, Mr. Johnston.

21 Q. Okay.

22 A. We're talking about things that we don't know about.

23 Q. Yes, sir.

24 A. It's also possible that he could have had a pound and a
25 half of cocaine in the vehicle, too.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. But you didn't know about it until you looked in there,
2 did you?

3 A. Correct.

4 Q. You know, they teach you about - - you've been to these
5 classes, they teach you about nervousness, don't they?

6 A. Sure.

7 Q. That's something you're supposed to look for.

8 A. Correct.

9 Q. In fact, I've seen these reports where officers try and
10 get objective signs of nervousness such as that they say
11 they saw the carotid artery pulsating or something like
12 that, that the person was profusely sweating even though it
13 was a cold day. Are you familiar with those sorts of
14 things?

15 A. Sure.

16 Q. You didn't write those down in this case, did you?

17 A. No, sir.

18 Q. You never even wrote down that he was nervous, did you?

19 A. I referred to stress in certain situations, but, no,
20 sir.

21 Q. You never wrote down he was nervous?

22 A. Sure, I agree with that.

23 Q. Much less, you never wrote down that he was very
24 nervous?

25 A. Correct.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. Much less, you never wrote down that you saw symptoms
2 of nervousness like the carotid artery or sweating on a cold
3 day. You didn't write any of that down, did you?

4 A. No, sir. But that could also point to the fact that
5 he's a very - - cool under stress. He could be very good at
6 what he does.

7 Q. Okay. So if you're nervous, that might mean you're a
8 drug trafficker, but if you're not nervous, it just means
9 you're cool.

10 A. No, sir, I wouldn't - - you're saying that if he's
11 nervous that means he's a drug trafficker. No, sir.

12 Q. Well, wouldn't it be - - -

13 A. He would be under stress for some situation or another.
14 We don't know that.

15 Q. Okay. Well, certainly it would heighten your - -
16 that's one of the things you're looking for, you're taught
17 to look for is the nervousness on the part of the driver,
18 isn't it?

19 A. The way that stress would leave one person's body, yes,
20 sir.

21 Q. And we didn't have any of that here?

22 A. No, sir.

23 Q. So there's two possible explanations for a person in
24 that situation. One, they're cool under pressure or, two,
25 they have nothing to be nervous about, right?

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. Anything's possible. We've covered that before.

2 Q. Okay. Two house keys attached to the rental keyring,
3 isn't there an innocent explanation for that, that he just
4 put his keys on there so he wouldn't have two sets of keys
5 to keep up with?

6 A. If you say so.

7 Q. No, I'm asking you.

8 A. No, sir. I've never seen that before.

9 Q. You've never seen it before?

10 A. Fourteen years of law enforcement, no, sir.

11 Q. All right. Mushroom air freshener placed in the
12 driver's door, that's an indicator?

13 A. When piled on top of everything else, yes, sir. When
14 you take everything in the totality of the circumstances,
15 yes.

16 Q. Okay.

17 A. By itself, it means nothing.

18 Q. All right.

19 A. But when you start putting the indicators together, it
20 means something to me.

21 Q. What's the strongest indicator to you in this case?

22 A. Can't put emphasis on one over the other. It's the
23 totality of the circumstances.

24 Q. What's the strongest three?

25 A. Sir?

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. What's the strongest three?

2 A. I can't put emphasis on one over the other. As I say,
3 it's the totality of the circumstances.

4 Q. All right. So one not anymore important than another,
5 correct?

6 A. Yes.

7 Q. At the time you asked for consent what serious crime
8 did you believe Mr. Alston had committed?

9 A. I believed he was involved in criminal activity.

10 Q. That wasn't my question. My question was at the time
11 you asked for consent what serious crime did you believe Mr.
12 Alston had committed?

13 A. And, again, I'll answer it the same. He was involved
14 in criminal activity.

15 Q. Okay. Well, tell me the specific nature of the
16 criminal activity that you knew at that time that he was
17 involved in.

18 A. Again, he was involved in criminal activity.

19 Q. I know, but I'm asking you about the nature of the
20 criminal activity.

21 A. I don't know until I search the vehicle what he's
22 involved in.

23 Q. Okay. So is it fair to say that you did not know that
24 you did not have a suspicion that a specific crime had been
25 committed by Mr. Alston?

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. With the totality of the circumstances I believed Mr.
2 Alston was involved with criminal activity.

3 Q. Yeah, but if you can't tell me what crime it was you
4 believed he had committed.

5 A. I can't tell the future, Mr. Johnston.

6 Q. Yes, sir, I know. But it's important for the courts to
7 look at what you knew at that time. So what I'm asking you
8 is what serious crime did you believe Mr. Alston had
9 committed at the time you asked for consent?

10 A. And, again, Mr. Johnston, he was involved in criminal
11 activity.

12 Q. All right. I take it from your answer, you correct me
13 if I'm wrong, that you cannot tell me what specific crime it
14 was.

15 A. He could have been involved in murder. He could have
16 been involved in metal thieves. He could've been involved
17 in any crime whatsoever. We don't know yet.

18 Q. All right.

19 A. With the totality of the circumstances, I firmly
20 believed he was involved in criminal activity.

21 Q. But you don't have any more or you did not at that time
22 have any more information that he had committed a murder
23 versus that he was involved in stealing metals, is that what
24 you said?

25 A. Yes, sir.

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 Q. Stealing metals or money laundering?

2 A. Correct.

3 Q. Please answer any other questions.

4 MR. HUNTER: Briefly.

5 **Redirect Examination by Mr. Hunter:**

6 Q. Mr. Johnston asked about a change of travel plans, that
7 Mr. Alston could have changed his travel plans without
8 knowledge of that third-party who rented the vehicle, is
9 that what he asked you?

10 A. I believe so, yes, sir.

11 Q. Okay. And in your time speaking with Mr. Alston on the
12 stand or on the side of the road did you ask him about a
13 Honda Cube?

14 A. Yes, sir.

15 Q. And why did you ask him about that?

16 A. It's the top left corner of the rental agreement, it
17 states that they got a Nissan Cube. It even gives the tag
18 number to it originally.

19 Q. Okay. And what was his response to that question?

20 A. They had to take it back. I don't remember the reason
21 that he gave. But they took it back and actually got the
22 Santa Fe instead.

23 Q. During your discussion did it seem that Mr. Alston was
24 present when this vehicle -- this rental vehicle was
25 rented?

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 A. I don't know. I don't know. During our conversation I
2 don't remember if he said anything to that effect or not.

3 Q. Well, would you normally rent a vehicle - - -

4 **MR. JOHNSTON:** Your Honor, he's asking for speculation.

5 **THE COURT:** Sustained.

6 Q. Did you ask him if he was present when the vehicle was
7 rented?

8 A. No, sir.

9 Q. Did he ever tell you that me and her rented the
10 vehicle?

11 A. I'd have to watch the tape again because I do know that
12 he was aware that the other vehicle was taken back. And I
13 don't know if he gave me a reason or not. But I'd have to
14 watch the tape again just to make sure.

15 Q. Okay. And Mr. Johnston spoke about Atlanta being a hub
16 of criminal activity, did he not?

17 A. Yes, sir.

18 Q. In your training - - what did you learn - - what do you
19 specifically learn in your training about major hubs of
20 criminal activity?

21 A. We go over a lot of things as far as trends, what
22 cities are more likely to be hubs for criminal activity than
23 others. Especially - - with where we work, Atlanta's the
24 number one city that we need to be looking for.

25 Q. And does Atlanta have an international airport?

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes.

2 Q. And has at least three interstates coming out of it?

3 **MR. JOHNSTON:** Your Honor, object to leading.

4 Q. How many interstates does Atlanta have coming out of
5 it?

6 A. 85, 75, right off the top of my head, I think, 65, I-20
7 and I believe that's about it.

8 Q. You talked about the mushroom air freshener. Was that
9 the smell of the air freshener?

10 A. No, sir.

11 Q. Okay.

12 A. It's the shape.

13 Q. Okay.

14 A. The reason that's odd to me is that you just don't see
15 rental vehicles with air fresheners in them. That's not
16 something that people go automatically rent a vehicle and
17 then just go put an air freshener in there.

18 Q. And in your experience have you seen that type of air
19 freshener in a rental vehicle?

20 A. No, sir.

21 Q. In your experience where do you see that type of air
22 freshener?

23 A. The first thing that came to my mind is that's the kind
24 that my mom bought when I was a child to put on top of the
25 toilet. I thought that was odd because you just don't see

1 that kind of air freshener in a vehicle.

2 Q. Okay. Please answer any questions Mr. Johnston may
3 have.

4 MR. JOHNSTON: I don't have anything else, Your Honor.

5 THE COURT: Okay. You can step down. What else, Mr.
6 Hunter?

7 MR. HUNTER: That's it from the State, Your Honor, as
8 far as this motion.

9 THE COURT: All right. Mr. Johnston.

10 MR. JOHNSTON: Your Honor, we'd move to suppress.

11 THE COURT: I know it.

12 MR. JOHNSTON: I'm sorry, Your Honor.

13 THE COURT: Would you like to - - -

14 MR. JOHNSTON: Do you want me to go - - -

15 THE COURT: - - - try to state your position?

16 MR. JOHNSTON: Yes, sir, Your Honor. First of all, I
17 have some concern about the initial reason for the stop.
18 The officer stated that the vehicle being driven by Mr.
19 Alston never crossed the dotted line, but he used the word
20 struck, that had struck it and then it went back into his
21 lane, which would've been the proper thing to do.

22 The movement of the vehicle was to the left and away
23 from the officer who says he's parked on the right. And
24 then Mr. - - also, what I'm saying is I think it very
25 possible that Mr. Alston was moving away from the officer to

1 allow maximum distance between him and the vehicle on the
2 road, and then after it passed that the vehicle moved over
3 back where it was supposed to be. So I have some concern as
4 to whether or not - - and I would argue to the Court that
5 that was not a sufficient basis for the stop.

6 Moving forward from that issue, Your Honor, it would be
7 our position that there was no valid consent in this case,
8 that regardless of the words that were actually spoken by
9 Mr. Alston, and I think that there's some reason to believe
10 that it really wasn't clear that he was, in fact, giving
11 consent, the officer comes back at one point to confirm it.
12 There's also an unequivocal statement by Mr. Alston that I'm
13 not giving consent, you're giving consent.

14 But again, be that as it may, if there was, in fact, a
15 valid consent, it was obtained by prolonged detention. That
16 consent is not vitiated by an illegal seizure.

17 Your Honor, the cases, I think, are clear. I'm going
18 to hand them up to you, the ones that I've collected. That
19 would be State versus Pichardo, State versus Williams, State
20 versus Tindall, that an officer has the right after a valid
21 traffic stop to check the person's identity, to check that
22 they have a driver's license, to confirm with dispatch that
23 that license is good, to check the registration and make
24 sure it's proper if he chooses to do that.

25 In this particular case the officer chose not to do

1 that. That the officer also has the right to make sure that
2 the tag is appropriate, the tag is not stolen, that it
3 matches the vehicle that it's tagged up to, which the
4 officer did all of that in this case. But the -- and the
5 officer had begun to write a warning, but the officer did
6 not give the warning to Mr. Alston, we would argue, because
7 the officer was stalling for time to allow another officer
8 to come on the scene.

9 There is no clear delineation between the end of the
10 stop and the request for consent. They run completely into
11 one another. The officer never says, okay, I've checked you
12 out, here's your citation, you can leave. Oh, and by the
13 way, do you mind if I search your car? There is no such
14 demarcation between those two things in this case.

15 Your Honor, it is our position that Mr. Alston was
16 illegally seized at that point because the purpose of the
17 stop had been fulfilled. As I said earlier, all of the
18 things that the officer's entitled to do had been done and
19 the officer had begun to write the warning citation with
20 that very little bit of information that it requires.

21 So we move from a situation where he doesn't have
22 anything left to do with the traffic stop and he begins to
23 conduct a narcotics investigation. But he's conducting that
24 narcotics investigation without reasonable articulable
25 suspicion.

1 Mr. Alston was not free to go per the officer. And I
2 think the officer concedes that Mr. Alston would have known
3 that he wasn't free to leave. The fact that another officer
4 had come on the scene, the fact that he'd been pulled over
5 with a blue light, the fact that the officer was uniform,
6 has his guns, gun with him, I think that Mr. Alston is at
7 that point seized. And I would argue to the Court that
8 based on the cases that that seizure, that second seizure
9 was in violation of the Fourth Amendment because it was
10 without probable cause and without reasonable articulable
11 suspicion.

12 Some of the very factors that the officer talked about
13 in this case were essentially debunked by our South Carolina
14 Supreme Court in the case of State versus Tindall. In that
15 case the court found that the officer's testimony about
16 driving a rental car and that there was also testimony in
17 there about the drug hub.

18 And in that case the court seemed less than impressed
19 by the fact that the officer testified in addition to, I
20 believe, Durham, which is where the defendant in that case
21 was going, that also Greenville, Charlotte, Jacksonville,
22 Raleigh, Spartanburg and Oconee counties were also areas of
23 drug activity.

24 Basically, Your Honor, I would argue that wherever
25 you're coming from apparently is a drug hub. And the fact

1 that the Defendant in this case lived in Rome, Georgia,
2 which is supposed to be near Atlanta, is not sufficient
3 reasonable articulable suspicion to detain Mr. Alston
4 further.

5 As I understand the ultimate question in this case is
6 that after the purpose of the stop has been fulfilled, that
7 unless the officer has reasonable articulable suspicion that
8 a serious crime has been committed by the Defendant, he is
9 required to allow the Defendant to leave. In this case I
10 asked specifically what specific crime it was that the
11 officer suspected? The officer gave me a very generalized
12 response of, well, I believe he was involved in criminal
13 activity.

14 He was unable to articulate any specific crime or any
15 specific criminal activity that the Defendant was involved
16 in. He said it could have been murder, it could've been
17 metals thieving or it could've been money laundering. He
18 didn't have anymore evidence of that, of any of those three
19 things than any other crime. And based on the totality of
20 the circumstances, Your Honor, we would argue that the drugs
21 which were seized should be suppressed.

22 **THE COURT:** Mr. Hunter.

23 **MR. HUNTER:** Your Honor, I believe I heard three
24 different arguments. I'll start with the first one that the
25 traffic stop was not made - - -

1 **MR. JOHNSTON:** We're just hoping one of them might
2 work.

3 **MR. HUNTER:** The traffic stop was not made with
4 probable cause on the failure to maintain lane. I'd like to
5 pass up State v. Vinson. It's a recent Court of Appeals
6 case out of South Carolina dealing with this issue of
7 failing to maintain lane.

8 In this case I believe the vehicle in Vinson did cross
9 over the yellow line. However, - - and in that case there
10 was also a few other jurisdictions that the attorney in that
11 case presented to the court as to why that did not violate
12 the statute at hand and that the - - the statute at hand, I
13 believe, states that someone must maintain their lane as
14 nearly as practicable. If striking the marker in the lane
15 - - and I believe Deputy Gilbert said he did it multiple
16 times.

17 The Court of Appeals points out in their footnotes at
18 the bottom of number three that the interpretation that
19 someone could be driving while hitting the lane marker - -
20 well, in this case we're on a three lane road going one way.
21 There's no vehicles coming towards him except on the other
22 side of the median.

23 However, driving on a two lane road where there's one
24 lane marker, it's absurd to believe that both people could
25 be traveling inside their own lane while also touching the

1 lane marker because eventually they would hit each other if
2 they were going in opposite directions. So just striking
3 the lane, I'd argue, is a violation of that statute and did
4 give reason for Deputy Gilbert to pull the vehicle over.

5 I'll first start with the -- I'll next go to the
6 unlawful detention. He stated the State v. Tindall case,
7 the State v., excuse me, all the State cases that say the
8 reasonable suspicion was lacking in those stops. There are
9 also cases that say the exact opposite, State v. Provet, US
10 v. Branch, US v. Sokolow, US v. Mason. Those are all Fourth
11 Circuit cases, Your Honor.

12 And what we're looking at is whether this officer had
13 reasonable articulable suspicion to detain this person
14 farther than the initial traffic stop. The initial traffic
15 stop was for the failure to maintain lane.

16 And what did Deputy Gilbert learn in those moments
17 during the execution of that traffic stop? When he first
18 approached the vehicle, Your Honor, and this is all learned
19 within two minutes and thirty seconds of the traffic stop,
20 the beginning. He sees the bags in the backseat that are
21 covered by a blanket. He's asked defensively by the driver
22 when he approaches the car why he's being stopped without
23 him ever saying anything.

24 There's two house keys attached to the rental, which is
25 -- the way he testified, he hasn't seen that in fourteen

1 years. It's a rental vehicle where you normally don't have
2 your house keys attached to that rental vehicle.

3 It's being operated outside the states that's
4 specifically stated on the contract, that they can only be
5 in Georgia, Tennessee, Kentucky, West Virginia and Virginia.
6 He's right now traveling in South Carolina, not on the
7 rental contract. He says he's going to New Jersey. Also
8 not on the rental contract. It's rented by a third person
9 who he says is his girlfriend, who is not present in the
10 vehicle.

11 And as Mr. Alston is exiting the vehicle and he opens
12 the door he sees an air freshener in the vehicle. Air
13 fresheners in US v. Branch, Your Honor, is one of the
14 indicators that allow an officer to have reasonable
15 suspicion to detain a person further to gain consent or to
16 have a dog come and do an open-air-sniff as Mr. Johnston
17 stated.

18 He also talks to him about the length of the trip. In
19 multiple of these cases a traffic stop doesn't have to be
20 specifically license, registration, write the ticket, on
21 your way. An officer is allowed to have minimal contact and
22 can discuss items as they relate to the traffic stop or
23 items that don't relate to the traffic stop as long as they
24 are minimized.

25 In this case they talk about the trip, that he's going

1 to see his mother. The contract was started on Saturday,
2 March 26th. It's due back a week later. We're now here on
3 Monday in South Carolina, he's making a trip to New Jersey
4 to see his sick mother. He states that when asked are you
5 coming back on Monday, he says, yeah, something like that,
6 after I get up there, rest and she's ready to go. His
7 travel plans don't match with the rental contract that he
8 has. And that raises the suspicion of the officer.

9 The officer is - - was hired in 1999 by the Highway
10 Patrol, works interstates, roads doing traffic enforcement
11 laws and has done that for, up until this point, at least
12 twelve years. He's been on the Ace Team, which is concerned
13 with highway interdiction, criminal activity going through
14 the highways. He's had a K-9. He's well versed in the laws
15 and the indicators. He's had over five hundred to six
16 hundred hours of training and experience in this field.

17 And some of these cases that I'm going to talk about
18 giving deference to the training and experience of the
19 officer. And he testified that all of these items along
20 with the six kids that he says he has, but yet he gives
21 names for seven. He did say he didn't see any nervousness,
22 but that shows nervousness right there. He has - - he says
23 he has six kids because he has lots of mouths to feed, but
24 yet when asked the age, he gives you seven ages.

25 Now, on a lot of these cases, hub of criminal activity

1 comes up, Atlanta being a source city. Some of those cases,
2 don't put too much deference in them, some of them do.

3 You have United States v. Mason, which is a case, I
4 believe, out of Georgia where an officer is stopping
5 somebody coming out of Atlanta. He testifies that at that
6 point that's the third biggest city for drug distribution.
7 In that case they found that that was a factor that the
8 officer could take into consideration in determining whether
9 he had reasonable articulable suspicion to keep the driver
10 there to ask to search or continuing an investigation.

11 When you look at all of these factors including I-85
12 being a known criminal corridor, Atlanta being a source city
13 for drugs, the air freshener, the discrepancies between his
14 answers and the rental contract, the luggage, the keys on
15 the keyring, and the third-party rental, it would be our
16 argument at that point that he did have reasonable
17 articulable suspicion to keep Mr. Alston there to ask for
18 consent.

19 He then argues that the consent wasn't voluntary. For
20 consent to be good is a question of fact to be given to you,
21 Judge, that consent must be freely and voluntarily given
22 without coercion or duress. You've seen the video. It's
23 the middle of the day. There's one officer present when
24 they first start this.

25 Another officer does arrive, however, stays away from

1 the scene. We don't know and testimony wasn't given whether
2 Mr. Alston knew that the other officer was here or not. The
3 only testimony we have is that the other officer stayed back
4 from the scene and Mr. Alston's back was turned to that
5 officer.

6 Deputy Gilbert asks him for consent to search the
7 vehicle. And that's when Mr. Alston asked - - he's trying
8 to figure out what all this is about. He then says, yeah,
9 you can search it. So at that point he does give consent.

10 However, Deputy Gilbert knows that Mr. Alston may or
11 may not know what he has just done. So he continues to ask
12 him. Said, no, I'm asking if you're giving consent and then
13 explains that he has the right to refuse consent. He has
14 the right to give it or to refuse it. That's when Mr.
15 Alston says, I have the right to refuse, and then states
16 again, then go ahead.

17 Mr. Alston then inquires again why Gilbert wants to
18 search the car. And Gilbert - - Deputy Gilbert explains
19 that he's going to tell him all that when he's done. He's
20 not going to go ahead and tell him right now, here, I have
21 all these indicators of criminal activity, let me search
22 your car. At that point Mr. Alston may say no. He's just
23 going to let him know at the end why he wanted to search the
24 car.

25 At that point he's - - that's when he says the sentence

1 that Mr. Johnston is enamored with that, nah, I'm not giving
2 consent, you're the one giving consent. And so Deputy
3 Gilbert realizes at this point that he doesn't understand
4 what he's doing.

5 So he wants to ask him a straight yes or no question.
6 Yes or no, can I search your car, at which point he says,
7 yes, yeah, go ahead and search the car. And at that point
8 the car is searched and the cocaine is found.

9 Your Honor, we believe that the traffic stop was
10 reasonable, that he had probable cause that a traffic
11 violation occurred, that he had reasonable articulable
12 suspicion to detain Mr. Alston there farther than the actual
13 traffic stop for the failure to maintain, and that consent
14 was voluntarily given by Mr. Alston, and that the drugs
15 should not be suppressed.

16 **MR. JOHNSTON:** Your Honor, if I could, I'd just like to
17 hand up the cases that I made reference to earlier. And I
18 provided the solicitor with a copy of them. Those being
19 State v. Williams, State versus Pichardo and State versus
20 Tindall.

21 **THE COURT:** Anything else?

22 **MR. JOHNSTON:** No, sir.

23 **THE COURT:** All right. I'll review the cases and rule
24 on the matter in the morning.

25 **MR. JOHNSTON:** Thank you, Your Honor. What time shall

1 we be here in the morning?

2 **THE COURT:** 9:30.

3 **MR. JOHNSTON:** Yes, sir. Thank you.

4 **THE COURT:** Court's in recess until 9:30 in the
5 morning.

6 (Whereupon court was in recess at 4:55 PM)

1 TUESDAY, MARCH 19, 2013:

2 (Whereupon court resumed at 9:38 AM)

3 **THE COURT:** We're back on the record in the matter of
4 the State versus Stepheno Alston. Mr. Johnston, have you
5 heard any further about your client, whether or not he
6 intends to appear and participate in the trial of his case?

7 **MR. JOHNSTON:** Your Honor, I have received no word from
8 him whatsoever. I did have my staff attempt to phone him
9 yesterday at the numbers that we have, but we were not able
10 to reach him.

11 **THE COURT:** And we've heard nothing further from his
12 surety?

13 **MR. HUNTER:** I have heard nothing from his surety, Your
14 Honor.

15 **THE COURT:** Okay. Well, based upon our discussion
16 yesterday I do find that the Defendant has been properly
17 noticed as to the fact that his case is to be called for
18 trial this week.

19 I also further find that he was actually notified to be
20 here yesterday and, in fact, was present here yesterday with
21 counsel for the beginning of his trial and that he left
22 without instruction from the Court or from counsel to remain
23 and left without providing any notice of his intent to
24 engage in some authorized activity and has failed to return
25 to court with knowledge that his case is scheduled to begin.

1 And I also find that he has previously received notice
2 by the bail proceeding form that he received notice of his
3 right to be present at the trial of his case and that he was
4 also notified by that bail proceeding form that he would be
5 tried in his absence in the event that he failed to appear.
6 So I find that the Defendant has received notice, that he's
7 failed to appear and, therefore, he has knowingly and
8 voluntarily waived his right to be present at the trial of
9 his case.

10 Now, with regard to the motion to suppress, I find that
11 the stop made by the officer was pursuant to a valid traffic
12 stop, that it was based upon probable cause, that the
13 detention resulting from that stop was based upon the
14 totality of the circumstances as presented by the evidence
15 in this case, was reasonable under the Fourth Amendment and
16 that the search made of the vehicle which resulted in the
17 seizure of evidence to be used in the trial against him was
18 based upon consent and in this case with actual knowledge of
19 his right to refuse consent. All right. And, therefore,
20 the motion to suppress is denied. All right.

21 Anything else we need to address before the jury is
22 brought around?

23 **MR. HUNTER:** Nothing from the State, Your Honor.

24 **THE COURT:** All right. Bring the jury around, please.

25 **MR. JOHNSTON:** Your Honor, I would like to address

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1 participation as well as for your careful attention. I
2 would ask that you please give the lawyers your attention
3 now as they give you their opening statements.

4 And let me say one other thing, too. As you - - as the
5 evidence and the witnesses are called to the stand and
6 evidence is being received, you're never to start making up
7 your minds or formulating your opinions as to what you think
8 the ultimate outcome should be until all of the evidence has
9 been received, until I've instructed you on the law and
10 until you've been asked to begin deliberations.

11 That's the process that is designed for you twelve
12 jurors to arrive at a fair and just decision in the case.
13 So please give the lawyers your attention now as they give
14 you their opening statements. Mr. Hunter.

15 **MR. HUNTER:** Thank you, Your Honor. May it please the
16 Court. You're here today on a case of trafficking in
17 cocaine over four hundred (400) grams, Stepheno Alston.
18 It's a car stop case.

19 On March 28th, 2011 Deputy Gilbert with the Spartanburg
20 County Sheriff's Office was positioned on the exit ramp,
21 excuse me, entrance ramp on 85 where 26 comes into 85 around
22 exit 70, 71. His car is sideways facing the lanes. He's
23 looking northbound going towards Charlotte, towards
24 Cherokee, towards Gaffney.

25 He sees a brown Hyundai Santa Fe vehicle passing him.

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1 He's going around a little curve and notices the vehicle
2 hits the lane dividers a few times, decides to pull him over
3 for a traffic stop.

4 Driving that car is Stepheno Alston. Mr. Alston is in
5 a rental vehicle out of Georgia. Mr. Alston is from
6 Georgia. And you'll hear that Mr. Alston stepped out of the
7 vehicle and came back toward Deputy Gilbert's vehicle. They
8 had a conversation for a while. Deputy Gilbert will ask for
9 consent to search his vehicle. Mr. Alston gives consent to
10 search the vehicle.

11 Deputy, excuse me, Captain Hollifield arrives on the
12 scene, helps Deputy Gilbert search that vehicle.. And the
13 evidence will show that in a void underneath the steering
14 column was over four hundred (400) grams of cocaine.

15 Now, you will hear the definition of trafficking
16 cocaine, you'll hear the definition of reasonable doubt, of
17 innocent until proven guilty, presumption of innocence.

18 We have the burden to prove this case. I gladly accept
19 that burden. And over today, hopefully just today, I'm
20 going to prove this case for you. When I stand up here
21 again, I'll be asking you to come back with a guilty
22 verdict. Thank you.

23 **THE COURT:** Mr. Johnston.

24 **MR. JOHNSTON:** May it please the Court, Madame
25 Forelady, ladies and gentlemen of the jury. First of all,

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1 let me address something head on here, and that is the fact
2 that the Defendant is not present in this case.

3 In that chair over there where - - his place next to
4 me, there's no one sitting in it. And I just want to tell
5 you that that doesn't change anything about what we're going
6 to do in this case from any other case when there's a
7 defendant who is sitting with me at the trial of his case.
8 In this particular situation, that chair, if you think of it
9 as a symbol of a person charged with a crime, has the same
10 rights that a human being would have seated there charged
11 with a crime.

12 And most importantly, ladies and gentlemen, that empty
13 chair is in view with perhaps the most precious right that
14 any of us had if we were to be charged with a crime, and
15 that is that we are presumed innocent and that the State,
16 the gentleman seated over here at the other table, has the
17 complete burden of proving the Defendant's guilt beyond any
18 reasonable doubt. And that is, ladies and gentlemen, the
19 highest burden that we have in the legal proceedings, the
20 requirement of proof beyond any reasonable doubt.

21 This is a car stop. The evidence is going to show that
22 Mr. Alston was driving a motor vehicle through Spartanburg
23 County and that he was stopped by Deputy Gilbert of the
24 Spartanburg County Sheriff's Office. The evidence is also
25 going to show the very large amount of cocaine was found in

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1 that vehicle.

2 But, ladies and gentlemen, that doesn't end the inquiry
3 there. In order to prove guilt beyond a reasonable doubt in
4 a drug case such as this, I believe the Court will tell you
5 that the State has to prove each and every element of the
6 crime, again, beyond any reasonable doubt.

7 Two of the elements here that I submit to you the State
8 will not be able to establish beyond a reasonable doubt are
9 possession and knowledge. I submit to you, ladies and
10 gentlemen, that the State has to prove those two elements in
11 order to establish guilt in this case and that they will not
12 be able to do so beyond any reasonable doubt. Therefore, at
13 the conclusion of this case, I will be asking you on behalf
14 of Mr. Alston to find him not guilty. Thank you.

15 **THE COURT:** Mr. Hunter.

16 **MR. HUNTER:** Your Honor, at this time the State would
17 call Master Deputy Donnie Gilbert.

18 **DONNIE GILBERT,** being
19 duly sworn testifies as follows:

20 **MADAME CLERK:** Thank you. You may be seated.

21 **Direct Examination by Mr. Hunter:**

22 Q. Mr. Gilbert, please give your full name for the record.

23 A. Donnie Leland Gilbert.

24 Q. How are you employed?

25 A. I work for the Spartanburg County Sheriff's Office.

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1 Q. And how long have you been with the Spartanburg County
2 Sheriff's Office?

3 A. I joined the Spartanburg County Sheriff's Office in
4 January of 2010.

5 Q. And how long have you been in law enforcement?

6 A. I joined the South Carolina Highway Patrol in July of
7 1999.

8 Q. Briefly go over your law enforcement experience from
9 1999 until the March 28th, 2011 stop.

10 A. Okay. July of '99 I was hired by the South Carolina
11 Highway Patrol, attended the Academy in Columbia, graduated
12 there in December of '99, and I was assigned to Richland
13 County to work the road there all the way up until August of
14 2004. Now, what I did there is just basically working your
15 wrecks, enforcing traffic laws of our State on - - in the
16 greater Columbia area.

17 At which point in time in August of 2004 I transferred
18 within the South Carolina Highway Patrol to the Aggressive
19 Criminal Enforcement Team as a K-9 handler. I was appointed
20 to the Midstate Team, which covers I-20, I-77 and I-26 in
21 the Midlands region. And in March of 2005 I was transferred
22 within the Aggressive Criminal Enforcement Team to the
23 upstate region, which covers thirteen counties in the
24 upstate including all the counties which Interstate 85 runs
25 through.

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1 I was a K-9 handler for that team and stayed there
2 until August or September of 2009 at which point in time I
3 joined or transferred within the South Carolina Highway
4 Patrol to work the road in Spartanburg County and stayed
5 there until January of 2010 when I joined the Spartanburg
6 County Sheriff's Office.

7 Q. And briefly explain what the purpose of the Ace Team is
8 as opposed to just normal troopers.

9 A. The purpose of the ACE Team is to eliminate criminal
10 activity from the roadways that you patrol at that time. We
11 basically monitored the interstate systems basically to
12 eliminate criminal activity, as I said before, to look for
13 indicators of criminal activity, to try to decide if
14 someone's involved in criminal activity and to try to stop
15 them from carrying that through.

16 Q. And what team are you currently on in the Sheriff's
17 Office?

18 A. I am assigned to the Interstate Criminal Enforcement
19 Team.

20 Q. And is that similar to the Ace Team for the Highway
21 Patrol?

22 A. Yes, sir, it's pretty much the same thing.

23 Q. What were you doing on March 28th, 2011?

24 A. I was patrolling Spartanburg County and monitoring
25 traffic on Interstate 85.

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1 Q. Where were you located?

2 A. If you're on 26 heading towards Inman, actually where
3 you would exit from 26 to get onto 85 north, which would
4 take you to Gaffney, I'm sitting there as the exit ramp
5 merges into Interstate 85.

6 Q. And how are you positioned?

7 A. I sit sideways on the interstate, basically, let's see,
8 perpendicular to the traffic that's passing me.

9 Q. Okay. So your driver's side is facing southbound and
10 your passenger's side is facing northbound?

11 A. Correct.

12 Q. Okay. What did you observe that day?

13 A. What I saw then was a brownish green in color Hyundai
14 Santa Fe passed my location in the middle lane. Now, where
15 I'm sitting is there's three lanes traveling towards Gaffney
16 and there's going to be three lanes traveling towards
17 Greenville.

18 When this vehicle passed me he was in the middle lane.
19 What I noticed and what popped out to me to begin with is
20 after he passed me there's a curve to his left. When he
21 goes through that curve his left side tires come over and
22 strike the dotted line that divides the fast lane and the
23 middle lane in which he's traveling in, at which point in
24 time he swerves back into the middle of the middle lane.

25 What that shows me is there's a chance he could be

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1 under the influence of alcohol, there's a chance he could
2 have a medical condition. We don't know until we actually
3 get up there and talk to him. There's also a chance that
4 he's worried about my presence on the interstate, the stress
5 of what's going on then could cause him to do that.

6 He then merges or swerves back into the middle of that
7 lane and continues northbound. What I do is I go ahead and
8 pull out and try to run the vehicle down. And in the
9 process of me catching up to the vehicle, he's did this
10 several other times.

11 Q. Okay. And where - - did you initiate your blue lights?

12 A. Somewhere around the 73 mile marker, which is right
13 after your exit for 176.

14 Q. And did he pull over?

15 A. Yes, sir.

16 Q. And exactly what - - what County are you in at this
17 point?

18 A. I'm in Spartanburg County.

19 Q. Okay. What did you do next?

20 A. I approached the vehicle that Mr. Alston was driving on
21 the passenger's side.

22 Q. Okay. Who was in the vehicle?

23 A. There was only one person in the vehicle and that was
24 Mr. Alston.

25 Q. And how did you know it was Mr. Alston?

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1 A. He produced a Georgia driver's license that identified
2 him as a Stepheno J. Alston from Rome, Georgia.

3 Q. What did you first observe when you approached the
4 vehicle?

5 A. The first thing I noticed is when I approached the rear
6 of the vehicle the luggage or what I thought was luggage was
7 covered by a gray, white, and black blanket, which is odd to
8 me because a lot of times in a vehicle that somebody's going
9 to put their luggage in, they're not going to take the time
10 to cover it up.

11 I got to the passenger's side, started talking to Mr.
12 Alston a little bit. And I also noticed that there were two
13 house keys - - -

14 Q. If you could hold on a second.

15 A. Oh, okay. Sorry.

16 Q. Let me show you what's been premarked as State's
17 exhibit 10. Do you recognize that photo?

18 A. Yes, sir.

19 Q. And how do you recognize that photo?

20 A. That's going to be the rear cargo area of the vehicle
21 that Mr. Alston was driving.

22 Q. Does that fairly and accurately depict the scene as you
23 remember it today?

24 A. Yes, sir.

25 Q. Or that day?

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1 A. Yes, sir, it does.

2 MR. HUNTER: Your Honor, at this time the State would
3 offer State's exhibit 10 into evidence.

4 MR. JOHNSTON: I just want to examine it one moment,
5 Your Honor.

6 (Pause)

7 MR. JOHNSTON: No objection.

8 THE COURT: It's admitted.

9 (Whereupon State's exhibit 10 was admitted into
10 evidence)

11 Q. Now, you started talking about keys. What were you
12 going into there?

13 A. Also, let me refer to the luggage being covered up as
14 well. Through the thousands of traffic stops that I've done
15 in the fourteen years that I've been employed with law
16 enforcement, you normally don't see that. That is not
17 something that's normal with the traveling public that you
18 see every day.

19 As far as when I got to the passenger's side, I noticed
20 that - - a lot of times when you rent a vehicle, they're
21 only going to give you the one key for the rental vehicle.
22 Very, very rarely, and I've never seen this before in my law
23 enforcement career, will someone else put a personal key on
24 the keyring for the rental car.

25 A lot of times - - what that tells me in training and

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1 experience with all of the classes that I've been to as
2 well, people will try to personalize a rental car to make it
3 look like theirs, to make - - where you're not going to know
4 if it's a rental car or not until you actually ask for the
5 paperwork, something to that nature.

6 He has put two house keys on the keyring to make you
7 think maybe this is going to be his vehicle. And that's
8 something else that throws up a red flag to me. You don't
9 see that. That is not normal with the common traveling
10 public that I come into contact with every day.

11 Q. Now, that's something I failed to mention. Through
12 your eleven years what type of training and experience have
13 you had in regards to criminal enforcement?

14 A. As far as being involved in, hundreds of felony arrests
15 for criminal activity in the Midlands Team and the Upstate
16 Team or the ACE Team and which also includes the Ice Team
17 with the Sheriff's Office, I've probably made somewhere
18 around fifty to seventy-five felony arrests myself doing the
19 same thing.

20 As far as training, there is such a thing as called the
21 National Criminal Enforcement Association. And there is
22 such a thing as called Desert Snow. What they do is they
23 will put on thirty-two hour classes, which is four days that
24 you will attend throughout this nation with instructors
25 throughout this nation that show you the trends.

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1 They actually teach you how to locate and find hidden
2 compartments within vehicles. They put you through the
3 process of actually training you through the scenarios that
4 they have been through on the side of the interstate. They
5 teach you roadside interviews. They teach you pretty much
6 anything and everything about how to detect criminal
7 activity from that point.

8 Starting in 2004 is when I started going to that type
9 training. Since then I've accrued somewhere between five
10 hundred and six hundred hours of training towards that.

11 Q. In fact, did you recently go to one of those?

12 A. Yes, sir. I attended the National Criminal Enforcement
13 Association's winter conference in Tulsa, Oklahoma last
14 week.

15 Q. And have we ever had that conference in Spartanburg?

16 A. Yes, sir. It was located here in Spartanburg in 2011.
17 It was a four day class there as well.

18 Q. Is that just prior to the stop?

19 A. Yes, sir.

20 Q. Now, you go up to the vehicle, you notice the luggage
21 and the keys. What do you do next?

22 A. I believe I ask Mr. Alston for the paperwork for the
23 vehicle. And he produces a rental agreement at that point
24 in time.

25 When he produces that I immediately notice - - what

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1 I'll do is I'll take about ten seconds, ten to fifteen
2 seconds to go over that rental agreement because it gives me
3 a lot of information.

4 It tells me who rented the vehicle. It tells me when
5 they rented it, where they rented it, when it's due back, if
6 they have to put gas in it. It tells you all kinds of
7 things as far as how long they rented it and also the states
8 that they're allowed to operate that vehicle in.

9 Q. Let me show you what has been premarked as State's
10 exhibit 14. Do you recognize that item?

11 A. Yes, sir, I do.

12 Q. And how do you recognize that item?

13 A. That is going to be the rental agreement that Mr.
14 Alston produced that day for the vehicle that he was
15 driving.

16 Q. Is that the exact rental agreement he handed you?

17 A. Yes, sir.

18 Q. Is that in the same or substantially the same condition
19 as you found it?

20 A. Correct. Yes, sir, it is.

21 Q. Did you actually talk to Mr. Alston about that
22 agreement?

23 A. I did.

24 Q. Through the course of the traffic stop?

25 A. Yes, sir.

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1 Q. And some of the items that were on that traffic stop he
2 agreed to or he admitted including who rented the vehicle?

3 A. Yes, sir.

4 Q. Okay.

5 MR. HUNTER: Your Honor, at this time the State would
6 offer State's exhibit 14 into evidence.

7 MR. JOHNSTON: Without objection.

8 THE COURT: It's admitted.

9 (Whereupon State's exhibit 14 was admitted into
10 evidence)

11 Q. I'm going to let you keep it for a second. I'm going
12 to ask a few questions about it. Now, you're standing at
13 the car and you're reading this information?

14 A. Yes, sir.

15 Q. Okay. What stuck out to you?

16 A. Immediately I noticed that it was rented by someone
17 else, a female by the name of Tomesha Harris. And it was
18 rented two days prior to the stop.

19 Q. Okay. Hold on a second. Was there anybody else
20 present in this vehicle?

21 A. No, sir, there was not.

22 Q. Through your conversation with Mr. Alston did you learn
23 who Ms. Harris was?

24 A. I believe it - - yes, sir. It was - - he admitted that
25 that's his girlfriend.

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1 Q. What else?

2 A. Also Enterprise will put on the rental agreement
3 exactly what states that this person is supposed to be
4 traveling through. The states that or rented here - - and
5 it'll actually say under permission granted to operate the
6 vehicle only in the state of rental and the following
7 states; Georgia, Tennessee, Kentucky, Virginia and West
8 Virginia.

9 Now, what stuck out to me is, number one, South
10 Carolina is not on there, okay. Why? Why did he not tell
11 them that that's where he's traveling to?

12 MR. JOHNSTON: Well, Your Honor, I would object. He
13 just said that someone else, a female was the one who rented
14 the car. Now he's saying that Mr. Alston should have told
15 them that.

16 THE COURT: Well, you'll be able to cross examine him
17 on it.

18 Q. All right. So he's handed you the contract, you're
19 reading it. We'll actually see here in a second. We can
20 stop with the contract for a second. Was there anything
21 else you noticed?

22 A. Well, and another thing - - -

23 Q. Outside the contract?

24 A. Sir?

25 Q. Other than the - - outside the rental agreement was

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1 there anything else you noticed when you first approached
2 the vehicle?

3 A. Uh ...

4 Q. Did you ever ask him outside the vehicle?

5 A. Yes, sir.

6 Q. And was there anything you noticed when he stepped
7 outside - - -

8 A. When he exited the vehicle - - what happens is - - what
9 I'm going to do is just sit at the passenger's window just
10 for second as he exits, as he gets out. As he shuts the
11 door I can see an air freshener in the door pocket of the
12 driver's door there.

13 And what it is is it's one of those old household air
14 fresheners that looks like a - - it's shaped like a
15 mushroom. I don't know if anybody here was raised in the
16 80s like me, but it resembles one of those mushroom air
17 fresheners that your parents would buy and put in the
18 bathroom or something. It's not something you normally see
19 in a car.

20 Q. Let me show you what's been premarked as State's
21 exhibits 4 and 11. Do you recognize those items?

22 A. Yes, sir, I do.

23 Q. And how do you recognize those items?

24 A. It's going to be pictures of the interior of the
25 vehicle as we - - as it depicts as what it was when we stop

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1 Mr. Alston. And also this picture here is going to be the
2 picture of the air freshener that I spoke about earlier.

3 Q. And do they fairly and accurately depict the scene as
4 you remember it that day?

5 A. Yes, sir.

6 MR. HUNTER: Your Honor, at this time the State would
7 offer State's exhibit 4 and - - -

8 MR. JOHNSTON: No objection, Your Honor.

9 MR. HUNTER: - - - 11 into evidence.

10 MR. JOHNSTON: No objection to that either.

11 THE COURT: They're admitted.

12 (Whereupon State's exhibits 4 and 11 were admitted into
13 evidence)

14 Q. Briefly describe State's exhibit 11 to the jury.

15 A. That's going to be the picture of the interior of the
16 vehicle. It's got a bookbag in the right front floorboard,
17 a Crown Royal bag in the middle console with two drinks and
18 a phone charger.

19 Q. Okay.

20 A. It's actually got a phone sitting in the middle
21 console.

22 Q. Where is that view from?

23 A. It's going to be from the passenger's window.

24 Q. Is that the view that you had when you first approached
25 the vehicle?

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes, sir. Actually, this is going to be with the
2 passenger's door open.

3 Q. Okay. Now, in that view would you be able to see
4 what's in the driver's door panel with someone sitting in
5 the vehicle, - - -

6 A. No, sir.

7 Q. - - - at the driver's seat?

8 A. No, sir.

9 Q. However, with that picture what can you see in the
10 driver's door panel?

11 A. You can see the tip - - the top of the air freshener,
12 but with a person sitting in there, you're not going to be
13 able to see it.

14 Q. However, on State's exhibit 4, what do you see there?

15 A. It's going to be a better view of the air freshener
16 that I spoke about earlier.

17 Q. Okay. Is that where the air freshener was located?

18 A. Yes, sir.

19 Q. Could you see that air freshener when you opened the
20 door?

21 A. Yes, sir.

22 Q. And as we see from these pictures, this isn't air
23 freshener that you normally see in a vehicle like the
24 palmetto tree or a tree hanging from the rearview mirror, is
25 it?

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 A. No, sir. And what's odd to me about that is the kind
2 of motoring public that I come into contact with every day
3 with rental vehicles, they don't have air fresheners in
4 them.

5 Q. Let me show you now what's been premarked State's
6 exhibit 2. Do you recognize that item?

7 A. Yes, sir, I do. It's going to be the DVD that we made
8 a copy of the stop.

9 Q. Have you been able to review that video?

10 A. Yes, sir.

11 Q. Does it fairly and accurately depict the scene as you
12 remember it?

13 A. Yes, sir, it does.

14 MR. HUNTER: Your Honor, at this time the State would
15 offer State's exhibit 2 into evidence.

16 MR. JOHNSTON: Your Honor, we would call the Court's
17 attention to the arguments that were made in pretrial
18 motions concerning some of the material that is on that
19 video. So to that extent, we would object.

20 THE COURT: It's admitted over objection.

21 (Whereupon State's exhibit 2 was admitted into
22 evidence).

23 (Whereupon the video was played for the jury)

24 Q. That's the first two minutes and forty-three seconds of
25 the traffic stop. When you approached the vehicle you put

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 your hand on it. Why do you do that?

2 A. Basically to transfer my fingerprints to the vehicle
3 itself just in case there's a shooting, just in case I'm
4 incapacitated and he drives away. It gives the
5 investigators a way to tell that that's the vehicle that I
6 stopped.

7 Q. Okay. We also saw you standing there for a while when
8 he opened the door. Why did you do that?

9 A. I basically wanted to get a better look to everything
10 that's inside the vehicle. And also that's when I noticed
11 the air freshener itself, too.

12 Q. Now why is an air freshener important to you?

13 A. To me, what we're trained - - it's to cover an odor
14 that he's trying to hide, basically for that reason there.
15 It can be used as a masking agent. You don't see normally
16 somebody rent a vehicle and then go straight to Western Auto
17 and buy an air freshener to stick in there. It's just not
18 something you see with the common motoring public.

19 Q. I want to go back to the rental agreement. In speaking
20 with Mr. Alston, where did he rent the vehicle?

21 A. The vehicle was rented in Cartersville, Georgia on
22 March 26th of 2011 at 11:21 AM.

23 Q. Where is that located?

24 A. Cartersville is going to be in the Atlanta area.

25 Q. All right. And what day was March 28th, 2011?

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 A. It'd be a Monday.

2 Q. And he rented it on a Saturday, it's now Monday in
3 South Carolina?

4 A. Correct.

5 Q. You've already mentioned the states and he's in South
6 Carolina. And who rented the vehicle?

7 A. It turned out to be a young lady by the name of Tomesha
8 Harris, who turned out to be his girlfriend. What stands
9 out to me with that is a lot of times people will use a
10 third-party to rent a vehicle. That way they're not - - -

11 **MR. JOHNSTON:** Your Honor, I would object to that.
12 That calls for speculation.

13 **THE COURT:** Sustained.

14 Q. Is there anything else odd on the registration or the
15 rental agreement that you remember seeing?

16 A. Yes, sir. To show the states that he's told the people
17 that he's driving to, that he's allowed to operate the
18 vehicle in.

19 Q. When is that car due back?

20 A. It's going to be due back on April the 2nd, 2011 at
21 11:30, which is right at a week, seven days from the day
22 that he rented the vehicle.

23 (Whereupon the video was played for the jury)

24 Q. In those next couple of minutes you start asking him
25 about his travel plans. Where does he state he's going?

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1 A. He told me that he was actually going to Newark, New
2 Jersey.

3 Q. And who lived in Newark, New Jersey?

4 A. His mom lived there. And the reason that he was going
5 up there was because - - he basically stated that she was
6 depressed and says he's going to bring her home for Mother's
7 Day and all that.

8 Q. Was New Jersey on the rental contract?

9 A. No, sir, it was not.

10 Q. Okay. It's March 28th. When is Mother's Day in 2011?

11 A. Mother's Day is going to be in about a month and a half.
12 It's going to be in May.

13 Q. And - - -

14 A. So that kind of sticks out to me a little bit.

15 Q. How long does he say he's going to stay?

16 A. A week. A week or so is what his words were.

17 Q. And we're on the northbound side in South Carolina.
18 And he's from Georgia?

19 A. Correct. Yes, sir.

20 Q. And he's going to stay in New Jersey a week or so?

21 A. Correct.

22 Q. When is the rental contract due back?

23 A. It's due back the Saturday following. That basically
24 tells me that the travel plans doesn't match the rental
25 agreement itself.

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1 Q. Did you call in his license to dispatch?

2 A. Yes, sir.

3 Q. It came back clear?

4 A. Yes, sir, it did.

5 Q. Where was he originally from?

6 A. Somewhere in New Jersey, I believe. It's what he told
7 me. He now lives in Georgia, but he was originally from
8 Jersey.

9 Q. I'm going to go ahead and fast-forward through a little
10 bit of this.

11 (Whereupon the video was played for the jury)

12 Q. Just one brief question. Who were you talking to right
13 there?

14 A. I went to sit down in my patrol vehicle, and I'm
15 actually calling my teammate on the Ice Team, who is the K-9
16 handler for us at that time.

17 Q. What was his - - -

18 A. Deputy Carraway is his name.

19 Q. Okay. Is he the one who said package?

20 A. Yes, sir. He's basically explaining to me - - what we
21 did is we just got done eating lunch. I went ahead and went
22 back to work. Jason had to - - Deputy Carraway had to go
23 home and pick up the actual K-9 that we use for our team.

24 And what he's telling me there is he hasn't made it to
25 the house yet to go ahead and pick him up and bring him

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 back. So I know he's not -- he hasn't even made it to the
2 house yet. He lives on the south side of the county. So
3 it's going to be a little while before he gets to me.

4 (Whereupon the video was played for the jury)

5 Q. Just briefly right there, what are you doing with your
6 right hand?

7 A. I'm actually writing a warning.

8 Q. So you're not writing him a ticket at this point,
9 you're going to write him a warning for the -- for what?

10 A. For failure to maintain his lane of travel.

11 Q. Okay.

12 A. And, no, it's not a ticket.

13 Q. What did you -- what did he ask you?

14 A. He actually asked me what I'm writing him a ticket for.

15 Q. Is that the first time he had questioned you?

16 A. Yes, sir.

17 Q. Did he question you when you approached the vehicle?

18 A. Yes, sir. Well, he also questioned me about why I
19 stopped him immediately before I could ever get his license
20 or anything like that. To me that's being a little
21 defensive.

22 He's not even giving me a chance to explain anything to
23 him yet, which is -- normally what I like to do is to get
24 somebody's license so I can address them by their last name.
25 It'd be a little more respectful than -- the way I would

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1 want to be treated, too.

2 Q. What did you - - what did you then next ask him?

3 A. I asked him if everything in the vehicle belonged to
4 him, if everything in there he was responsible for.

5 **MR. JOHNSTON:** Your Honor, please note our objection
6 concerning that matter.

7 **THE COURT:** Your exception is noted.

8 A. He told me, yes, everything in the vehicle belonged to
9 him. I also asked him if anybody else had had access to the
10 car besides him. And he said he had no idea.

11 Q. Okay. And when he said no idea what did you then ask?

12 A. I asked him if - - I asked him again - - basically
13 asked him if anyone else had had access to it. And his
14 answer to me was, nah, - - -

15 Q. Well, hold on a second. I haven't gotten to that part
16 yet.

17 A. Okay.

18 Q. Did you ask him if anybody rented the vehicle or been
19 in the vehicle since they rented it?

20 A. Yes, sir.

21 Q. Do remember what his response was?

22 A. I have no idea.

23 Q. Well, after that? Would you like me to play the video
24 again?

25 A. Please.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 Q. We'll go back a little bit. I know it's a little hard
2 to hear sometimes.

3 A. I'm hard of hearing anyway.

4 Q. Bear with me for a second, it looks like the computer
5 is frozen.

6 (Pause)

7 (Whereupon the video was played for the jury)

8 Q. When did he say he had rented the vehicle?

9 A. Saturday.

10 Q. And then when you said - - what did he say next?

11 A. I can't tell exactly what that - - I can't tell. My
12 hearing's not the best in the world and the mike's kind of
13 muffled, too. I can't exactly tell what he said. Did he
14 say we? It's what it sounds like to me.

15 Q. I might have to stop pausing this thing. I'm going to
16 try a different program.

17 (Pause)

18 (Whereupon the video was played for the jury)

19 Q. What are y'all talking about right there?

20 A. Mr. Alston produced to me - - his license is actually a
21 paper license. What - - I was sitting back trying to
22 dissect exactly what - - everything about it. And I think
23 he basically saw me trying to study the thing, and he wanted
24 to try to put any fears that I had about his license away.

25 Q. There was nothing wrong with - - -

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 A. No, sir.

2 Q. - - - his paper license other than - - -

3 A. No, sir. He explained to me that that's what they gave
4 him when he went to the DMV.

5 Q. Okay. When you say paper license, what do you mean?

6 A. It's actually a piece of paper. It's folded, but it's
7 - - -

8 Q. In comparison to our driver's license?

9 A. Right. Ours is laminated, his is not.

10 (Whereupon the video was played for the jury)

11 Q. Y'all start talking about what he does for a living.

12 What did he state he'd do?

13 A. That he sells clothes.

14 Q. And then what did y'all start talking about?

15 A. I asked him - - basically he stated that he had six
16 kids to feed. So I asked him the ages of the children. And
17 he had stated he had six kids. And when he told me the
18 ages, he actually gave me seven.

19 Q. And what were the ages he gave you?

20 A. Thirteen, fourteen, ten, five, four, three and the
21 little one's about six months.

22 Q. So he tells you he has how many kids?

23 A. He says he has six kids to feed, but he gives me the
24 ages of seven.

25 (Whereupon the video was played for the jury)

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 Q. Again, you ask him about his trip. What did he say?

2 A. I asked him if he was going to stay up there until
3 about Monday. And he said, yeah, something like that, just
4 whenever she gets ready to leave, when I get rested up.
5 That's going to be - - that's going to be his answer.

6 Q. Okay. And you - - you assumed he was talking about who
7 at that point?

8 A. His mom.

9 Q. Okay.

10 (Whereupon the video was played for the jury)

11 Q. Now, at this point you've run the license, you've run
12 the vehicle check. Who was that that you were just speaking
13 to?

14 A. Captain Hollifield.

15 Q. What did he ask?

16 A. He asked me if there was anybody out with me yet.

17 Q. Okay. What did you tell him?

18 A. I told him no.

19 Q. Okay.

20 (Whereupon the video was played for the jury)

21 Q. Go back a little bit to this part. I think we were
22 skipping over where I was - - the program was freezing up.
23 But just in that part of the video, what were y'all talking
24 about? I know it's a little hard to - - -

25 A. I actually saw where they had actually rented a Nissan

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 Cube before they actually got the Hyundai Santa Fe. And I
2 asked him about that. And his answer to me, well, we rented
3 it, but I didn't want that. So actually what they did is
4 they went back and actually exchanged vehicles and got the
5 Hyundai Santa Fe instead of using the Nissan Cube.

6 Q. If you'll just watch this portion of the video real
7 quick.

8 (Whereupon the video was played for the jury)

9 Q. Right there, what was he saying?

10 A. I asked him - - we pointed out that she's got him
11 listed as an additional driver on the rental agreement. And
12 I had asked him has anyone else had access to the vehicle
13 besides them. And he told me, nah, you don't let anybody
14 use those cars these days or nowadays.

15 Q. And you asked him again later in the video we just
16 watched previously again, correct?

17 A. Yes, sir.

18 Q. And what was his answer at that point?

19 A. That no one else had used the vehicle.

20 (Whereupon the video was played for the jury)

21 Q. What did you ask him at that point?

22 A. At that point in time I asked for consent to search the
23 vehicle.

24 Q. And what was - - -

25 A. And - - -

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 Q. - - - his initial response?

2 A. - - - let me back up - - -

3 Q. Okay.

4 A. - - - just a second because I didn't cover something
5 that I feel like I should have. Basically when I asked Mr.
6 Alston does everything in the vehicle belong to him, his
7 answer was yes, that he was responsible for everything, that
8 no one else had had access to the vehicle and that there was
9 nothing illegal or harmful in the vehicle at that time. He
10 advised me that the only weapon that he had was a small
11 knife that was in the front of the vehicle for protection.

12 Q. I'm glad you brought that up.

13 A. I also asked him if there was anything in the - - -

14 Q. Hold on one second. I'll show you what's been
15 premarked as State's exhibit 13. If you'd look inside that
16 bag. Now, just for the jury's - - that bag was not found in
17 the vehicle?

18 A. No, sir, that's something that I put it in as evidence.

19 Q. State's exhibit 13, do you recognize that item?

20 A. Yes, sir.

21 Q. How do you recognize that item?

22 A. It's going to be the knife that was found in the middle
23 console.

24 Q. Is it in the same or substantially same condition as
25 when it was located - - -

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes, sir.

2 Q. - - - in the vehicle?

3 A. Yes, sir.

4 Q. And where was it located?

5 A. If I'm not mistaken it was found in the middle console.

6 And I believe Captain Hollifield was the one that located

7 it.

8 MR. HUNTER: Your Honor, at this time the State would

9 offer State's exhibit 13 into evidence.

10 MR. JOHNSTON: Your Honor, we would renew our previous

11 objection concerning that item.

12 THE COURT: Let me see y'all just a minute.

13 (Whereupon a bench conference was held off the record

14 in the presence of the jury, but out of their hearing)

15 Q. Who actually found the knife?

16 A. If I'm not mistaken, Captain Hollifield was the one

17 that found it.

18 Q. Okay.

19 A. I didn't refer to it in the report as who found the

20 knife.

21 Q. Okay. But who did you receive it from?

22 A. I believe Captain Hollifield.

23 Q. Did you put it into evidence?

24 A. Yes, sir.

25 MR. HUNTER: Again, the State would offer State's

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 exhibit 13 into evidence.

2 **THE COURT:** Its admitted - - -

3 **MR. JOHNSTON:** The same objection.

4 **THE COURT:** - - - over objection.

5 (Whereupon State's exhibit 13 was admitted into
6 evidence)

7 Q. Please describe this item.

8 A. It's going to be a black handled knife - - -

9 **THE COURT:** We need the lights on, please.

10 A. - - - with a double serrated blade.

11 **THE COURT:** Mr. Bogan, we need the lights on.

12 (Pause)

13 Q. When you asked him for consent to search the car, what
14 did he say?

15 A. His exact words were I'm just trying to figure out what
16 all this is about.

17 Q. What did you then advise him?

18 A. I just told him that I was asking a question. And then
19 he - - he looked at me and said, I mean, yeah, you can
20 search it.

21 Q. Okay.

22 (Whereupon the video was played for the jury)

23 Q. Briefly go over that exchange with Mr. Alston.

24 A. Basically he was trying to figure out why I was asking
25 for consent to search the vehicle. And I explained to him I

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 just needed a yes or no answer.

2 At the end of the conversation - - before that I had
3 explained to him, Mr. Alston, you have the right to refuse
4 consent to search the vehicle. And he asked me, he said, I
5 have the right to refuse? And I said, yes. He said, then
6 go ahead.

7 At which point in time I started to walk towards the
8 vehicle. And I wanted to make sure that clearly I had a yes
9 or no answer. So I came back and basically wanted to make
10 sure that he understood that he's giving me consent to
11 search. And I asked him that again.

12 And he basically comes out and says, nah, I'm not
13 giving you consent, you're the one giving consent. And I
14 explained to him, no, that's not the case here. I can wait
15 on one of my teammates that has a K-9 if that's what you
16 want to do. I need a yes or no answer. And he come out and
17 said, yeah, go ahead and search the car.

18 Q. Okay. At that point you go and search the vehicle?

19 A. Yes, sir.

20 (Whereupon the video was played for the jury)

21 Q. Who is that with you in the video?

22 A. That's going to be Captain Hollifield.

23 Q. Is there anybody else on the scene with you at the
24 beginning of the traffic stop?

25 A. At the beginning, you're asking?

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 Q. At the beginning of the - - -

2 A. No, sir.

3 Q. - - -traffic stop?

4 A. No, sir. Captain Hollifield arrives about the same
5 time that you see him on the video. Before that, right
6 about the time I'm asking for consent to search the vehicle,
7 First Sergeant Travis Barnett arrives on the scene as well.

8 Q. Okay. So when we first see you searching the vehicle
9 you're searching the cargo area?

10 A. Yes, sir.

11 Q. Your back is turned, however, there's another officer
12 there?

13 A. Yes, sir. He's going to be actually standing behind
14 Mr. Alston.

15 Q. And how have you learned to search a vehicle?

16 A. There's going to be a systematic approach that I take.
17 My preferred method - - a lot of other people may do it
18 something completely different than I. But I'll go to the
19 rear cargo area first, search all the luggage. Then I'm
20 going to search the natural voids, especially it being a
21 rental. You want to look in the natural voids, things of
22 that nature.

23 You're not really looking for the hidden compartments
24 because they don't have the car long enough to actually put
25 a hidden compartment in it. Although, that has been done.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 That's just not something I'm focusing on here.

2 What I will do then is get - - eliminate the luggage,
3 eliminate the rear cargo area and the natural voids there.
4 I'll go to the passenger's side rear seat, and then I'll go
5 to the passenger's side front seat and work my way around
6 and then eliminate all the natural voids - - any contents
7 the car has at that time. And just what you're doing is
8 just a systematic approach to work your way around to where
9 you've covered the whole car.

10 Captain Hollifield shows up and actually assists and
11 gets to the area where the white powdery substance is found.
12 And there is a natural void between - - let's say you have a
13 tilt steering in this vehicle here. When you put the tilt
14 steering up, there's a void there between the steering
15 column and the actual plastic molding piece that holds that
16 steering column in place.

17 You can actually see there's a space there that you can
18 see through. And that's where this package was stuffed.
19 It's actually two packages. Captain Hollifield actually saw
20 that - - -

21 Q. Hold on a second, Deputy Gilbert.

22 **MR. HUNTER:** May we approach, Your Honor?

23 (Whereupon a bench conference was held off the record
24 in the presence of the jury, but out of their hearing)

25 Q. I'm going to show you what's been premarked State's

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 exhibit 5. You talked a little bit about the void. Do you
2 recognize this picture?

3 A. Yes, sir. That's going to be the actual picture of the
4 vehicle that Mr. Alston was driving that day.

5 Q. And how do you recognize that picture?

6 A. I'm the one that took it.

7 Q. Does it fairly and accurately depict the scene as you
8 remember it that day?

9 A. Yes, sir.

10 **MR. HUNTER:** At this time the State would offer State's
11 exhibit 5 into evidence.

12 **MR. JOHNSTON:** Without objection, Your Honor.

13 **THE COURT:** It's admitted.

14 (Whereupon State's exhibit 5 was admitted into
15 evidence)

16 Q. Briefly describe what it shows.

17 A. It's going to show the actual natural void that I spoke
18 about earlier.

19 Q. If you could, step out and just show them where you're
20 talking about.

21 A. It's actually going to be the void here between the
22 steering wheel column and the plastic piece that holds the
23 steering wheel column in place. It's actually going to be
24 right there.

25 Q. Come down and show these members.

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 A. It's going to be right here. There's actually a
2 natural void between the two, the steering column and the
3 plastic trimming piece that holds that in place.

4 Q. Thank you. Now for the good stuff. Let me show you
5 what's been premarked as State's exhibit 1. Do you
6 recognize that item?

7 A. Yes, sir, I do.

8 Q. How do you recognize that item?

9 A. That's going to be the two packages that were hidden
10 below the steering wheel.

11 Q. Okay. Who actually located those items?

12 A. Captain Hollifield.

13 Q. However, did he take possession of them?

14 A. No, sir.

15 Q. Who took possession of them?

16 A. I did.

17 Q. Okay. What is it packaged in?

18 A. It's going to be packaged in a - - vacuum sealed bags.
19 One of them's in a vacuum sealed bag and the other one, I
20 think, was in a - - I think it was in a vacuum sealed bag as
21 well.

22 Q. Are they in the same substantial - - same condition as
23 when you found them?

24 A. Yes, sir.

25 Q. What did you do with them?

DONNIE GILBERT - DIRECT EXAMINATION BY MR. HUNTER

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1 A. I put them in evidence.

2 Q. Okay. Well, explain that process for us.

3 A. What I did is took possession of the white powdery
4 substance here, transported Mr. Alston to jail, took him - -
5 booked him in, went to the office, filled out the proper
6 paperwork and put this into evidence, which is - - we have
7 an evidence room at the Sheriff's Office who takes
8 possession of any evidence that you have at that point in
9 time..

10 Q. Okay. And did you follow that process?

11 A. Yes, sir.

12 Q. And where did you place this evidence?

13 A. I filled out the proper paperwork and gave it to the
14 evidence room technician.

15 Q. What is the evidence drop-box?

16 A. It's going to be in the Sheriff's Office back there in
17 front of the evidence room.

18 Q. Would you please explain what it is.

19 A. That's going to be a drop-box that we actually put
20 things in if the evidence room is not open.

21 Q. Did you do that in this case?

22 A. Yes, sir.

23 Q. And briefly just explain what the process of the drop-
24 box is.

25 A. It's actually - - you're going to fill out the forms

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 that you have to fill out. It keeps me from having to take
2 it home basically is what it's doing. It's keeping
3 possession of this until the evidence technicians come to
4 work the next morning and get it out. It's keeping me from
5 having to take it to the house.

6 Q. Once you put it in the drop-box can you or other
7 officers, not the evidence technician, but any other
8 officers get to that evidence?

9 A. No, sir.

10 Q. And what date did you do this?

11 A. It would be the same day as the stop.

12 Q. Okay. Please answer any questions Mr. Johnston may
13 have for you.

14 **Cross Examination by Mr. Johnston:**

15 Q. Sergeant Gilbert, State's exhibit 14, tell me what that
16 is again.

17 A. That's going to be the rental agreement that Mr. Alston
18 had for the vehicle he was driving.

19 Q. Who rented the vehicle according to that agreement?

20 A. This is going to be Ms. Harris.

21 Q. And you learned that Ms. Harris was Mr. Alston's
22 girlfriend or that's what he said?

23 A. That is correct, sir.

24 Q. You don't know Ms. Harris, do you?

25 A. No, sir, I sure don't.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. You don't know whether or not Mr. Alston was present at
2 the time this agreement was prepared, do you?

3 A. I can't prove that, but I can also fall back on what he
4 said during the stop itself.

5 Q. Okay. Did he say he was there when this agreement was
6 prepared?

7 A. Something he did say that I caught onto just a second
8 ago was when I asked him about the Nissan Cube, he said, we
9 rented it, but I didn't want that. So he inferred that they
10 took it back.

11 Q. He said that we rented the Nissan Cube.

12 A. Correct.

13 Q. Did he say that we rented the Hyundai?

14 A. He said, I didn't want that, so they took it back.

15 Q. Did he say we rented the Hyundai?

16 A. No, sir.

17 Q. His name does not appear, other than as an additional
18 driver on that vehicle, does it?

19 A. No, sir. What I've also learned in training and
20 experience is that a person will use a third-party to rent a
21 vehicle - - -

22 **MR. JOHNSTON:** Your Honor.

23 **THE COURT:** Be sure you respond to the question, it's
24 not a narrative.

25 A. Yes, sir.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 **MR. JOHNSTON:** I would move to strike that as being
2 non-responsive.

3 **THE COURT:** All right. The last response is stricken.
4 The jury is asked to disregard it. It's not responsive to a
5 question.

6 **Q.** You carefully searched the luggage that was in the
7 vehicle, did you not?

8 **A.** Yes, sir.

9 **Q.** The luggage that is at least depicted under a blanket
10 in State's exhibit number 10, am I correct?

11 **A.** Correct.

12 **Q.** What kind of luggage was up underneath that blanket?

13 **A.** I'll have to watch the tape again. It looked like it
14 was a couple of suitcases, a bag or two.

15 **Q.** Okay. Well, I'm not interested enough in it to -- for
16 you watch the tape again. I'm just sort of -- are you
17 fairly confident it was a couple of suitcases?

18 **A.** Looked like it was a couple of bags, yes, sir.

19 **Q.** All right. Bags, you mean suitcase-type bags, -- --

20 **A.** Yes, sir.

21 **Q.** -- -- not garbage bags or -- --

22 **A.** Correct. Clothing.

23 **Q.** -- -- trashbags or something like that, am I correct?

24 **A.** Yes, sir.

25 **Q.** You went through those suitcases, those pieces of

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 luggage, correct?

2 A. That is correct.

3 Q. You found no drugs - - -

4 A. No, sir.

5 Q. - - - in that luggage, correct?

6 A. That is correct, yes, sir.

7 Q. That was stowed under this blanket, am I correct?

8 A. Yes, sir.

9 Q. Do you know who put the other keys on the rental car
10 key?

11 A. No, sir, I don't. I could speculate if you want me to.

12 Q. That won't be necessary, but I appreciate the offer.

13 Do you know who put the air freshener in the vehicle?

14 A. I sure don't, no, sir.

15 Q. Did you have the air freshener tested for fingerprints?

16 A. No, sir.

17 Q. That could have told us who put it there, couldn't it?

18 A. Yes, sir.

19 Q. How much money did Mr. Alston have on his person?

20 A. Mr. Johnston, with all due respect, I don't think I
21 have anything as far as the money notated in the report. I
22 don't know if he had any or not.

23 Q. All right. Well, would it be fair to say that if he'd
24 had something other than a few dollars, something like that
25 that you would have noted it on your report?

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. Yes, sir.

2 Q. And, in fact, the Sheriff's Office would probably have
3 seized it?

4 A. Depending on the amount, yes, sir.

5 Q. If it was a significant amount of money?

6 A. Correct.

7 Q. So may I infer from the fact that you didn't note it,
8 that Mr. Alston had no significant amount of money?

9 A. I would agree with that, yes, sir.

10 Q. What exactly did you ask Mr. Alston about his children?

11 A. He had stated that he had six mouths to feed. And I
12 asked him the ages of it - - the ages of the children.

13 Q. All right. Did you specify children versus
14 stepchildren versus other children who might reside in his
15 household?

16 A. I sure didn't. I didn't hear that part. As far as I
17 know I didn't.

18 Q. All right. So when he first or when he told you the
19 number of six and then he gave you seven ages, it's
20 certainly possible he could have been talking about
21 stepchild or other child that lives in the home with him?

22 A. It's also possible that he was under some stress, too.

23 Q. Okay. Well, it is possible that he was talking about
24 stepchildren or other children that he might be responsible
25 for. That is possible, isn't it?

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. It's also possible that he was under a certain amount
2 of stress that would have caused him to give the wrong
3 number of ages to it as well.

4 Q. Okay. I've read a lot of these kind of reports before,
5 officers making cases of this kind. And one of the things
6 that I noticed that officers often write in their reports is
7 that the subject, the driver, or the passenger, whoever it
8 may be was extremely nervous.

9 A. Some officers would notate that, yes, sir.

10 Q. You would note that if that were the case, wouldn't
11 you?

12 A. Correct.

13 Q. Is it fair to say that the word nervous does not appear
14 in your report?

15 A. I've referred to stress several times, but nervousness,
16 no, sir.

17 Q. So the word nervous does not appear?

18 A. No, sir, it does not.

19 Q. Certainly the term extremely nervous does not appear?

20 A. No, sir.

21 Q. Mr. Alston was cooperative with you, wasn't he?

22 A. Yes, sir.

23 Q. You asked him to step from the vehicle and he did so,
24 correct?

25 A. That is right, yes, sir.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. You asked him to produce certain indicia of his right
2 to drive the car, his license, the rental agreement. He did
3 all that, didn't he?

4 A. That is correct, yes, sir.

5 Q. He didn't try to run away from you?

6 A. No, sir.

7 Q. He didn't refuse to stop when you put the blue light on
8 him, did he?

9 A. No, sir.

10 Q. And he gave you consent to search the vehicle, right?

11 A. Yes, sir.

12 Q. He gave you consent to search the vehicle even after
13 you told him you had a right to refuse, am I correct?

14 A. That is correct, yes, sir.

15 Q. We know that at least one other person had access to
16 this vehicle, don't we?

17 A. He didn't say. I asked him if anyone else had access
18 to the vehicle and he says, I have no idea. And then after
19 I asked him again, nah, you don't let nobody use those cars
20 nowadays.

21 Q. Does he - - -

22 A. Referring to who rented it, yes. Ms. Harris had access
23 to it. Was that her last name?

24 Q. It was.

25 A. Yes, sir.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. So we - - -

2 A. You would assume she did. You could speculate that if
3 you want.

4 Q. All right. Well, she certainly had the legal right,
5 didn't she?

6 A. I would - - I would think so, yes, sir.

7 Q. All right. And usually when a person rents a car, they
8 give the keys to whom? The person on the rental agreement?

9 A. You could speculate that, yes, sir. Obviously she did
10 because Mr. Alston's in the vehicle.

11 Q. Sir?

12 A. I said obviously she did because he's the one actually
13 in the vehicle.

14 Q. Okay. Well, I'm talking about from the beginning, the
15 person who rented it was Tomeka Harris. She would have been
16 the person to have gotten the keys at least from the start?

17 A. I don't know.

18 Q. Well, - - -

19 A. If he's - - if he's listed as the additional driver - -
20 I don't know who they gave the keys to. They could have
21 gave it to him. He could have been there with her. We
22 could speculate that as well.

23 Q. Of course we don't know that?

24 A. We have no idea.

25 Q. I want to show you State's exhibit 1. Do you smell any

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 odor associated with that? Sniff that for me.

2 A. No, sir.

3 Q. Air freshener wouldn't be much help for that, would it?

4 A. Not at that time, no, sir.

5 Q. Okay.

6 A. There's no odor from that to hide.

7 Q. Right.

8 A. You can't - - I can't smell it, no, sir.

9 Q. I couldn't smell it either. Now, it is admittedly
10 inside the bag, but - - -

11 A. Correct.

12 Q. In fact, it was in two bags, wasn't it?

13 A. I believe so.

14 Q. What happened when you submitted those bags to the - -
15 for fingerprint analysis? What did you learn from that?

16 A. Mr. Johnston, with all due respect, I don't know if I
17 asked for the packages to be fingerprinted or not. I felt
18 like the facts of the case that I had at the time were
19 strong enough - - -

20 Q. Hang on a minute.

21 A. - - - to keep from having - - -

22 Q. Hang on a minute.

23 A. - - - to get them fingerprinted.

24 Q. Hang on a minute. I'm not asking for your personal
25 opinions or anything like that.

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. Yes, sir.

2 Q. What I asked you for was what did the analysis for
3 fingerprints that you requested show?

4 A. I don't think we had that.

5 Q. Okay. Did you request that these bags be examined for
6 fingerprints?

7 A. No, sir.

8 Q. All right. You do have folks at the Sheriff's Office
9 who know how to fingerprint things?

10 A. That is correct, yes, sir.

11 Q. And when Mr. Alston was arrested you know as part of
12 the booking process they would take his fingerprints,
13 wouldn't they?

14 A. Yes, sir.

15 Q. All right. That's routine, right?

16 A. I would assume so. I don't work at the jail, so ...

17 Q. Okay. All right. That's - - now, if you had submitted
18 this for fingerprint analysis and there had been
19 fingerprints on it, you have someone there at the Sheriff's
20 Office who could have compared any prints that were on those
21 bags with Mr. Alston's fingerprints that were produced in
22 the booking process?

23 A. Well, you said a key word there, if, if there was
24 fingerprints on the package itself. And also in training
25 and experience - - -

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 Q. Okay. Well, - - -

2 A. - - - I have found out that - - -

3 Q. Hang on - - -

4 **MR. HUNTER:** Allow him to finish his answer.

5 **MR. JOHNSTON:** Your Honor, - - -

6 A. If you would allow me - - -

7 **MR. JOHNSTON:** - - - his answer may be - - -

8 A. - - - to explain what my - - -

9 **MR. JOHNSTON:** - - - inadmissible.

10 A. - - - education has taught me.

11 **THE COURT:** All right. Just a minute, just a minute.

12 Ask your question and just be sure you're responsive to the
13 question. Ask the question again.

14 **MR. JOHNSTON:** I don't think I was asking a question.

15 I think he was volunteering an answer.

16 **THE COURT:** Okay.

17 **MR. JOHNSTON:** So I don't - - -

18 **THE COURT:** Just ask a question then.

19 **MR. JOHNSTON:** All right, sir, I will.

20 **THE COURT:** He's not volunteering an answer now.

21 **MR. JOHNSTON:** Yes, sir. Thank you.

22 Q. State's exhibit 1, the two bags of cocaine, were hidden
23 from view, were they not?

24 A. Yes, sir, they were.

25 Q. You walked to the passenger's side of this vehicle when

DONNIE GILBERT - CROSS EXAMINATION BY MR. JOHNSTON

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1 you first stopped him, didn't you?

2 A. Yes, sir.

3 Q. You looked into that vehicle.

4 A. I had a fairly good view of what was inside the vehicle
5 at that time, yes, sir.

6 Q. Then after you got consent to search, you actually
7 searched the vehicle?

8 A. Yes, sir.

9 Q. But you didn't immediately see State's exhibit 1, did
10 you?

11 A. That is correct, yes, sir.

12 Q. Because it was hidden, - - -

13 A. Yes, sir.

14 Q. - - - am I correct?

15 A. Yes, sir. If I was driving with cocaine in the
16 vehicle, I'd hide it, too.

17 Q. Okay. Well, if you were driving in the car and you
18 didn't know it was there, one of the ways you wouldn't know
19 it was there is because you didn't see it.

20 A. We could presume that, but I can also say that if I sat
21 in the driver's seat it was fairly easy - - easy to see.
22 That's how Mr. Hollifield or Captain Hollifield found it.

23 Q. Okay. Well, you're saying that - - -

24 A. He didn't manipulate it - - well, I'll let him tell you
25 that.

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 Q. All right.

2 A. Sorry.

3 Q. Do you know whether or not it was a hidden compartment
4 or it was a hidden void area, was it not?

5 A. A natural void, yes, sir.

6 Q. Okay. You looked in the window and you didn't see it.

7 A. No, sir. It's kind of hard to see from the passenger's
8 side.

9 Q. Okay.

10 A. The angle that I was looking at.

11 Q. Well, it wouldn't do it any - - do me any good to hide
12 it if you could see it easy, would it?

13 A. I - - I can speculate, if you want me to.

14 Q. I think we've had enough of that. Please answer any
15 other questions.

16 **Redirect Examination by Mr. Hunter:**

17 Q. What type of packaging was this in when it was located?

18 A. Vacuum sealed bags.

19 Q. What is a vacuum sealed bag?

20 A. To the best of my knowledge what they do is they
21 actually take the vacuum seal - - it's a food saver bag for
22 what people would take meat, things of that nature, package
23 the meat in, seal it to the best of their ability to
24 preserve that meat. And that's what they did with this
25 here.

1 Q. In your training and experience have you ever located
2 this amount of drugs or somewhere around this amount of
3 drugs in vehicles?

4 A. Yes, sir.

5 Q. Okay. And how are they usually packaged?

6 A. Usually in vacuum sealed bags. A lot of times they
7 would take duct tape, other things, they will take mustard,
8 coffee grounds, anything they can to wrap that stuff in, put
9 duct tape on it, they will layer it three and four different
10 times with three or four different layers of things.

11 Q. Specifically on plastic bags have you had success in
12 getting fingerprints off of - - -

13 **MR. JOHNSTON:** Your Honor, I would object to that.

14 He's not a fingerprint evaluator. If he's the person who
15 actually does the examination, that question might be
16 relevant.

17 **MR. HUNTER:** Your Honor, I believe Mr. Johnston went
18 into this asking if he knew the results of the fingerprint
19 analysis.

20 **THE COURT:** Well, he asked - - he asked if there had
21 been - - if they had been submitted or if he asked them to
22 be submitted for fingerprint analysis, and he said not. So
23 ...

24 Q. Have you ever submitted items like this for fingerprint
25 analysis?

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes, sir.

2 Q. What were the results - - -

3 MR. JOHNSTON: Your Honor, I would object to that on
4 the grounds of relevance.

5 THE COURT: Sustained.

6 Q. When someone - - he also asked who rented the vehicle.
7 Why is it interesting to you that a third-party rented the
8 vehicle?

9 A. Through my training and experience - - -

10 MR. JOHNSTON: Your Honor, I would - - -

11 A. - - - what we do is - - -

12 MR. JOHNSTON: I would object to that that it calls for
13 speculation.

14 THE COURT: Overruled.

15 A. Through my training and experience what we've been
16 taught and also through the cases that I've made over the
17 past eight years of doing this is people will take a third-
18 party, let them go rent the vehicle and they'll take
19 possession of that vehicle and drive it to wherever they
20 need to go.

21 The reason - - what really stood out to me on this was
22 that it was a female. What we have been taught and what I
23 have seen in the past, I have had a lot of success with is
24 officers will not take a female and associate that with
25 criminal activity. They are not threatened by a female

DONNIE GILBERT - REDIRECT EXAMINATION BY MR. HUNTER

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1 being involved in criminal activity. That's why they'll put
2 it in a female's name. They will take the time to register
3 a vehicle in a female's name just for that specific purpose.

4 Q. We're aware of your training and experience. How long
5 were you a K-9 officer?

6 A. From 2004 until 2009.

7 Q. And what is the purpose of a K-9?

8 A. It is for a free-air K-9 sniff.

9 Q. Okay.

10 A. What that is is we basically just take the dog, present
11 the vehicle to him, and if he alerts to the presence of the
12 odor of illegal narcotics or drug tainted odor, that gives
13 us probable cause to search the car with or without that
14 person's consent.

15 Q. Does cocaine have a smell?

16 A. Yes, sir.

17 Q. And is that smell easily identifiable by a human?

18 A. Depending on the volume of cocaine and also the length
19 of time that it has been in one place. It would take a lot
20 for you to be able to smell it.

21 Q. What about marijuana?

22 A. Yes, marijuana has a smell as well.

23 Q. Would it be easier to detect marijuana or cocaine?

24 A. In my training and experience it's a lot easier to
25 detect marijuana just by the smell.

DONNIE GILBERT - RECROSS EXAMINATION BY MR. JOHNSTON

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1 Q. No further questions.

2 **Recross Examination by Mr. Johnston:**

3 Q. How do you know the third-party wasn't just his
4 girlfriend?

5 A. Well, sir, I - - -

6 Q. You don't know that.

7 A. I can't prove it.

8 Q. You don't - - -

9 A. I can speculate.

10 Q. You don't know that, do you?

11 A. No, sir.

12 Q. She could very well just be his girlfriend?

13 A. Yes, sir.

14 Q. But while we're on the subject of those, what did you
15 call them, criminal - - criminal organizations, is that what
16 you called them?

17 A. Is that what I said, Mr. Johnston?

18 Q. I can't remember the - - criminal people.

19 A. I'll give you that. Go ahead.

20 Q. Criminals. Okay. Do you know what a mule is?

21 A. Yes, sir, I sure do.

22 Q. What's a mule?

23 A. A mule is someone that will be hired to run drugs from
24 or run drugs, guns, money from one point to another. And he
25 will be paid for that trip.

DONNIE GILBERT - RE-REDIRECT EXAMINATION BY MR. HUNTER

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1 That's how a criminal organization refers to the person
2 that is transporting their goods. He may not even be told
3 what he's transporting, but he is aware that he is driving a
4 vehicle that contains something. He may not know what, from
5 point A to point B. And he will - - he will be paid for
6 that as well.

7 Q. Let me ask you to repeat part of what you said.

8 A. I can repeat that. He may not know what's actually in
9 that vehicle.

10 Q. That was the part. Please answer any other questions.

11 **Re-redirect Examination by Mr. Hunter:**

12 Q. However, that mule does know - - -

13 **MR. JOHNSTON:** Your Honor, this is re-re - - -

14 **THE COURT:** Yeah, I know.

15 **MR. JOHNSTON:** - - - direct.

16 **THE COURT:** Thank you for telling me.

17 **MR. JOHNSTON:** Yes, sir. Thank you.

18 Q. However, that mule does know he is involved - - -

19 **MR. JOHNSTON:** Your Honor, - - -

20 A. Yes, sir, absolutely. He - - he does know that he's
21 involved in criminal activity and he is getting paid for the
22 duty that he's doing.

23 Q. Thank you.

24 **MR. JOHNSTON:** I don't have any further questions.

25 **THE COURT:** You may step down.

RANDY HOLLIFIELD - DIRECT EXAMINATION BY MR. HUNTER

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1 Direct Examination by Mr. Hunter:

2 Q. Please state your full name.

3 A. Randy Edward Hollifield.

4 Q. And are you currently employed by the Spartanburg
5 County Sheriff's Office?

6 A. Yes, sir, I am.

7 Q. How long have you been employed by the Spartanburg
8 County - - -

9 A. Thirty-one years.

10 Q. Give a brief overview of your thirty-one years. You
11 don't have to go into great detail.

12 A. First started out in narcotics back in the early 80s.
13 Since then I was in traffic, warrant detail, court detail,
14 basically then became captain over special services. And
15 that's where I am right now.

16 Q. Were you a captain on March 28th, 2011?

17 A. Yes, sir.

18 Q. And what are your duties as it refers to the Ice Team?

19 A. I am actually - - traffic division is actually under
20 me, which is - - Ice is part of traffic division. There's
21 actually two parts of traffic. You have the part that does
22 DUI, DUI detection and then you have those that work the
23 interstate. Both of those are under me. A lot of times I
24 get out - - try to get out of the office as much as I can
25 and get out and do drug interdiction with the guys out on

RANDY HOLLIFIELD - DIRECT EXAMINATION BY MR. HUNTER

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1 the interstate.

2 Q. What type of training have you received as regards to
3 searching vehicles?

4 A. Basically just about the same as Officer Gilbert. I
5 have been through NCA conference. There are different
6 schools that you can actually go to. What the schools are
7 set up for are to actually have compartments where you
8 actually have to search a vehicle.

9 They don't tell you where the compartment's at. You
10 actually have to find the compartment. You have to look for
11 different indicators inside the car that would lead you to a
12 compartment where there'd be a natural void that the
13 manufacturer makes or something that is done after somebody
14 gets a car.

15 Q. Okay. And on March 28th did you help Deputy Gilbert
16 search a vehicle?

17 A. Yes, sir, I did.

18 Q. And that's the vehicle we saw on the video camera
19 earlier?

20 A. Yes, sir, it was.

21 Q. Okay. Where did you begin your search?

22 A. I actually - - as you could tell by the video, I
23 actually went up to find out where Donnie had actually been,
24 where he was at. And so I went actually to the passenger's
25 side of the vehicle.

RANDY HOLLIFIELD - DIRECT EXAMINATION BY MR. HUNTER

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1 Q. Okay. What did you find in the middle console?

2 A. When I first started - - basically when I - - when I
3 start a search I look - - I try to look for the obvious. I
4 try to look down the side of the seats, floorboard, anything
5 that I can actually see right off the bat.

6 Opened up or actually when I got in the car, didn't see
7 anything actually down beside the seats. There was a bag
8 down in the floorboard. Actually raised the center console
9 up where I located a knife in a sheath that was inside the
10 console.

11 Q. What did you do with that knife?

12 A. I actually laid it in the seat.

13 Q. All right. Did you hand it to Deputy Gilbert at some
14 time?

15 A. At some time later he actually got the knife.

16 Q. Okay. And that's the knife that's in the brown paper
17 bag that's already been admitted into evidence?

18 A. That is correct.

19 Q. Okay. Did you continue searching the vehicle?

20 A. Yes, I did.

21 Q. And where did you go after that?

22 A. What actually happened was while I was looking in the
23 glove compartment I actually, just by the way I was inside
24 the car, I looked to the right and just basically scanning
25 around the bottom of the dash, and I could see where the

RANDY HOLLIFIELD - DIRECT EXAMINATION BY MR. HUNTER

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1 steering wheel actually goes down into - - into the console,
2 I mean, into the dash, there's an opening. When I looked
3 over there I could see what appeared to be some kind of
4 plastic that was sort of shoved up next to where the hole
5 should've been. And that's what actually drew my attention
6 to it.

7 I actually finished the search and actually got back
8 out of the car. You actually see - - or what you actually
9 see me do is what I go back and get. I actually go back and
10 get a flashlight because what happens a lot of times when
11 people hide things in cars they tend to set it up to where
12 you're not able to get to it very easily.

13 A lot of times they put fish hooks, they put all kind
14 of things up in there so when you reach up in there it's
15 sort of like booby trapped. So actually what I did, I went
16 back to get a flashlight so I'd be able to look to see if
17 there was anything - - that I was actually going to grab
18 anything if I stuck my hand up and under there.

19 Q. Let me show you what's been marked as State's exhibit
20 5. And if you could, step off the witness stand for a
21 second and just let Mr. Johnston take his place.

22 A. Okay.

23 Q. Where exactly are you talking about?

24 A. If you're looking from the passenger's side across, you
25 can see this section that's right in here. I could actually

RANDY HOLLIFIELD - CROSS EXAMINATION BY MR. JOHNSTON

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1 see the plastic bag inside this hole right here. That's
2 where I could actually see it at.

3 Q. And that's when you went back to get your flashlight?

4 A. Right here. Yes, sir.

5 Q. When you went back to the driver's side of the vehicle
6 what did you discover?

7 A. I could see a plastic bag up inside the hole. And it
8 appeared to have some kind of white, looking like a block of
9 powder.

10 Q. Let me show you what's been premarked State's exhibit

11 1. Do you recognize that item?

12 A. Yes, sir, I do.

13 Q. And how do you recognize that item?

14 A. This is the - - well, by looking at what's written on
15 here, and the date and when it was actually done, this would
16 be the cocaine or the white powder that was located under
17 the dash that I called Donnie's attention to.

18 Q. Did you actually take control of that substance?

19 A. No, sir.

20 Q. Okay. Who actually took control of that substance?

21 A. Deputy Gilbert.

22 Q. Please answer any questions Mr. Johnston may have.

23 A. Yes, sir.

24 **Cross Examination by Mr. Johnston:**

25 Q. You first begin by looking for the obvious.

RANDY HOLLIFIELD - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. Yes, sir.

2 Q. And when you looked for the obvious you didn't find any
3 drugs, did you?

4 A. You talking about just as far as laying out?

5 Q. Yes.

6 A. No, sir. No, sir, did not.

7 Q. The next obvious part - - the next most obvious thing
8 being by the seats, under the seats, in the pockets?

9 A. Yes, sir.

10 Q. That'd be the next most obvious - - -

11 A. Sure. Absolutely.

12 Q. Then we'd move to the good hiding places, right?

13 A. Well, if it was a good hiding place, I'd never found
14 it.

15 Q. Okay. Well, you were looking for it?

16 A. Absolutely, I was.

17 Q. All right. So it was a better hiding place than the
18 glove box, wasn't it?

19 A. Well, sure, I guess so. Yes, sir.

20 Q. It was better - - it's a better hiding place than up
21 under the driver's seat?

22 A. Yes, sir, because I'm going to find it real easy.

23 Q. Okay. It's obvious someone was trying to hide it?

24 A. Somebody put it there.

25 Q. Yeah.

ROBERT ROSENBERG - DIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes, sir.

2 Q. It just didn't fall there?

3 A. No, sir.

4 Q. Okay. Please answer any other questions.

5 A. Yes, sir.

6 MR. HUNTER: No further questions.

7 THE COURT: Okay. You may step down.

8 A. Thank you, sir.

9 MR. HUNTER: Your Honor, may Captain Hollifield be
10 excused?

11 THE COURT: He may - - -

12 MR. JOHNSTON: We have no objection.

13 A. Thank you, sir.

14 THE COURT: Thank you.

15 MR. HUNTER: The State would call Robert Rosenberg.

16 Robert Rosenberg, being
17 duly sworn testifies as follows:

18 MADAME CLERK: Thank you. You may be seated.

19 **Direct Examination by Mr. Hunter:**

20 Q. I'm going to try to stand at this microphone so
21 everybody can hear me. Please state your name for the
22 record.

23 A. I'm Robert Rosenberg.

24 Q. Are you employed by the Spartanburg County Sheriff's
25 Office?

ROBERT ROSENBERG - DIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes, sir, I am.

2 Q. How are you employed?

3 A. I'm currently assigned as an evidence custodian.

4 Q. And how long have you been with the Sheriff's Office?

5 A. Twenty-nine years, approaching thirty.

6 Q. Okay. And how long have you been an evidence
7 custodian?

8 A. Probably for the last ten.

9 Q. Were you an evidence custodian during the time of March
10 2011?

11 A. Yes, sir.

12 Q. Okay. What are the specific duties of an evidence
13 custodian?

14 A. What we're to do is when the evidence is collected on a
15 crime scene, they bring it to us, we catalog it, store it.
16 We store it for different things, like money goes in a
17 vault. We have a drug room that we put drugs in that are
18 picked up by the chemist, test, they bring it back to us,
19 and we file it in our drug room we keep in the storage
20 facility.

21 Q. Were you working during March 28th, March 29th of 2011
22 in the evidence custodian office?

23 A. Yes, sir.

24 Q. And did you receive the package that's in front of you,
25 State's exhibit 1?

ROBERT ROSENBERG - DIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes, sir.

2 Q. And how do you know that?

3 A. Because I received a chain, part of a chain that comes
4 in the envelope, a brown envelope. There'll be three sheets
5 of paper with it. And I received it that day. I filled out
6 a corresponding chain to go with it. It's not in this
7 plastic, but the blue plastic is this, in our brown envelope
8 with the three sheets of paper.

9 Q. And when did you receive that package?

10 A. March 28th, 2011.

11 Q. And is it in the same or substantially same, and I know
12 you said the packaging's a little different, but is it - - -

13 A. It's basically the same. The only thing that's added
14 is the sealed vacuum-type bag on the outside. We received
15 it in a brown envelope. This blue envelope here actually is
16 folded up and it drops down to here and it all slides down
17 in the brown envelope, and we receive the brown envelope.

18 Q. What did you do with that package?

19 A. I processed it. It is a sealed package. All we do is
20 fill out a sheet of paper or a form, I put the subject's
21 name on it, put the case number on it, and then I put it in
22 our drug room.

23 Q. Does it appear to have been tampered with - - -

24 A. No, sir.

25 Q. - - - since you've touched it?

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 A. No, sir.

2 Q. Okay. Please answer any questions Mr. Johnston may
3 have for you.

4 **MR. JOHNSTON:** I have no questions for this gentleman
5 and no objection to him being excused.

6 **THE COURT:** You may step down.

7 **MR. HUNTER:** The State would call Beth Stuart.

8 **Mary Elizabeth Stuart,**
9 being duly sworn testifies as follows:

10 **MADAME CLERK:** Thank you. You may be seated.

11 **Direct Examination by Mr. Hunter:**

12 Q. Please state your full name, please.

13 A. Mary Elizabeth Stuart.

14 Q. Are you currently employed by the Spartanburg County
15 Sheriff's Office?

16 A. I am.

17 Q. How are you currently employed?

18 A. I'm actually a school resource officer currently.

19 Q. Okay. However, how long have you been with the
20 Sheriff's Office?

21 A. Almost ten years.

22 Q. Okay. And how did you first get hired on at the
23 Sheriff's Office?

24 A. As a forensic chemist?

25 Q. Okay. Do you have an undergraduate degree?

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 A. I do. I have a bachelor of science in chemistry and a
2 bachelor of science in biochemistry both from the College of
3 Charleston.

4 Q. Do you have a master's degree?

5 A. I do. I have a master's degree in chemistry from the
6 University of South Carolina.

7 Q. What type of training have you received in regards to
8 the chemical testing of controlled substances?

9 A. Sure. I'm certified in drug analysis. I've also been
10 to the DEA, which is our federal government school for
11 forensic chemists. I have been to the DEA school on
12 clandestine laboratories. I have been to numerous agilent
13 classes, which is the makers of our instrumentation within
14 our lab. Have to do forty hours of continuing training
15 every year.

16 I have -- I'm also a member of the Clandestine Lab
17 Investigating Chemists International Association. I still
18 am currently. I also am still currently certified by the
19 American Board of Criminalistics, which is a national agency
20 that certifies forensic chemists. I'm certified in all
21 areas of forensic science.

22 Q. How many hours of annual training did you have in
23 regards to testing controlled substances?

24 A. Forty. And I'm maintaining those.

25 Q. Every year since you've been hired?

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 A. Yes.

2 Q. Okay. Approximately how many substance have you - -
3 substances have you tested in your career as a chemist?

4 A. By last count right before I switched positions, I was
5 near three thousand.

6 Q. Okay. How many times have you come into court and
7 testified as an expert?

8 A. Thirty-five.

9 **MR. HUNTER:** Your Honor, at this time the State would
10 offer Beth Stuart as an expert in chemical analysis of
11 controlled substances.

12 **MR. JOHNSTON:** Your Honor, we believe she's qualified
13 to offer her opinion.

14 **THE COURT:** All right. She is so qualified.

15 Q. Take a look at State's exhibit 1 that's up there by
16 you.

17 A. Sure.

18 Q. Do you recognize that package?

19 A. I do. And I recognize it because it has my initials
20 and the date and the letters OK on the bag inside and also
21 in the seal in the bag.

22 Q. And when did you receive that bag?

23 A. I received it on March the 29th of 2011.

24 Q. And where would you have gotten that from?

25 A. From the drug room in the evidence room.

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 Q. Explain what the drug room is, specifically.

2 A. Basically after they log it into the evidence room,
3 they have a room that's secure where they go and stack all
4 the drugs. And we'll go in there and pick up the drugs for
5 testing. So I'd go in there and get them.

6 Q. Okay. Did you do that that day?

7 A. I did.

8 Q. What type of bag is - - why is it in a different bag?

9 Mr. Rosenberg - - -

10 A. Oh, sure.

11 Q. - - - said it was in a different bag.

12 A. Originally they come in the blue bag you see inside.

13 And that's called a BEST bag, which stands for best evidence
14 sample testing.

15 And basically because in the lab we receive drugs from
16 anybody in Spartanburg County, all the city agencies, the
17 county agency, the state agencies, any federal agency that
18 did something in Spartanburg County. So there were numerous
19 agencies bringing us drugs, we need a uniform way for
20 everyone to bring drugs into us. And that's what the BEST
21 bag was, a way that everyone could bring them in the same to
22 us.

23 The BEST bags are not tamper-proof. I mean, if you cut
24 it, you can get into it. But it's tamper evident, so that
25 if you tried to rip the sides, the lines would be distorted.

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 And once it's sealed, you'd literally have to cut it, use a
2 knife to get it open.

3 It's originally in that packaging. After I test it,
4 obviously, the bag's been cut open. So I re-put everything
5 in this heat sealed bag you see and put my initials in the
6 seal.

7 Q. And when you received that BEST bag, what was in it?

8 A. The BEST bag had two heat sealed bags of white powdered
9 substance inside.

10 Q. Had it been evident that anybody had tampered with it
11 before you received it?

12 A. No. When we go into the drug room to pick up a drug,
13 we will pull the BEST bag out of the brown envelope that the
14 evidence officer was telling you about and look and make
15 sure it hasn't been tampered with. Then it comes back into
16 the lab with us and goes into a vault until we get a chance
17 to test it.

18 When we pull it out for testing, again, I would look at
19 it again and just make sure it's not open, the seal's not
20 broken or anything. And actually I put my initials, the
21 date I test it and the letters OK. And that lets me know
22 that before I ever cut it open it was okay and it was still
23 sealed before I ever cut it open.

24 Q. Okay. Please briefly explain your testing procedures
25 in the lab.

MARY ELIZABETH STUART - DIRECT EXAMINATION BY MR. HUNTER

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1 A. Sure. When a white powder substance comes into the lab
2 we have a two-step process test that we do. One is a color
3 change process in which we would drop a chemical on it and
4 it would give us a color change. This is just an indicator
5 of what the drug might be. It gives us an idea of where we
6 go next.

7 At that point we do an instrumental test. It's called
8 a gas chromatograph-mass spectrometer. And then that gives
9 us data, which is a fingerprint of the compound that we use.
10 We also then weigh the substance.

11 Q. And in regards to this substance did you do the first
12 test?

13 A. I did.

14 Q. And what was the result of that test?

15 A. The field test field tested positive for cocaine. And
16 then I went ahead and did the instrumental test also. And
17 it found it to be cocaine.

18 Q. Did you then weigh the package?

19 A. I did.

20 Q. And what was the weight?

21 A. Four hundred and thirty-four point zero four (434.04)
22 grams.

23 Q. So in your expert opinion what is inside that package?

24 A. Cocaine at four hundred and thirty-four point zero four
25 (434.04) grams.

MARY ELIZABETH STUART - CROSS EXAMINATION BY MR. JOHNSTON

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1 **MR. HUNTER:** Your Honor, at this time the State would
2 offer State's exhibit 1 into evidence.

3 **MR. JOHNSTON:** Your Honor, we would interpose an
4 objection along the same lines of what we argued in the
5 pretrial motions at this time.

6 **THE COURT:** All right. The objection is noted and
7 overruled.

8 (Whereupon State's exhibit 1 was admitted into
9 evidence)

10 Q. Please answer any questions Mr. Johnston may have for
11 you.

12 **Cross Examination by Mr. Johnston:**

13 Q. Okay. Now, State's exhibit number 1, when you got it,
14 - - -

15 A. Yes, sir.

16 Q. - - - was it inside two - - tell me about these bags
17 again. I'm a little bit confused.

18 A. It was - - each was inside a heat sealed bag.

19 Q. Each?

20 A. There were two packages - - -

21 Q. Two packages?

22 A. - - - in heat sealed bags. And then both heat sealed
23 bags were down inside the blue BEST bag.

24 Q. So apparently there were two separate packages seized,
25 if you will, is that right?

MARY ELIZABETH STUART - CROSS EXAMINATION BY MR. JOHNSTON

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1 A. Yes, sir. There were two heat sealed bags down inside
2 the blue BEST bag. So, yes, two packages.

3 Q. Okay. Did you test both of them?

4 A. I did, yes, sir.

5 Q. All right. And were your results the same?

6 A. Yes, sir, they were.

7 Q. Okay. I don't have any further questions.

8 MR. HUNTER: May Ms. Stuart be excused?

9 THE COURT: You may step down. You may also be
10 excused.

11 MR. JOHNSTON: No objection.

12 MR. HUNTER: Your Honor, at this time the State would
13 rest.

14 THE COURT: All right. Ladies and gentlemen, that is
15 all of the testimony and evidence to be offered by the
16 State. Before we go any further, I've got some matters I'll
17 need to address with the lawyers. So I would ask you to
18 please go to your jury room and don't yet begin discussing
19 the case. I'll bring you back shortly to conclude.

20 (Whereupon the jury exited the courtroom at 2:44 PM)

21 THE COURT: All right. Any motions or other matters to
22 address?

23 MR. JOHNSTON: Yes, sir, Your Honor, the Defense has
24 some motions. May I have the indictment? Thank you, sir.

25 Your Honor, we would move for a directed verdict at

1 (Whereupon court was in recess at 2:53 PM)

2 (whereupon court resumed at 3:08 PM)

3 **THE COURT:** All right. Ready for the jury?

4 **MR. JOHNSTON:** Yes, sir.

5 **THE COURT:** Okay. Bring them in.

6 **MR. HUNTER:** Yes, sir. Just briefly, it'll take two
7 seconds. The video is not complete yet, however, I've
8 spoken to Mr. Johnston. I don't plan to use it during
9 closing. And it should be completed by the time we finish
10 closing to go back to the jury.

11 **MR. JOHNSTON:** I don't either.

12 **THE COURT:** Okay. Mr. Johnston, would you like for the
13 record to reflect that your motions have been renewed and
14 denied by the Court?

15 **MR. JOHNSTON:** Yes, sir. And, Your Honor, shall I rest

16 - - -

17 (Whereupon the jury entered the courtroom at 3:09 PM)

18 **THE COURT:** Does the State have any additional evidence
19 to offer, Mr. Hunter?

20 **MR. HUNTER:** No, Your Honor.

21 **THE COURT:** Mr. Johnston, do you have any additional
22 evidence to offer?

23 **MR. JOHNSTON:** No, Your Honor. The Defense rests.

24 **THE COURT:** All right. Ladies and gentlemen, that's
25 all the evidence. What remains to be done are the lawyers'

CLOSING ARGUMENTS - MR. HUNTER

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1 final summations, after which I'll instruct you on the law.
2 Then you can begin with your deliberations. So please give
3 the lawyers your attention now as they give you their final
4 summations.

5 **MR. HUNTER:** Thank you, Your Honor. May it please the
6 Court.

7 **THE COURT:** Mr. Hunter.

8 **MR. HUNTER:** Over four hundred and thirty (430) grams
9 of cocaine, that's a lot. When I came up here before you, I
10 said we'd gladly take the burden, the burden of proof beyond
11 a reasonable doubt that Stepheno Alston knowingly brought
12 into this State or knowingly and constructively possessed
13 more than four hundred (400) grams of cocaine.

14 I want to talk to you a little bit about what
15 constructive possession is. There's two forms of
16 possession. There's actual and constructive possession.
17 We're not arguing actual possession here, but it'll help to
18 understand what constructive possession is.

19 I have my car keys in my pocket. They're in my actual
20 possession right here. I know where they are. I can
21 control the disposition of them right here. I have a
22 computer in my office. It's not on me, but I know where it
23 is. And I'm the one that controls the use of it. I have
24 constructive possession of that computer.

25 Now, in this case we also have bringing into this

CLOSING ARGUMENTS - MR. HUNTER

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1 State. Mr. Alston, when talking to Donnie Gilbert on the
2 side of the street, said he was coming from Georgia. Where
3 was he stopped? The State of South Carolina.

4 Mr. Johnston brought up something in his opening that
5 we couldn't prove possession or knowledge. He seemed to be
6 questioning Mr. Gilbert about a mule, a mule would have
7 knowledge of the cocaine.

8 This is the chance where you get to use your common
9 sense, you get to use your education, you get to use your
10 mental faculties, you get to listen to the evidence that
11 every officer testified to, you get to watch the video. And
12 the video will be available to you back in the jury room
13 when you begin your deliberations.

14 You'll be able to decide whether Mr. Alston was just a
15 blind mule who had no clue what was going on or if he was
16 trafficking in cocaine over four hundred (400) grams. And
17 how do you decide that? You use your common sense. You
18 look at the factors. You look at the evidence. You look at
19 the direct and circumstantial evidence.

20 When he's pulled over by Deputy Gilbert he immediately
21 gets defensive about why he's pulled over. He has a rental
22 agreement. In that rental agreement it's rented not by Mr.
23 Alston, but by a third-party who he says is his girlfriend.

24 That rental agreement says that car's only supposed to
25 be operated in Georgia, Tennessee, Kentucky, West Virginia

CLOSING ARGUMENTS - MR. HUNTER

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1 and Virginia. Where's he going? He's in South Carolina.
2 That's not on the rental agreement. He's headed to New
3 Jersey. That's not on the rental agreement. The first car
4 that they got, the Nissan Cube, he didn't like that. He
5 wanted a different car. What does that say about his
6 knowledge?

7 And he gets out and starts talking to Deputy Gilbert.
8 He asked about his job. He runs a clothing store in Rome.
9 Talks about how he has mouths to feed, six of them, six
10 mouths to feed. When asked the age, seven ages. And you
11 can watch the video. You actually can hear the pause,
12 thirteen, ten, and five, oh, and the little one's six
13 months. Seven ages. He's stressed on the side of the road
14 because he has four hundred (400) grams of cocaine in his
15 vehicle.

16 Asked him if he has any weapons in his vehicle. He
17 responds he has a knife. He keeps it for protection. I'm
18 traveling from Georgia to New Jersey to see my mother, what
19 do you need protection from? The little console, very
20 easily reachable. Nothing illegal to having it in the
21 middle console, a knife, gun. So what do you need
22 protection for? What does your common sense tell you?

23 You heard the testimony about the air freshener.
24 Deputy Gilbert called it a mushroom air freshener. That's
25 not to say - - I don't think I've ever heard of an air

CLOSING ARGUMENTS - MR. HUNTER

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1 freshener that smelled like mushrooms, but it's just the
2 shape, the type that you would normally see on the back of a
3 toilet. Not the pine tag that's hanging from the back of a
4 rearview mirror. What's the purpose of an air freshener?

5 Now we heard that that - - the cocaine was hidden. It
6 wasn't in a place you would normally find something. You
7 couldn't really see it when you looked in the vehicle.
8 That's pretty out in the open, though, isn't it? You'd
9 notice that.

10 Well, what's an air freshener used for? That's where
11 you get to use your common sense. What do you need an air
12 freshener for? I mean, you could be going to New Jersey and
13 you just want to keep the car smelling nice. It could be
14 because you don't want to have someone to smell the cocaine
15 or much less a K-9.

16 You get to look at all the facts that were presented
17 here. You get to listen to all the officers' testimony.
18 You have listened to it. You can listen to it again if you
19 want to. You get to watch the video. You get to look at
20 the cocaine. You get to look over the rental agreement.
21 You get to see all this stuff.

22 You've already seen it. You can see it again back in
23 the jury room if you'd like. You get to decide whether he
24 was just a blind mule or if he knew that cocaine was in
25 there. We're not talking about a small size bag of cocaine.

CLOSING ARGUMENTS - MR. HUNTER

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1 It's a large amount. What does your common sense tell you?

2 When you go to the airport, when you're at the ticket
3 counter, they ask you have you received any baggage, any
4 cases that someone else has provided you? You know why they
5 do that. Has anyone given you anything to carry on that you
6 didn't bring yourself? This is where you use your common
7 sense.

8 Captain Hollifield in looking on the passenger's side
9 could see there was a little void there, something that
10 shouldn't be there. What did he see? Two plastic bags,
11 four hundred and thirty-four (434) grams of cocaine.

12 The last thing I want to talk about is this trip. The
13 car was rented on Saturday. It's due back on Saturday.
14 It's going to New Jersey. I've already said it's not on the
15 rental contract.

16 Going to see his mother to bring her back for Mother's
17 Day. We're talking about on March 28th. Ten days from now
18 he's, you know, it's 2013, he's going to bring back his mom
19 for Mother's Day. That's another whole month, the second
20 Sunday of May. Six weeks, and he's just now starting his
21 trip.

22 Rome, it's not that far out of Atlanta. Most of y'all
23 know where Atlanta is. He's going to travel to New Jersey,
24 stay up there for a couple of day's rest and come back. You
25 get to look at all these factors. Circumstantial evidence

CLOSING ARGUMENTS - MR. JOHNSTON

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1 that he knew what was going on that day.

2 I urge you to watch the video, look at the evidence and
3 come back and find Mr. Alston guilty. Four hundred and
4 thirty-four (434) grams of cocaine, not a small amount.
5 You're not going to put that on the side of your seat for
6 everybody to look at. It's why he had the knife there.
7 Four hundred and thirty-four (434) grams of cocaine, guilty.
8 Thank you.

9 **THE COURT:** Mr. Johnston.

10 **MR. JOHNSTON:** May it please the Court, Madame
11 Forelady, ladies and gentlemen of the jury. This hasn't
12 been a particularly long case, but I want you to think that
13 by virtue of the fact that it's taken less than a day to
14 complete it that that in any way diminishes the seriousness
15 of your task for you to decide whether or not one of your
16 fellow citizens has been proven guilty beyond any reasonable
17 doubt of a serious crime.

18 But I think it is indicative that this case boils down
19 to basically only a couple of issues. Sometimes in a
20 criminal case there might be many, many different things
21 that a jury would need to resolve and consider. In this
22 case, I submit to you that it boils down to one word, and
23 that word is knowledge, knowledge, knowing. Has the State
24 proven beyond a reasonable doubt that Stepheno Alston knew
25 this amount of cocaine was in his vehicle or at least the

CLOSING ARGUMENTS - MR. JOHNSTON

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1 vehicle that he was driving? I submit to you they have not.

2 There are two possible other explanations here. The
3 first is it was placed there without his knowledge. Have
4 they presented a single witness who says that they know Mr.
5 Alston knew that was in the car or that Mr. Alston admitted
6 that he knew those drugs were in his car? I put it to you
7 they have not.

8 This cocaine was not in the form that we see it now,
9 best as I can tell. You see, part of this is in a hard
10 brick form, a brick just like a brick that you put in, you
11 know, that you use for building materials. It's compressed.
12 Part of it is compressed and part of it is broken up.

13 There hasn't been any testimony specifically about
14 this, but I submit to you that it's certainly possible that
15 all of the cocaine was compressed into two tiny bricks.
16 Remember that there has been testimony that the cocaine was
17 placed inside one of these food storage bags, these vacuum
18 sealed bag things that you see on TV, but instead of it
19 being your leftover beef stew, it's drugs.

20 But in any event, when that vacuum seal bites down on
21 whatever's inside of it, that reduces volume. When the
22 volume is reduced, the size is reduced making it a much
23 tinier package to hide. So when you're considering this,
24 don't think of it this way, think of it as two compressed
25 bricks in food storage bags.

CLOSING ARGUMENTS - MR. JOHNSTON

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1 The second explanation, and this was provided by the
2 investigating officer in this case who testified from his
3 experience there are people who are known in the drug trade
4 as mules. A mule is a person who carries just like an
5 animal. If you use a real mule, a real mule's kind of on
6 the dumb side, kind of stubborn and it basically only does
7 when it gets whacked and it's told to move. And it doesn't
8 make decisions on its own. It basically is directed by
9 others.

10 Now, the officer goes on to say, well, they always
11 know. Even if you're a mule, they always know. And you're
12 going to get paid for being a mule. Of course, there's no
13 evidence in this case that Mr. Alston was going to get paid,
14 no evidence whatsoever.

15 I submit to you that there is nothing in this case but
16 suspicion, conjecture and assumption. Suspicion, conjecture
17 and assumption. Ladies and gentlemen, a jury verdict of
18 guilty in any event can certainly not be based upon any of
19 those three things. A jury verdict of guilty must be based
20 on evidence. It must be based upon proof beyond any
21 reasonable doubt.

22 Now, there are two theories that the State has for
23 stating that Mr. Alston's guilty. The first is that he
24 brought drugs into the State. The second is that they were
25 in his constructive possession. Those are the only two

CLOSING ARGUMENTS - MR. JOHNSTON

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1 theories. Both, ladies and gentlemen, require a knowledge.
2 It is not guilty bringing into the State, it is not guilty
3 of possession unless there is also knowledge of the nature
4 and character of the substance, again, of which there has
5 been no evidence in this case.

6 The drugs could not be seen in the car. They were
7 hidden as is shown in State's exhibit number 5. They were
8 hidden. I submit to you that it's very possible that a
9 person could travel a significant distance in this vehicle
10 and not know those drugs were in there. Cocaine apparently
11 has no smell, at least no smell to the human being. You try
12 to smell it, you don't smell it.

13 They talked about an air freshener. Who put the air
14 freshener in there? There was no evidence of who did that.
15 Perhaps we could have had some evidence of that had they
16 bothered to do one of the most basic law enforcement
17 functions, which is to take fingerprints. They didn't do
18 that in this case. The police not doing something can
19 constitute reasonable doubt, ladies and gentlemen.

20 There were no drugs in the luggage. Now, the officer
21 seemed very intrigued by the fact that the suitcases were
22 covered up with a blanket. And he said the motoring public
23 usually doesn't do that. Suspicion, conjecture, assumption.
24 But we do know this, he looked in the bags, there was
25 nothing in there. There were no drugs, no money, no guns.

CLOSING ARGUMENTS - MR. JOHNSTON

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1 Now, they talk about this knife. Big drug dealer
2 carries a knife. This is the kind of knife kids carry. The
3 kind of knife - - I don't mean little kids, I mean high
4 school kids, young kids, people that are going to go
5 hunting, whatever. It's certainly not a semiautomatic
6 pistol. It's certainly not a submachine gun. It's
7 certainly not an assault weapon. It's not any of those
8 things.

9 As far as protection is concerned, I think it's
10 entirely or I submit to you it's entirely consistent with
11 someone who just feels more comfortable having a knife with
12 them than somebody who's really worried about taking on some
13 serious bad people because I don't know about you, but I
14 don't think you'd want to take on any serious bad people
15 with this knife. Suspicion, conjecture, assumption.

16 Traveling plans, I have never heard so much material
17 about travel plans. Oh, his travel plans didn't match up.
18 He was going to different states than what's on this rental
19 agreement. He was in South Carolina instead of Kentucky.
20 He was in South Carolina instead of Kentucky.

21 He was going to stay with his mom longer than what this
22 rental agreement provided for. So, therefore, he must be a
23 drug dealer, a big-time drug dealer because he wasn't in
24 Kentucky, because he was going to stay with his mom longer
25 than the rental agreement called for.

CLOSING ARGUMENTS - MR. JOHNSTON

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1 The only problem with that theory is he's not the
2 person that rented the car. The person that rented the car
3 is Tomeka Harris. Is it certainly possible that his travel
4 plans changed after she rented the car? I submit to you it
5 is. And that that being evidence that he's a drug dealer, I
6 submit to you it fails.

7 He didn't act consistently with a person who felt he
8 was in immediate jeopardy. The officer concedes that in his
9 detailed report that he wrote about this incident the word
10 nervous doesn't appear. He's suspicious because the man's
11 got a blanket on his luggage, but he apparently is not
12 concerned with the fact the man isn't nervous. He's not
13 concerned with the fact that the man isn't very nervous,
14 sweating, suffering. He's not concerned with that.

15 What he is concerned with apparently is some type of
16 census problem with the number of kids. Ladies and
17 gentlemen, I put it to you that it's very common, and I see
18 this all the time, I ask, do you have kids? The person will
19 say, yeah, I've got three. But then they'll go on and say,
20 but, yeah, but my significant other, my wife, my husband,
21 whatever, yeah, they've got one or they've got two and they
22 throw that in. So I submit to you that that is certainly no
23 evidence that he's a drug dealer because he doesn't
24 specifically recite the ages of the children the way that
25 they think you should.

CLOSING ARGUMENTS - MR. JOHNSTON

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1 And, ladies and gentlemen, the most valuable piece of
2 evidence that we could have had in this case that could have
3 cleared up this entire controversy wasn't even asked for.
4 Two bags, two bags, fingerprints? Nah, we didn't ask for
5 that. We assumed, we conjectured, we suspected, we didn't
6 need no fingerprints. Again, ladies and gentlemen, the
7 absence of evidence, that certainly can be reasonable doubt.

8 And of all the things they talked about that Mr. Alston
9 said, they never said, Stepheno, what's the story on this
10 Coke? What's the story on this? They never said that they
11 asked him that or more importantly what he said in response.

12 **MR. HUNTER:** Your Honor, may we approach on this?

13 **THE COURT:** Okay.

14 (Whereupon a bench conference was held off the record
15 in the presence of the jury, but out of their hearing)

16 **THE COURT:** You may proceed.

17 **MR. JOHNSTON:** Thank you, Your Honor. Mr. Alston was
18 cooperative. He didn't try to run, didn't try to drive
19 away. He stayed there, talked to the officers. He answered
20 the myriad of questions that were posed to him in exact
21 detail. And he was overall cooperative.

22 And then it boils down to this. The officer asks him,
23 may I search your car? Stepheno says, I just want to know
24 what this is all about. I just want to know what this is
25 all about. Then he says, okay, you can search. And then he

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1 says or the officer says, you've got a right to refuse.

2 Stepheno still says, you can go ahead and search.

3 Ladies and gentlemen, I submit to you that that is not
4 the response of a person who has knowledge of four hundred
5 (400) grams of cocaine in the car. I submit to you that is
6 the assertion of a person who has nothing to fear. And if
7 he has nothing to fear, he doesn't know. And if he has no
8 knowledge, he's not guilty. And that's what I ask you to
9 find, I ask you to find him not guilty.

10 **THE COURT:** Madame Forelady, ladies and gentlemen
11 of the jury, you, of course, have heard and seen all of the
12 evidence in the case. And now you've heard the final
13 summations of the lawyers. And, therefore, it now becomes
14 my duty and obligation to instruct you on the law that's
15 applicable in this case.

16 And then you'll be asked to go back in to begin with
17 your deliberations. And through that process you'll examine
18 the evidence, decide the facts, apply the law and arrive at
19 a fair and just decision, whatever that decision might be.
20 It is your exclusive duty to determine what the facts are.

21 You do that through your own common sense, examination
22 and evaluation of all of the testimony and the other
23 evidence received during the course of this trial. You
24 twelve jurors alone will decide what weight, value and
25 effect to give to any particular witness' testimony or other

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1 evidence in the case. Your sole objective is to simply
2 fairly determine the facts, apply the law and arrive at a
3 fair and just decision in the case, whatever that decision
4 might be.

5 Now, as you know, the Defendant was charged with
6 trafficking in cocaine. The allegations setting forth that
7 charge are contained in that document that I referred to
8 prior to and after your selection, that is the indictment.
9 But as I've told you, the indictment, while it will be in
10 the jury room to serve as the verdict form, it serves no
11 other purpose so far as you jurors are concerned. It's not
12 proof of anything. It doesn't establish anything. And it's
13 not evidence of anything in the case.

14 But as to the charge contained in that indictment the
15 Defendant has entered a plea of not guilty. And as I've
16 told you, that plea of not guilty has placed upon the State
17 the burden of proving the allegations that they have made
18 against the Defendant, the burden of proving each of the
19 essential elements that constitutes the crime alleged
20 against the Defendant. And, therefore, the burden is upon
21 the State to establish his guilt to your satisfaction beyond
22 a reasonable doubt before any verdict of guilty could be
23 returned.

24 The burden is never upon a defendant to prove that he
25 or she is not guilty or to prove that he or she is innocent

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1 because in some cases that might not be possible. As I've
2 said, the burden is always on the State, because they made
3 the charge, to prove his guilt beyond a reasonable doubt.

4 It is a vital, important and cardinal rule of law that
5 every defendant in a criminal trial, no matter how serious
6 might be the offense for which that person stands charged, a
7 defendant is always presumed innocent of the charge. That
8 presumption of innocence remains with any defendant as it
9 does with this Defendant from the time that he is placed
10 under arrest and throughout the course of the criminal
11 process and even throughout the course of the actual trial
12 on the case.

13 As I've told you, that presumption of innocence will be
14 with Mr. Alston even as you go back to begin with your
15 deliberations after I provide you this instruction. And
16 that presumption of innocence will be with him in that jury
17 room and it'll be with him forever unless you twelve jurors
18 determine that he's no longer entitled to the presumption of
19 innocence.

20 In other words, after you've carefully considered all
21 of the evidence in the case and from that evidence you
22 determine what you believe to be the true facts as they
23 relate to these allegations, and once you decide those
24 facts, you apply the law that I will have provided you, if
25 you twelve jurors unanimously determine that his guilt has

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1 been proven beyond a reasonable doubt, then he would no
2 longer be entitled to that presumption of innocence. But
3 it's only if, unless and until you are satisfied of his
4 guilt beyond a reasonable doubt that the presumption of
5 innocence would no longer be applicable.

6 Now, while the State does have the burden of proving
7 the Defendant's guilt beyond a reasonable doubt, that
8 doesn't mean that they have to prove his guilt beyond all
9 doubt or beyond any possible doubt, but it does require the
10 State to prove his guilt to your satisfaction beyond a
11 reasonable doubt. And the term reasonable doubt should be
12 given its plain and ordinary meaning. A reasonable doubt is
13 the kind of doubt that would cause a reasonable person to
14 hesitate to act upon the information provided.

15 And a defendant in a criminal trial is entitled to any
16 reasonable doubt that arises from the evidence or lack of
17 evidence in a case. And if upon any factual issue essential
18 to a finding of a verdict of guilty you have some reasonable
19 doubt as to how that issue should be resolved, it would be
20 your duty to resolve that reasonable doubt in favor of the
21 Defendant.

22 And, therefore, if upon your consideration of the whole
23 case you have a reasonable doubt as to his guilt, it is your
24 duty to resolve that doubt in his favor and to return a
25 verdict of not guilty. And on the other hand, after you've

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1 carefully considered all the evidence in the case, and
2 decided the facts, and applied the law, if you have no
3 reasonable doubt as to his guilt, then it would be your
4 corresponding duty to find him guilty where you have been
5 convinced of that guilt beyond a reasonable doubt.

6 The same law that provides that you are the judges of
7 the facts also provides that I am the judge of the law.
8 That simply means that nobody's going to tell you how to
9 arrive at your determination of fact in this case. You do
10 that as I've already stated, through the exercise of good
11 judgment and common sense, conscientiously applied to the
12 testimony and evidence received during the course of the
13 trial.

14 You must, however, under your oath as a juror accept
15 the law as I provide it to you as being the law that you are
16 to apply in the case. In other words, you're not to concern
17 yourself with what you thought the law was before you came
18 to serve as a juror this week or what you think the law
19 ought to be.

20 You must, under your oath as a juror, accept the law as
21 I provide it to you as being the law that you are to apply
22 in the case. And then you simply take that law and you
23 apply it to the facts as you twelve jurors determine those
24 facts to be based upon your common sense, examination of the
25 evidence in the case.

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1 Because you are the sole judges of the facts you are,
2 therefore, necessarily the sole judges of the credibility or
3 believability of each witness that has testified. And,
4 therefore, you may believe as much or as little of what a
5 witness has testified to as you deem as appropriate. But
6 there are a number of factors which you should take into
7 account in arriving at your assessment as to a witness'
8 credibility.

9 You should consider the demeanor of the witness, that
10 is how the witness appeared to you when the witness
11 testified from the witness stand. Was the witness
12 straightforward in responding to questions? Or was the
13 witness hesitant or evasive in responding to questions that
14 were asked of the witness? Simply put, did the witness
15 appear to you to be telling the truth and to have knowledge
16 of the facts to which that witness has testified?

17 You should also consider whether or not the testimony
18 of the witness is consistent or is it inconsistent with that
19 witness' own testimony or with other testimony or other
20 evidence received during the trial? You should also
21 consider how the witness came to know the facts to which a
22 witness has testified.

23 In other words, what was their opportunity and ability
24 to perceive the existence of those facts which they have
25 testified by having previously used their senses? And then

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1 what is that witness' ability to be able to come into court
2 and to accurately recollect to you as to what they have
3 previously perceived?

4 You should also consider any bias, or prejudice or
5 interest that a witness might have in the outcome of a case.
6 In other words, do you find some reason that a particular
7 witness would testify one way or another to help or hurt one
8 side or the other?

9 And you may consider any interest that a witness might
10 have in the outcome, if you determine that a witness does
11 have such an interest and you find that that interest would
12 bear upon that particular witness' credibility. You may
13 also consider whether or not the testimony of a witness is
14 strengthened or is it weakened by other testimony or other
15 evidence received during the course of the trial.

16 Now, you as the finders of the fact and you as the
17 judges of the credibility of each witness are permitted to
18 believe as much or as little of what a witness has testified
19 to as you deem is appropriate. And, therefore, you may
20 believe everything that a witness testified to, you may
21 choose to believe none of it. You may believe one portion
22 of a witness' testimony and reject some other portion of
23 that same witness' testimony.

24 You may believe one as opposed to several in a given
25 case or several as opposed to one. But whatever your good

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1 judgment and common sense tells you is the most believable
2 and credible testimony is the testimony you should accept.
3 And you should reject any testimony that you find not to be
4 credible or believable.

5 Now, while there are various forms of evidence such as
6 testimony, such as photographs, documents, charts, and other
7 types of physical exhibits, there are really only two types
8 of evidence. And the two types of evidence are direct
9 evidence and circumstantial evidence.

10 Now, direct evidence is the testimony of a person who
11 testifies from actual knowledge of that fact. It is
12 testimony by a person who has perceived the existence of
13 some fact by means of his or her senses and then they come
14 into court and they testify as to what they have previously
15 perceived.

16 Circumstantial evidence, on the other hand, is the
17 proof of some other fact or a set of facts, which taken
18 either singly or collectively, may prove the existence of a
19 fact in question as a necessary consequence, that is,
20 through an inference. And an inference is simply a
21 deduction of fact that may logically and reasonably be drawn
22 from the proof of some other fact or set of facts. In other
23 words, it's not a fact proven by the direct testimony of a
24 person based upon their personal perception, but it is a
25 conclusion which might reasonably be drawn from the proof of

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1 some other fact or facts.

2 In other words, you may infer that a particular event
3 occurred or that a particular fact exists based upon the
4 proof of sufficient factual circumstances which would
5 reasonably warrant your arriving at a particular conclusion.
6 The law, however, makes absolutely no distinction between
7 the weight or value to be given to direct evidence as
8 opposed to circumstantial evidence, nor is a greater degree
9 of certainty required of circumstantial evidence as opposed
10 to direct evidence.

11 Whatever the type of evidence used to prove any fact in
12 issue, you should consider all of the evidence presented
13 during the trial of the case. And after carefully
14 considering all that evidence in your minds, if you are not
15 convinced of the guilt of the Defendant beyond a reasonable
16 doubt, then it would be your duty to resolve that doubt in
17 his favor and return a verdict of not guilty.

18 Now, as you know, the Defendant is charged with a crime
19 of trafficking in cocaine. That's a statutory offense. And
20 that just means that the Legislature has codified it in the
21 written form. The Legislature meets every year from January
22 to June. They're meeting right now.

23 When they meet they pass a number of laws, and rules,
24 and regulations that govern our conduct in a variety of
25 ways. Some of those statutes are criminal penalty statutes.

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1 And that just means they define what a criminal offense is.
2 And if you are found to have engaged in conduct which is
3 prohibited by that statute, then that subjects you to some
4 form of punishment or penalty.

5 Please understand, however, that you are never to be
6 concerned with punishment or penalty. That's not something
7 that a jury decides. Your sole obligation and duty in this
8 case is to determine whether or not the Defendant's guilt
9 has been proven beyond a reasonable doubt as to the crime
10 alleged. And you do that without consideration of any
11 consequence to your decision by way of any punishment that
12 might be imposed.

13 But the statutory provision that the State alleges the
14 Defendant has violated is set for in section 44-53-370 of
15 the Code of Laws. And that particular code section provides
16 that any person who knowingly sells, manufactures,
17 cultivates, delivers, purchases, or brings into the State,
18 or who provides financial assistance, or otherwise aides,
19 abets, attempts, or conspires to sell, manufacture,
20 cultivate, deliver, purchase, or bring into this State, or
21 who is knowingly in actual or constructive possession, or
22 who knowingly attempts to become in actual or constructive
23 possession of ten grams or more of cocaine or any mixtures
24 of cocaine is guilty of the crime of trafficking in cocaine.

25 Now, in this particular case the State is alleging that

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1 the Defendant did commit the crime of trafficking in cocaine
2 in that he did bring into this State and/or he did have in
3 his constructive possession a quantity of four hundred (400)
4 grams or more of cocaine. And, therefore, before the
5 Defendant can be found guilty of trafficking in cocaine in
6 this case the evidence must convince you beyond a reasonable
7 doubt that the Defendant knowingly brought into this State
8 or did knowingly have in his constructive possession a
9 quantity of four hundred (400) grams or more of cocaine.

10 And cocaine is classified in a separate code section as
11 a schedule II narcotic drug and, therefore, is a controlled
12 substance under the law. And the weight of any controlled
13 substance includes the weight of the substance in its pure
14 form as well as any compound or any mixture containing the
15 substance.

16 Before the Defendant may be found guilty of a crime
17 involving the unlawful possession of cocaine by constructive
18 possession it must be proven beyond a reasonable doubt that
19 the Defendant did knowingly and intentionally have in his
20 constructive possession four hundred (400) grams or more of
21 cocaine.

22 Knowingly is defined as having knowledge of the fact.
23 It is an act which is done willfully, purposefully and
24 consciously. Intentionally is defined as purposefully, that
25 is by aim or design and not by accident, mistake or

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1 inadvertence.

2 Constructive possession of a substance occurs when a
3 person, although not in actual physical custody of the
4 substance, exercises dominion and control over the substance
5 or has the right to exercise dominion and control over the
6 substance. A person has possession of the substance within
7 the meaning of the law when he has both the ability and the
8 intent to control the disposition or use of the substance.
9 And the act of possession as well as the fact of knowledge
10 and/or intent may be proven by circumstantial evidence as
11 well as direct evidence or by a combination of both types of
12 evidence.

13 And you are permitted to infer the act of possession of
14 the substance as well as the existence of knowledge or
15 intent from evidence of acts, declarations or conduct of the
16 person charged with possession as well as any other
17 circumstances established by the evidence in this case from
18 which any such reasonable inference may be made in light of
19 all the evidence in the case and in the exercise of good
20 judgment and common sense.

21 You are, however, instructed that proof of mere
22 presence of the Defendant at or near a location where a
23 substance is found is not sufficient by itself to prove the
24 Defendant guilty of the crime of unlawful possession of that
25 substance. A defendant's mere presence where an item is

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1 located, even with knowledge of its presence, is not
2 sufficient standing alone to prove the crime of unlawful
3 possession. It must be further proven that the Defendant
4 intended to exercise dominion and control over the substance
5 and had the ability and the intent to control the use or
6 disposition of the substance.

7 If after your review of the evidence in this case you
8 determine that the State has only proven that the Defendant
9 was merely present at or near a place where cocaine was
10 located, but has failed to prove that the Defendant did
11 bring that cocaine into the State or did constructively
12 possess that cocaine beyond a reasonable doubt, then you
13 must find the Defendant not guilty.

14 And on the other hand, after you have reviewed all the
15 evidence in the case if you determine that the State has
16 proven beyond a reasonable doubt that the Defendant did
17 bring into this State or did have in his actual, excuse me,
18 did have in his constructive possession a quantity of four
19 hundred (400) grams or more of cocaine, then it would be
20 your corresponding duty to find him guilty.

21 I further instruct you and I emphasize to you that the
22 fact that a defendant during the trial of a criminal case
23 does not take the witness stand and testify during the trial
24 or the fact that he is not present at the trial of his case
25 is not a fact which may be considered by you in any way

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1 during your deliberations, nor in your determination as to
2 whether or not his guilt has been proven beyond a reasonable
3 doubt.

4 As I've already stated, the burden is on the State,
5 because they brought the charge, to prove the Defendant
6 guilty beyond a reasonable doubt. The burden is never upon
7 a defendant to prove that he is not guilty or to prove that
8 he is innocent because in some cases that might not be
9 possible.

10 You may not permit such a fact to weigh in the
11 slightest degree against this Defendant. You are not to
12 draw any inference, nor reach any conclusion from the fact
13 that the Defendant was not present during the trial of this
14 case, nor may that fact even be discussed by you while you
15 are engaged in your deliberations in the jury room.

16 Now, Madame Forelady and ladies and gentlemen of the
17 jury, I am not in any way concerned with what your decision
18 is, but you are instructed that your decision must be
19 unanimous. All twelve of you must be in agreement before
20 any verdict may be rendered and returned to court.

21 Madame Forelady, you will have in the jury room along
22 with the exhibits which have been introduced into evidence,
23 you'll have the indictment which serves as the verdict form.
24 On the back of the indictment you'll see the word verdict.
25 It is beneath that word that you will indicate the jury's

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1 unanimous decision.

2 In this case you have two potential verdict forms.
3 Those forms are guilty and not guilty. So whatever that
4 decision is, insert it in that space provided beneath the
5 word verdict, sign your name as the Foreperson. You're the
6 only juror that needs to sign the verdict form. There's
7 also a place for you to place the appropriate date.

8 If at any time during your deliberations you have a
9 question about evidence or you wonder if there's something
10 else out there that you can have or you think of something
11 that you'd like to have and you wonder if it exists and can
12 you have it, the answer is you can't have it even if it does
13 exist because all the evidence has been presented that's
14 going to be presented. The evidence is closed. So even if
15 something is out there that might assist you, you can't have
16 it. So don't inquire about that.

17 If you have a question about testimony of a witness, I
18 can bring you back into the courtroom to have a witness'
19 testimony replayed in whole or in part. I don't have
20 transcripts of the testimony, but if you want to hear a
21 particular witness' testimony we heard, I can bring you back
22 into the courtroom for that purpose. You'll just need to
23 let me know.

24 If at any time you have a question about the law that
25 you are to apply, I am always permitted to answer those

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1 questions. So should you have a question about the law, you
2 need to have a re-instruction, you need to have an
3 explanation or clarification, you let me know and I'll be
4 happy to provide you with that re-instruction, explanation
5 or clarification.

6 I don't know if we have any smokers on the jury. If we
7 do, you're not permitted to smoke in the jury room. You
8 have to go outside in order to accomplish that purpose. But
9 if you want to, let the bailiff know, and he'll take those
10 smokers outside to accomplish that purpose. You are
11 instructed, however, that the deliberations have to stop and
12 deliberations may only be engaged in when all twelve jurors
13 are present so that all twelve may participate.

14 The exhibits will be going back with you into the jury
15 room. The videotape which was played for you will also be
16 provided. And you will also have a computer so if you want
17 to look at it again, you're welcome to do that.

18 And, Madame Forelady, if at any time you ever have a
19 matter that needs to be addressed to me, if you'll simply
20 write it on a piece of paper, give it to the bailiff, he'll
21 provide it to me, and I'll respond to those issues or answer
22 those questions.

23 Once you have decided the case and you've reached a
24 decision, and I've told you you are to indicate the decision
25 on the back of the indictment, when you come back into the

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1 courtroom you hold on to the indictment. The bailiff may
2 take up the evidence, but you will hold on to the verdict
3 form, and I'll receive that from you after you have come
4 back into the courtroom and been seated with your fellow
5 jurors.

6 Also, there is an item which has been introduced into
7 evidence and it's in a sealed container. I prefer that you
8 never open a concealed - - a sealed container. However,
9 it's your prerogative to do so. But if you want to do that
10 or you need to do that, you let me know because I'll need to
11 make other arrangements and talk to you about that. So
12 don't open any sealed container without discussing that with
13 me first. All right.

14 With the exception of Mr. Galloway, I'll ask the twelve
15 primary jurors to retire to your jury room. Mr. Galloway
16 will remain with me. The twelve primary jurors, retire to
17 your jury room, but do not begin deliberations until I send
18 you word to do so.

19 (Whereupon the jury exited the courtroom at 4:00 PM)

20 **THE COURT:** Mr. Galloway, as you know, you can't
21 participate in jury deliberations because these twelve are
22 able to do that. So that's going to conclude your service
23 in the trial of this case. But I do want to thank you for
24 your participation and the time and the attention that you
25 devoted to it. If you'll call back after 6:00 this evening

VERDICT OF THE JURY

1 **THE COURT:** The video is not ready yet, is it?

2 **MR. HUNTER:** It is not, Your Honor.

3 **THE COURT:** Okay. The jury's reached a verdict. Are
4 we ready to receive it?

5 **MR. JOHNSTON:** The Defense is ready.

6 **MR. HUNTER:** The State's ready.

7 **THE COURT:** Okay. Bring them in.

8 (Whereupon the jury entered the courtroom at 5:03 PM)

9 **THE COURT:** Madame Forelady, have you and your fellow
10 jurors reached a unanimous decision?

11 **MADAME FORELADY:** Yes, we have.

12 **THE COURT:** Have you reflected that on the indictment
13 as requested?

14 **MADAME FORELADY:** Yes, I have.

15 **THE COURT:** Did you sign it and date it?

16 **MADAME FORELADY:** Yes, I did.

17 **THE COURT:** If you'll please hand that up by way of the
18 bailiff. All right. You may publish the verdict.

19 **MADAME CLERK:** Case number 2011-GS-42-3090, the State
20 versus Stepheno Alston, the verdict is guilty, signed by the
21 Foreperson, dated March the 19th of 2013. Ladies and
22 gentlemen of the jury, is this your verdict and still your
23 verdict? If so, please raise your right hand.

24 (Whereupon all jurors raised their right hands)

25 **MADAME CLERK:** So say you all.

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE GENERAL SESSIONS COURT

3 The State,)
4 -vs-) TRANSCRIPT OF RECORD
5) 2011-GS-42-3090
6 Stepheno Alston,)
7 Defendant.) September 19, 2013
8) Spartanburg, South Carolina
9
10

11 B E F O R E:

12 HONORABLE J. DERHAM COLE, JUDGE
13
14

15 A P P E A R A N C E S:

16 JAMES EDWARD HUNTER, ESQUIRE
17 Attorney for the State

18 ANDREW J. JOHNSTON, ESQUIRE
19 Attorney for the Defendant
20
21
22

23 Linda D. Moffitt
24 Circuit Court Reporter
25

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Sentence -- page 3.

No sworn testimony; no exhibits entered into evidence.

Sentence

1 (Proceedings September 19, 2013)

2 THE COURT: All right. We're here in the matter of
3 the State vs. Stepheno Austin.

4 Mr. Johnston, you represent Mr. Austin.

5 MR. JOHNSTON: Yes, sir.

6 THE COURT: Mr. Hunter is here on behalf of the state.
7 This is a -- we're here for the purpose of imposing a
8 sentence. The defendant was tried in his absence
9 March 19th of 2013.

10 Okay. Mr. Johnston, anything you want to tell me by
11 chance?

12 MR. JOHNSTON: Yes, sir, Your Honor. I know that you
13 imposed sentence at the time as is required by law, and
14 that sentence is sealed, but you do have the option to look
15 at the sentence again today as he stands before you.

16 I just would like to tell you a few things about him.
17 He is 40 years of age. He is engaged. He has seven
18 children ages 20, 17, 14, seven, five, four and three. The
19 three youngest children reside with him and his fiancé.

20 He is a resident of Rome, Georgia, and has lived there
21 almost all of his life.

22 He went to the 11th grade in school. He does not have
23 a G.E.D. His most recent employment was that he owned his
24 own clothing store, and he operated that for about five or
25 six years.

Sentence

1 He does have a prior record, but it appears to me he
2 doesn't have any convictions since 1995. It's a little
3 difficult for me to interpret because it's out of state,
4 and it doesn't look like he's had any drug convictions
5 since 1994.

6 THE COURT: Where was Mr. Austin apprehended?

7 MR. JOHNSTON: At his home.

8 THE COURT: Well, I don't have the indictment before
9 me, but I do have the sentencing sheet. But as I
10 understand it, he was convicted of trafficking in 400 grams
11 or more of cocaine.

12 MR. HUNTER: That's correct, Your Honor.

13 THE COURT: It has a mandatory minimum sentence. You
14 know that.

15 MR. JOHNSTON: Yes, sir. And I've explained that to
16 him.

17 THE COURT: Yeah. All right. Anything else you need
18 to tell me?

19 MR. HUNTER: Nothing, Your Honor.

20 THE COURT: All right. On Indictment 2011-3090,
21 having been convicted by a jury of trafficking in 400 grams
22 or more of cocaine, the sentence imposed was that you be
23 confined to the South Carolina Department of Corrections
24 for a period of 25 years and pay a fine of \$200,000.

25 Mr. Alston, you have a right to appeal the verdict of

Sentence

1 the jury and the Sentence of the Court. You must file your
2 notice of intention to appeal those decisions within ten
3 days of today's date.

4 MR. JOHNSTON: And I will undertake to do that, to
5 file the initial paperwork, Your Honor, and then I will
6 turn it over to either retained counsel or to appellate
7 defense. I've provided him information about that process.

8 THE COURT: Okay. Thank you.

9 THE DEFENDANT: Do I get to say anything?

10 THE COURT: Well, you can if you want to. What do you
11 want to say?

12 THE DEFENDANT: That I just wanted to let you know the
13 only reason why I didn't show up because I've been having
14 problems with my lawyer ever since the day I hired him.
15 Other than that I would have been here.

16 THE COURT: Okay. Thank you.

17 END OF REQUESTED TRANSCRIPT OF RECORD
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Certificate

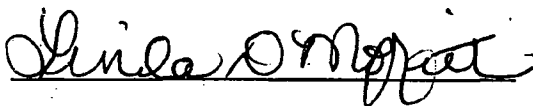
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 19th day of September 2013.

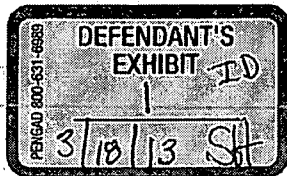
I do further certify that I am neither of kin, counsel nor interest to any party hereto.

October 21, 2013



Linda D. Moffitt
Circuit Court Reporter

© ENTERPRISE LEASING COMPANY OF GEORGIA, LLC



Georgia DRIVER'S LICENSE

STEPHEN J ALSTON

DOB: 03/09/2011

SEX: M EYES: BRO HT: 5-07 WGT: 220

DD: 0321222143AC036150

RESTRICTIONS: A NONE

St. Albans

SPARTANBURG COUNTY SHERIFF'S OFFICE
WARNING

NAME: [REDACTED] LAST NAME: [REDACTED]

STATE LICENSE NO: [REDACTED] OFFICIAL LICENSE NO: [REDACTED]

RACE: [REDACTED] SEX: [REDACTED] DATE OF BIRTH: [REDACTED] AGE: 37

LOCATION: [REDACTED] DATE: 3-28-13 TIME: 1:31

VEHICLE LICENSE NO: [REDACTED] STATE: [REDACTED] VEHICLE MAKE: [REDACTED] YEAR: [REDACTED] COLOR: [REDACTED]

ISSUED BY: [REDACTED] RATING: [REDACTED] RANGING: [REDACTED]

Di. [REDACTED] DEP 4 37

NATURE OF CONTACT

- ☐ SPEEDING ☐ DISREGARDING TRAFFIC SIGNAL
- ☐ FAILURE TO DIM LIGHTS ☐ NO RIGHT OF WAY
- ☐ IMPROPER BACKING ☐ DEFECTIVE EQUIPMENT
- ☐ IMPROPER LIGHTS ☐ IMPROPER PASSING
- ☐ IMPROPER TURN ☐ DRIVERS LICENSE VIOLATION
- ☐ DISREGARDING TRAFFIC SIGNAL ☐ VEHICLE LICENSE VIOLATION
- ☒ OTHER (SPECIFY) *From 10:00 AM to 10:00 PM*

This warning is being issued to you for a violation of the South Carolina Code of Laws. If you are unsure about the nature of the violation, feel free to ask the officer any questions in order to clarify the situation. If necessary, procure and study a copy of the South Carolina Drivers Handbook.

14521

025815

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WITNESSES

SPTBG CO SHERIFF'S OFFICE

INDEXED

CHECKED

CHECKED

ANGELINE AND

AND LADY

ARREST WARRANT NUMBER

M753164

ACTION OF GRAND JURY

JUN 17 2011

True Bill

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

11-GS-42-3090

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

JUN 20 2011

TERM

THE STATE

VS.

STEPHENO ALSTON

Indictment for

TRAFFICKING IN COCAINE

SC Code: 44-53-370

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 JUN 21 PM 4:57
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

JUN 17 2011

At a Court of General Sessions, convened on _____, the
Grand Jurors of Spartanburg County present upon their oath:

TRAFFICKING IN COCAINE

That Stepheno Alston did in Spartanburg County on or about March 28, 2011,
knowingly sell, manufacture, cultivate, deliver, purchase or bring into this State, or did
provide financial assistance or did otherwise aid, abet, attempt, or conspire to sell,
manufacture, cultivate, deliver, purchase or bring into this State, or did knowingly
actually or constructively possess or did knowingly attempt to become in actual or
constructive possession of more than (400) four hundred grams of Cocaine, a schedule
II controlled substance, in violation of §44-53-370, *THE CODE OF LAWS OF SOUTH
CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided,


ASSISTANT SOLICITOR

CEA/IMP/COPY
CLERK OF COURT
SPARTANBURG COUNTY
BY  D.C.
DATED 

213
WITNESSES

SPTBG CO SHERIFF'S OFFICE

T. H. Tilton

ARREST WARRANT NUMBER

M753164

ACTION OF GRAND JURY

P. H. Tilton

Foreperson of Grand Jury
Date:

VERDICT

Guilty

Wendell Johnson
Foreperson of Petit Jury
Date: March 14, 2013

DOCKET NO.
11-GS-42-3090
The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

JUN 20 2011

TERM

THE STATE
vs.

STEPHENO ALSTON

Indictment for
TRAFFICKING IN COCAINE

SC Code: 44-53-370

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 JUN 21 PM 4:50
M. ROY CLACKLEY
CLERK OF COURT
SPARTANBURG COUNTY
D.C.
DATED 6/23/11

3011

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on June 17, 2011, the
Grand Jurors of Spartanburg County present upon their oath:

TRAFFICKING IN COCAINE

That Stepheno Alston did in Spartanburg County on or about March 28, 2011,
knowingly bring into this State, or did knowingly constructively possess more than (400)
four hundred grams of Cocaine, a schedule II controlled substance, in violation of §44-
53-370, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided.


ASSISTANT SOLICITOR

RECEIVED COPY

CLERK OF COURT

SPARTANBURG COUNTY

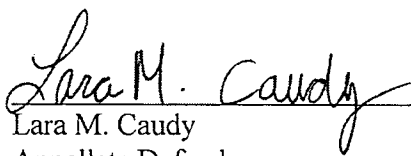
S.C.

6/23/11

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

September 26, 2014


Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHENO JEMAIN ALSTON,

APPELLANT.

APPELLATE CASE NO. 2013-002089

FINAL BRIEF OF APPELLANT

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South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where the officer did not have reasonable suspicion or probable cause to stop Appellant's car for a traffic violation thereby illegally seizing Appellant in violation of the Fourth Amendment?

2.

Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where the officer's continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime nor Appellant's consent to detain him beyond the scope of the traffic stop?

3.

Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where Appellant's consent to search was not freely and voluntarily given, and even if it was freely and voluntarily given, was invalid as an exploitation of an unlawful detention?

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Appellant at the June 20, 2011 term of General Sessions for trafficking in cocaine. R. 211 – R. 212. His case was called to trial on March 18, 2013 before the Honorable J. Derham Cole, and a jury. R. 1. Appellant was tried in his absence after he did not appear for trial. R. 6, ll. 20-25; R. 97, l. 3 – 98, l. 9. Andrew J. Johnston represented Appellant and J. Edward Hunter was the assistant solicitor. R. 1.

At the conclusion of the trial on March 19, 2013, the jury found Appellant guilty. R. 202, ll. 19-25. On September 19, 2013, the sealed sentence was opened. R. 203. Judge Cole sentenced Appellant to twenty-five years imprisonment and a \$200,000 fine. R. 206, ll. 20-24.

This appeal follows.

STATEMENT OF FACTS

Motion to Suppress

Appellant moved pretrial to suppress the cocaine seized from his vehicle in violation of the Fourth Amendment. R. 7, ll. 24-25. The state called Sergeant Donnie Gilbert of the Spartanburg County Sheriff's Office in response to Appellant's motion.

A. Testimony

Sergeant Gilbert testified that on Monday, March 28, 2011, he was monitoring traffic on Interstate 85. R. 12, ll. 13-17. Gilbert explained that he was parked perpendicular to traffic on the northbound side of the interstate when he "observed a Hyundai Santa Fe pass [his] location and failed to maintain its lane." He claimed, "[A]fter it passed by me its left side tire struck the dotted line that divides the middle lane, which it was traveling in, and the fast lane, which would've been to its left. Then it drifted back into the middle of that middle lane." Gilbert testified that once he caught up to the vehicle, he activated his blue lights and the driver pulled over to the "emergency shoulder" on the right side of the road. R. 12, l. 22 – 14, l. 10.

Gilbert explained that as he approached the vehicle, "the first thing [he] noticed was in the rear cargo area there was some luggage covered up by a blanket." R. 16, ll. 3-6. He said, "That's not common with the motoring public that I come into contact with every day. You just don't see that. You don't see the people to actually take the time to cover it with a blanket. They put their luggage in there and go." R. 40, l. 19 – 41, l. 2.

After noticing the luggage, Gilbert said he walked to the passenger side window and the driver, who was later identified as Appellant, immediately asked him "why he was being stopped." R. 16, ll. 5-9. Gilbert claimed that Appellant's question was not "normal." He

said, "It's not consistent with the innocent motoring public. Ninety-nine percent of the time [motorists] will let - - they will let me explain why, basically get to that point." R. 17, ll. 2-6.

After obtaining Appellant's driver's license, Gilbert learned Appellant's identity and that he was from Rome, Georgia, which the officer knew was south of Atlanta. The fact that Appellant was from an area near Atlanta caused Gilbert some concern. He explained, "Me being involved in the interdiction community, Atlanta is a major hub for criminal activity in the southeast." Gilbert also explained that the fact that Appellant was traveling on Interstate 85 also caused him some concern. He said, "Again, me being involved in the interdiction community, Interstate 85 is a major criminal activity corridor connecting Atlanta to many routes to the south and to the north of that." R. 17, l. 8 - 18, l. 6.

Gilbert testified that he asked Appellant for the paperwork for the vehicle and Appellant produced a rental contract. R. 18, ll. 10-13. Gilbert learned from the contract that the car was rented in Cartersville, Georgia, which is also in the Atlanta area. The car was rented on Saturday, March 26, 2011, which was two days before the stop, to a Tomeka Harris.¹ Gilbert explained that the fact that the vehicle was rented to a third party raised his suspicion because "in [his] training and experience, that is very common when it comes to criminal activity. They will have a third-party rental in their possession. That way if they are involved in criminal activity they're not in their vehicle. So that vehicle won't get seized when they get caught." R. 20, l. 13 - 21, l. 2. Gilbert also said that he thought it was suspicious that the car was rented in a female's name because "a lot of your criminal organizations will rent a vehicle in a woman's name for the simple fact that law enforcement

¹ This person is also referred to as Tomesha Harris in other places in the record.

does not - - they are not threatened by a woman. They don't recognize criminal activity with a female. At least that's what the drug trafficking organizations think." R. 21, ll. 3-11.

Gilbert further explained that the rental contract indicated that the car was only allowed to be operated in five states: Georgia, Tennessee, Kentucky, Virginia, and West Virginia. Since Appellant was stopped in South Carolina, he was driving the vehicle in a state that was not listed on the rental contract as a place where Appellant was permitted to travel. R. 21, ll. 12-24. Gilbert said, "Another thing that raised a big flag with me is why he's putting the states on here like Georgia, Tennessee, Kentucky, West Virginia, and Virginia. In my mind that automatically makes me think that from the beginning of the trip he was trying to avoid Interstate 85." R. 26, ll. 10-14.

Additionally, Gilbert testified, "There was a key in the ignition that is consistent with the car being a rental, just one key. And on the key ring there was two house keys on the key ring, which is very odd. I mean, you don't see that. Anytime somebody rents a vehicle, in my training and experience and in the fourteen years of being involved in law enforcement, you don't see other people took or take their house keys and put [them] on the key ring for the rental. To us, in my training and experience, they're trying to personalize the vehicle." R. 22, ll. 13-25.

Gilbert explained that he eventually asked Appellant to get out of the car and stand near his patrol vehicle and, as Appellant did so, Gilbert noticed an air freshener in the "driver's door pocket." He said, "To me, that's also odd because in a rental vehicle you just don't see people go straight to a store and buy an air freshener and put it in a rental vehicle if it's not yours." Gilbert said that an air freshener "could be used as a masking agent to hide

odors of other things, which could be drugs, could be anything that he's trying to hide that he doesn't want you to smell."² R. 23, l. 1 – 24, l. 24.

When questioned by Gilbert, Appellant told him that Tomeka Harris was his girlfriend. Appellant also explained that he was traveling to Newark, New Jersey to pick up his mother and bring her back to Georgia with him for Mother's Day. Gilbert said this was "another red flag" since New Jersey was another state not listed on the rental agreement and because Mother's Day was not until May and this was the end of March. R. 25, l. 15 – 27, l. 6. Appellant later explained to Gilbert that he was concerned about his mother's health and was afraid that she was not being honest about her condition so "[he] figured [he] would go up there and see what's going on." R. 35, ll. 1-5.

Gilbert also testified that he asked Appellant how long he planned on staying in New Jersey and Appellant "advised somewhere around a week, yeah, something like that, just whenever [his mother] gets ready to leave, when [Appellant] get[s] rested up." Gilbert said that he specifically asked Appellant if he was going to stay in New Jersey until the following Monday and Appellant said, "Yeah, something like that . . ." Gilbert noted that the rental vehicle was due back the upcoming Saturday, which was two days before Appellant said that he expected to head back to Georgia. R. 34, l. 20 – 35, l. 21; R. 27, l. 10 – 28, l. 1.

While Gilbert was writing Appellant a warning ticket for failure to maintain a lane, the officer asked Appellant what he did for a living. Gilbert testified that Appellant told him he owned a clothing store in Rome, Georgia, and that "he had to make a living somehow, he

² While Gilbert claimed during the suppression hearing that cocaine has an odor depending on its volume and the way it is packaged, he admitted that he did not smell any cocaine that day and, later during his trial testimony, that he could not smell an odor coming from the four hundred and thirty-four grams of cocaine seized in this case and admitted in to evidence. R. 51, l. 9 – 52, l. 6; R. 144, l. 25 – 145, l. 13; R. 169, ll. 21-22.

had six kids to feed.” Gilbert asked Appellant how old his children were and Appellant allegedly gave the ages of seven kids. When asked by the solicitor what this meant to him, Gilbert testified, “He’s not keeping up with - - it’s the stress of the situation. He’s not even being able to keep up with how old the kids are and how many he’s got.” R. 33, l. 7 – 34, l. 11.

Gilbert said that after he checked Appellant’s license, he went back to his vehicle and called Deputy Jason Carraway. Gilbert testified that he was trying “to figure out if [Carraway] was close to [him] or not.” However, Carraway responded that he had to go home to pick up his drug dog and then come back. Since Carraway would not be able to respond to the scene with his drug dog for some time, Gilbert explained, “I went ahead and switched to channel 1 to see if anybody on uniform patrol was close to me at that point in time.” Gilbert said, “They had somebody coming to me, but I think it was - - they didn’t say how long it was going to be, but [the person coming] wasn’t necessarily in the same area as me.” R. 31, ll. 1-11.

Gilbert stated that he continued to wait for another law enforcement officer to arrive at the scene. He testified that he knew he was going to ask Appellant for consent to search his vehicle, but he explained, “I’ve done got to the point to where I’m not going to ask for consent until I actually get somebody else there with me for the simple fact that a lot of times things start getting a lot - - a little tense and people start figuring out what’s actually going on when you start asking for consent to search.” R. 35, l. 22 – 36, l. 21.

About sixteen minutes and thirty seconds into the traffic stop, and after “First Sergeant Barnett from the uniform patrol” arrived on scene, Gilbert asked Appellant for consent to search his car. R. 38, l. 25 – 39, l. 1. He testified, “I then asked for consent to

search the vehicle. And instead of answering the question, which I encounter sometimes, Mr. Alston explained, 'I'm just trying to figure all - - what all this is about.' I advised him that I'm just asking a question. He said, I mean yeah you can search it, quoting him." Gilbert explained that Appellant then asked him "why you want to search the vehicle? And [Gilbert] explained to him I'm not going to answer that until everything's done." At some point, Gilbert claimed that he advised Appellant that he had a right to refuse consent, but Appellant still indicated to Gilbert that he could search the vehicle. R. 37, l. 6 - 38, l. 21. Gilbert then began to search Appellant's car and "Captain Hollifield and Deputy Carraway arrived at the scene shortly thereafter and assisted as well." R. 40, ll. 7-10.

On cross-examination, Gilbert testified that before he pulled Appellant over, Appellant's left tire "struck" the dotted line dividing the middle lane and the fast lane. He explained, "Now, when I say struck, what I would mean by that is that tire could have covered that whole line, but it didn't go all the way across it. But it did make contact with that line and then drift back into the middle of that lane." Gilbert admitted that Appellant never crossed the dotted line. Appellant merely "rode on top of it." R. 43, l. 21 - 45, l. 2.

Gilbert conceded that when he approached the passenger window, he did not see any guns or any other weapons nor did he smell alcohol, marijuana, or cocaine. R. 50, l. 14 - 52, l. 6. He explained that he called both the tag for the vehicle and Appellant's driver's license into dispatch and both came back "clear." He testified, "Everything was clear on his license, and the tag came back to that vehicle." R. 53, l. 21 - 54, l. 24. Gilbert maintained that he learned this information from dispatch while he was writing Appellant a warning for failure to maintain a lane. R. 54, l. 25 - 55, l. 5.

Gilbert said he finished filling out the warning ticket after another officer arrived on scene, but he claimed that he could not remember whether he had completed the warning ticket when he asked Appellant for consent to search the car. He testified, "At this point in time, I don't know. I can't tell you one way or the other because I don't remember." After a lot of back and forth with defense counsel, Gilbert said, "It's not on camera, so I really don't know. If we can watch the tape to try to figure it out, that's fine with me, but at this point in time I can't tell you one way or the other." But Gilbert did explain that he never gave the warning ticket to Appellant nor did he return Appellant's license and paperwork before he asked for consent to search. Gilbert also admitted that the warning form was very simple and it required very little information to complete. R. 59, l. 1 – 60, l. 11; R. 61, l. 12 – 63, l. 15.

Additionally, Gilbert testified that he did not inform Appellant that he was free to leave before he asked for consent to search the car. He said, "In my judgment [he was] not free to leave as it is." **Gilbert clarified that even though he had checked Appellant's license and paperwork, which came back clear, and had written Appellant a warning, he did not think Appellant was free to leave.** R. 63, l. 16 – 64, l. 13 (emphasis added). Gilbert refused to speculate whether Appellant believed at that point that he was free to leave. But he did admit again that he had not informed Appellant he was free to leave and, at this point, a second police officer had arrived on scene and parked behind Gilbert's vehicle. R. 64, l. 14 – 65, l. 15.

Gilbert further explained that after this second officer arrived on scene and Gilbert had finished writing the warning ticket, but had not given it to Appellant, he asked Appellant for consent to search the car. When asked for consent to search, Gilbert

claimed Appellant responded that he was “just trying to figure out what this is all about.” However, according to Gilbert, Appellant eventually told Gilbert that he could search his car. Gilbert then began to approach Appellant’s car, but hesitated and walked back to Appellant. He then told Appellant that he could refuse consent, but, despite informing Appellant he could refuse, Appellant allegedly told Gilbert he could search the car. Appellant did say at one point, however, that “I’m not giving you consent, you the one giving consent.” Appellant also repeatedly asked why Gilbert wanted to search the car. R. 66, l. 3 – 69, l. 17 (emphasis added). Gilbert ultimately searched Appellant’s vehicle and, with the assistance of Captain Hollifield, discovered cocaine in the steering column. R. 156, l. 21 – 159, l. 21.

Gilbert again conceded that **at the time he asked for consent to search, he had not seen or smelled any drugs or alcohol nor had he seen any weapons. He also said that he had checked Appellant’s license, the vehicle tag, and the rental agreement, and all were valid.** Gilbert explained that he ultimately asked Appellant for consent to search the car after he had observed behavior he found to be suspicious and after noting that Appellant was traveling from the Atlanta area on Interstate 85. R. 69, l. 20 – 70, l. 25 (emphasis added).

B. Arguments

After Gilbert had finished testifying, defense counsel told the court that he had “some concern about the initial reason for the stop.” He said, “The officer stated that the vehicle being driven by Mr. Alston never crossed the dotted line, but he used the word struck, that [the car] had struck [the line] and then it went back into his lane, which

would've been the proper thing to do." Defense counsel argued that this was not a "sufficient basis for the stop." R. 84, l. 16 – 85, l. 5.

Defense counsel also argued that there was no valid consent to search the vehicle. He pointed out that Appellant unequivocally stated "that I'm not giving consent, you're giving consent." However, defense counsel argued that "if there was, in fact, a valid consent, it was obtained by prolonged detention." Defense counsel explained that after the officer determined that Appellant had a valid license and that the vehicle tag was clear, he wrote Appellant a warning. R. 85, l. 6 – 86, l. 5. He said:

[B]ut the officer did not give the warning to Mr. Alston, we would argue, because the officer was stalling for time to allow another officer to come on the scene.

There is no clear delineation between the end of the stop and the request for consent. They run completely into one another. The officer never says, okay, I've checked you out, here's your citation, you can leave. Oh, and by the way, do you mind if I search your car? There is no such demarcation between those two things in this case.

Your honor, it is our position that Mr. Alston was illegally seized at that point because the purpose of the stop had been fulfilled. As I said earlier, all of the things that the officer's entitled to do had been done and the officer had begun to write the warning citation with that very little bit of information that it requires.

So we move from a situation where he doesn't have anything left to do with the traffic stop and he begins to conduct a narcotics investigation. But he's conducting that narcotics investigation without reasonable articulable suspicion.

Mr. Alston was not free to go per the officer. And I think the officer concedes that Mr. Alston would have known that he wasn't free to leave. The fact that another officer had come on the scene, the fact that he'd been pulled over with a blue light, the fact that the officer was [in] uniform, has his guns, gun with him, I think that Mr. Alston is at that point

seized. And I would argue to the court that based on the cases that that seizure, that second seizure was in violation of the Fourth Amendment because it was without probable cause and without reasonable articulable suspicion.

R. 86, l. 5 – 87, l. 11.

The solicitor argued in response that the officer had probable cause that a traffic violation had occurred, had reasonable articulable suspicion to detain Appellant longer than necessary to issue the warning ticket, and that Appellant had voluntarily consented to the search. Therefore, the state concluded that the cocaine should not be suppressed. R. 95, ll. 9-15. The solicitor claimed Gilbert had reasonable articulable suspicion to prolong the stop because of a multitude of factors including (1) Interstate 85 is a “known criminal corridor;” (2) Atlanta is a “source city for drugs;” (3) the discrepancies between Appellant’s answers and the rental agreement; (4) the luggage was covered by a blanket; (5) the additional keys on the key ring; (6) the air freshener found in the car; and (7) the third party rental. R. 90, l. 12 - 93, l. 18.

C. Court Ruling

The court held, “I find that the stop made by the officer was pursuant to a valid traffic stop, that it was based upon probable cause, that the detention resulting from that stop was based upon the totality of the circumstances as presented by the evidence in this cause, was reasonable under the Fourth Amendment and that the search made of the vehicle which resulted in the seizure of evidence to be used in the trial against him was based upon consent and in this case with actual acknowledge of his right to refuse consent. All right. And, therefore, the motion to suppress is denied.” R. 98, ll. 10-20.

ARGUMENT

1.

The court erred by denying Appellant's motion to suppress evidence found in his vehicle where the officer did not have reasonable suspicion or probable cause to stop Appellant's car for a traffic violation.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Mapp v. Ohio, 367 U.S. 643 (1961). A traffic stop constitutes a Fourth Amendment seizure and, therefore, must be reasonable under the circumstances. State v. Vinson, 400 S.C. 347, 351, 734 S.E.2d 182, 184 (Ct. App. 2012) (internal citations omitted). "Reasonableness is measured in objective terms by examining the totality of circumstances." Vinson, 400 S.C. at 352, 734 S.E.2d at 184 (quoting State v. Pichardo, 367 S.C. 84, 101, 623 S.E.2d 840, 849 (2005) (internal quotation marks omitted). "A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation had occurred, or when the officer has reasonable suspicion the occupants are involved in criminal activity." Vinson, 400 S.C. at 352, 734 S.E.2d at 184 (citing State v. Burgess, 394 S.C. 407, 412, 714 S.E.2d 917, 919 (Ct. App. 2011)); see also Whren v. United States, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"). "Moreover, a police officer's subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Vinson, 400 S.C. at 352, 734

S.E.2d at 184 (quoting State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009)) (internal quotation marks omitted).

Sergeant Gilbert testified that he stopped Appellant's car for failure to maintain a lane. He explained during the suppression hearing that before he pulled Appellant over, Appellant's left tire "struck" the dotted line dividing the middle lane and the fast lane. He said, "Now, when I say struck, what I would mean by that is that tire could have covered that whole line, but it didn't go all the way across it. But it did make contact with that line and then drift back into the middle of that lane." Gilbert admitted that Appellant never crossed the dotted line. Appellant merely "rode on top of it." R. 43, l. 21 – 45, l. 2.

The written warning completed by Gilbert during the traffic stop also indicated that the "nature of contact" was "fail to maintain lane." R. 210. (Defendant's Exhibit No. 1). Furthermore, the warning ticket stated, "This warning is being issued to you for a violation of the South Carolina Code of Laws." R. 210. (Defendant's Exhibit No. 1). Presumably, although not explicitly stated at the proceedings below, Appellant was stopped and later warned for allegedly violating South Carolina Code Section 56-5-1900, which states in relevant part: "Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply: (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety."

In his argument at trial, the solicitor cited Vinson in support of his position that Sergeant Gilbert had probable cause to stop Appellant's vehicle for failure to maintain his lane. Based on this Court's holding in Vinson, the solicitor argued that "just striking the

lane . . . is a violation of that statute and did give reason for Deputy Gilbert to pull the vehicle over.” R. 89,1. 3 – 90, 1. 4. Based on his reliance on Vinson, it is clear the solicitor was referring to S.C. Code § 56-5-1900.

However, Vinson is factually different from this case. In Vinson, the defendant was traveling on a two-lane roadway in which traffic was moving in opposite directions in each lane. The two lanes of travel were divided by two solid yellow lines indicating that passing was prohibited. The defendant was stopped for allegedly striking the double yellow lines. Vinson, 400 S.C. at 349, 734 S.E.2d at 183. This Court noted that under the plain language of § 56-5-1900 a driver must maintain his vehicle “entirely within a single lane” unless “it is not practicable or the driver can safely change lanes.” This Court held that the officer was justified in stopping Vinson for a perceived violation of §56-5-1900 because “Vinson’s front tire crossed into the area between the double yellow lines that separated opposing lanes of traffic in a ‘no passing’ zone” and because it was practicable for Vinson to remain within his lane of traffic. Id. at 353, 734 S.E.2d at 185.

In this case, Appellant was traveling on Interstate 85, which had six lanes of traffic: three lanes traveling northbound and three lanes traveling southbound divided by a median. Appellant was traveling northbound in the middle lane and allegedly struck the white dotted line dividing the middle lane in which he was traveling and the far left lane or “fast lane.” This action is not a violation of § 56-5-1900. Section 56-5-1900 permits a driver to move from the lane in which he is traveling when “such movement can be made with safety.” There was no testimony that another vehicle was traveling in the far left lane or that it would have been unsafe at the time Appellant allegedly struck the white dotted line for him to change lanes. Because Appellant could have legally and

safely changed lanes at the time he allegedly struck the white dotted line dividing the middle lane and the far left lane, Appellant did not violate § 56-5-1900. See Texas v. Cerny, 28 S.W.3d 796, 800-801 (Tex. Ct. App. 2000); see also Hernandez v. Texas, 983 S.W.2d 867, 868-871 (Tex. Ct. App. 1998).

Since Gilbert did not have probable cause to stop Appellant's vehicle for failure to maintain his lane, he unreasonably seized Appellant in violation of the Fourth Amendment. Therefore, the court erred in denying Appellant's motion to suppress the cocaine found in his vehicle. See Wong Sun v. United States, 371 U.S. 471, 484 (1963) (The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

The court erred by denying Appellant's motion to suppress evidence found in his vehicle where the officer's continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime nor Appellant's consent to detain him beyond the scope of the traffic stop.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Mapp, 367 U.S. 643. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). "Thus, the Fourth Amendment protects against unreasonable searches and seizures, including seizures that involve only a brief detention." Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing United States v. Mendenhall, 446 U.S. 544 (1980)).

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment." Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing Whren, 517 U.S. 806). Thus, an automobile stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing Whren, 517 U.S. at 810). "Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable *per se*." Id.

A. Sergeant Gilbert's continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment.

"The officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning." Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (citing Ferris v. State, 355 Md. 356, 735 A.2d 491 (1991)). "Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention." Id.; see State v. Tindall, 388 S.C. 518, 522-523, 698 S.E.2d 203, 205-206 (2010) (finding "the officer's continued detention of Tindall exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment"); see also United States v. Jones, 234 F.3d 234, 241 (5th Cir. 2000) ("The basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle. Accordingly, the officers should have ended the detention and allowed the defendants to leave. And the failure to release the defendants violated the Fourth Amendment.").

In this case, Sergeant Gilbert unlawfully extended the traffic stop when he asked Appellant for consent to search his car because the purpose of the traffic stop had already been accomplished. At the time Gilbert asked for consent, he had already been informed by dispatch that Appellant's license and the vehicle tag were "clear" and he had already completed the warning for failure to maintain a lane. R. 53, l. 21 – 55, l. 15; R. 59, ll. 11-18; R. 61, ll. 12-23; R. 66, ll. 3-7; see Tindall, 388 S.C. at 522, 698 S.E.2d at 205 (finding 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, and a continued detention occurred when the officer

questioned Tindall for several minutes after the purpose of the stop was accomplished); see also State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct. App. 2009) (finding the purpose of the traffic stop was accomplished when the officer informed Rivera he would receive a warning citation and found the officer's questions regarding the transport of drugs exceeded the scope of the initial traffic stop and constituted a second and illegal detention).

The DVD of the traffic stop indicates that Gilbert had completed the warning ticket approximately fifteen minutes and ten seconds into the traffic stop. (DVD of Traffic Stop). At this point in the video, one can see Gilbert put away his pen, rip off the warning from his pad, and place the warning in his right hand. (DVD of Traffic Stop). After this is completed, instead of giving Appellant the warning and returning Appellant's license and rental contract, Gilbert continued to ask Appellant questions unrelated to the purpose of the traffic stop. Specifically, Gilbert asked Appellant whether the rental company had originally given Appellant a Nissan Cube, which the rental contract indicated, and whether everything in the vehicle belonged to Appellant. (DVD of Traffic Stop). While Gilbert was asking Appellant these questions, a second officer arrived at the scene, and Gilbert subsequently asked Appellant for consent to search his car. (DVD of Traffic Stop); R. 66, ll. 3-7.

Furthermore, the record clearly reveals that Gilbert was purposefully prolonging the stop in order to allow enough time for a second officer to arrive on scene. Gilbert admitted that he was "waiting on somebody to get there." R. 35, ll. 22-25. He testified that he planned to ask Appellant for consent to search the car, but because asking for consent sometimes causes tension, did not want to ask for consent until a second officer

arrived. R. 36, ll. 1-16. The record also clearly reveals that Gilbert was purposefully prolonging the stop to allow time for Deputy Carraway to go home, pick up his drug dog, and travel to the scene. He testified that he had “a K-9 on the way.” R. 35, l. 22 – 36, l. 21; R. 56, l. 12 – 58, l. 16. This is likely why Gilbert took longer than necessary to complete the warning, which even Gilbert conceded required very little information to complete. R. 59, l. 23 – 60, l. 16.

Additionally, at the time Gilbert asked Appellant for consent to search his vehicle, a second officer had arrived at the scene and Gilbert had not returned Appellant’s driver’s license or the rental agreement. A reasonable person in this situation would not have felt free to leave. Accordingly, Gilbert’s “continued detention of [Appellant] exceeded the scope of the traffic stop and constituted a seizure for the purposes of the Fourth Amendment” because a reasonable person in Appellant’s position “would not have felt free to terminate the encounter.” See Tindall, 388 S.C. at 522-523, 698 S.E.2d at 205-206 (citing Florida v. Bostick, 501 U.S. 429, 434 (1991)); see also Arizona v. Johnson, 555 U.S. 323 (2009); see also United States v. Sullivan, 138 F.3d 126, 132 (4th Cir. 1998).

B. Sergeant Gilbert did not have reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop.

“Lengthening the detention for further questioning beyond that related to the initial stop is permissible in two circumstances. First, the 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. Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter.” Pichardo, 367 S.C. at 99, 623 S.E.2d at 848 (quoting United States v. Hunnicutt, 135 F.3d

1345, 1349 (10th Cir. 1998)); see also United States v. Brugal, 209 F.3d 353, 358 (4th Cir. 2000) (finding “[t]he Terry reasonable suspicion standard required an officer to have a reasonable suspicion that criminal activity is afoot before he may . . . continue to seize a person following the conclusion of the purposes of a valid stop”). The state has the burden to articulate facts, which are sufficient to support an officer’s reasonable suspicion that criminal activity has occurred or is occurring. See generally State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000); see also Tindall, 388 S.C. at 527, 698 S.E.2d at 208 (“[T]he nature of the reasonableness inquiry [in determining the existence of reasonable suspicion] is highly fact-specific”).

Reasonable suspicion requires “a particularized and objective basis that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). Reasonable suspicion also requires “something more than an inchoate and unparticularized suspicion or hunch.” Lesley, 326 S.C. at 644, 486 S.E.2d at 277 (citing Butler, 343 S.C. at 202, 539 S.E.2d at 416). “In determining whether reasonable suspicion exists, the totality of the circumstances—the whole picture—must be considered.” State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (quoting Cortez, 449 U.S. at 417).

In State v. Burgess, 394 S.C. 407, 415, 714 S.E.2d 917, 921 (2011), our Supreme Court recognized the same concerns as the Fourth Circuit Court of Appeals in United States v. Foster, 634 F.3d 243, 248 (4th Cir.2011):

We are mindful of concerns regarding the State ‘using whatever facts are present, no matter how innocent, as indicia of suspicious activity’ and that the State ‘must do more than simply label a behavior as ‘suspicious’ to

make it so.’ The State must ‘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.’

(internal citation omitted) (emphasis added); see also State v. Moore, 404 S.C. 634, 643-644, 746 S.E.2d 352, 357 (Ct. App. 2013).

The Fourth Circuit also emphasized:

We are deeply troubled by the way in which the Government attempts to spin these largely mundane acts into a web of deception. Although these matters generally only come before this Court where a police seizure uncovers some wrongdoing, we would be remiss if we did not acknowledge that **the exclusionary rule is our sole means of ensuring that police refrain from engaging in the unwarranted harassment or unlawful seizure of anyone**—whether he or she is one of the most affluent or most vulnerable members of our community.

Foster, 634 F.3d at 248-249 (emphasis added) (citing Terry v. Ohio, 392 U.S. 1, 12-13 (1968) (finding “Courts which sit under our Constitution cannot and will not be made party to lawless invasion of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”))).

Here, the state has failed to meet its burden to articulate facts, which are sufficient to support Sergeant Gilbert’s reasonable suspicion of a serious crime. Based on Gilbert’s speculation and opinion during the traffic stop, he labeled innocent facts as “suspicious” including: (1) Appellant had luggage in the rear cargo area that was covered with a blanket; (2) immediately upon approaching the passenger side door, Appellant asked Gilbert why he was being stopped; (3) the vehicle was rented by a third party; (4) the third party who rented the vehicle was female; (5) Appellant was traveling from a suburb

of Atlanta, which is “a major hub for criminal activity in the southeast;” (6) Appellant was traveling on Interstate 85, which is “a major criminal activity corridor;” (7) the key ring had two house keys on it in addition to the key for the rental vehicle; (8) there was an air freshener on the “driver’s door pocket;” (9) Appellant was traveling in a state not permitted on the rental contract; (10) Appellant said he had six children, but listed the ages of seven children; (11) Appellant said he was bringing his mother to Georgia for Mother’s Day, but Mother’s Day is not until May and this was in late March; and (12) Appellant said that he planned to stay in New Jersey for a week, but the rental car was due back before then. R. 16, l. 5 – 18, l. 6; R. 20, l. 13 – 21, l. 24; R. 22, l. 13 – 25, l. 2; R. 25, l. 24 – 28, l. 1; R. 33, l. 7 – 34, l. 11; R. 40, l. 19 – 41, l. 2; R. 70, ll. 4-12; R. 74, ll. 15-24; see Foster, 634 F.3d at 248; Cf. United States v. Wilson, 951 F.2d 116, 124-25 (4th Cir. 1991) (finding “[a] suspect’s arrival from a ‘source city’ is still noted by many courts as a factor lending support for a ‘reasonable suspicion’ finding, **but the vast number of persons coming from those ‘source cities’ relegates this factor to a relatively insignificant role**”) (emphasis added).

Gilbert essentially characterized everything he observed during the traffic stop as suspicious. Furthermore, he relied heavily on his subjective speculation in finding reasonable suspicion, instead of objective facts, as required. See Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. When looked at objectively, all of these factors are entirely innocent and would not lead an objective detached person to think Appellant was involved in a serious crime. See United States v. Foreman, 369 F.3d. 776, 781 (4th Cir. 2004) (finding “[t]he articulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be

satisfied”). Notably, Gilbert testified that he did not see or smell any drugs or alcohol nor did he see any weapons. R. 69, l. 20 – 70, l. 12. Gilbert also testified that Appellant did not appear to be nervous. R. 76, l. 4 – 77, l. 22.

Therefore, under the totality of the circumstances, Gilbert did not have reasonable and articulable suspicion of a serious crime when he chose not to conclude the traffic stop. See Moore, 404 S.C. 644, 746 S.E.2d at 357. Additionally, the traffic stop never became a “consensual encounter.” See Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Consequently, the continued detention of Appellant was illegal and the evidence seized during the search of his vehicle should have been suppressed. See Wong Sun, 371 U.S. at 484 (The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

The court erred by denying Appellant's motion to suppress evidence found in his vehicle where Appellant's consent to search was not freely and voluntarily given, and even if it was freely and voluntarily given, was invalid as an exploitation of an unlawful detention.

"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." Tindall, 388 S.C. at 523-524, 698 S.E.2d at 206 (quoting State v. Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008)); see Wong Sun, 371 U.S. 487-488 ("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.") (internal citation and quotation marks omitted).

Here, any consent Appellant may have given was not voluntary. When asked for consent to search the car, Appellant stated that he was "just trying to figure what all this is about" and "I didn't do anything wrong." R. 38, l. 19; R. 66, ll. 21-24. Appellant also stated, "[N]ah, I'm not giving you consent, you the one giving consent." R. 69, ll. 12-19. These statements, along with the fact that a second officer had arrived at the scene by the time this discussion occurred and that Gilbert had not returned Appellant's license and

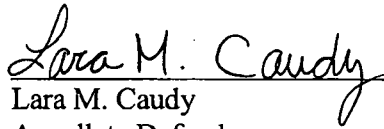
rental contract or given Appellant the warning citation, indicate that Appellant did not freely and voluntarily consent to the search. See State v. Provet, 405 S.C 101, 114, 747 S.E.2d 453, 460 (2013) (affirming the lower court's finding that the defendant's consent to search his vehicle was voluntary where the officer had returned his driver's license and vehicle registration and had issued a warning citation and where only two officers were present).

However, even if Appellant had voluntarily consented to the search of his car, it was invalid as "an exploitation of the unlawful detention" since Gilbert did not have reasonable articulable suspicion to prolong the traffic stop. Tindall, 388 S.C. at 523-524, 698 S.E.2d at 206 (internal citation and quotation marks omitted).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse his conviction and sentence and remand this case to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

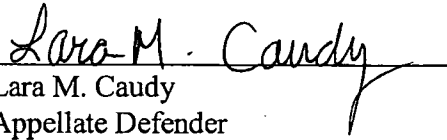
ATTORNEY FOR APPELLANT

This 16th day of October, 2014.

CERTIFICATE OF COUNSEL

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

October 16, 2014


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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

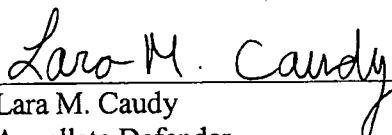
V.

STEPHENO JEMAIN ALSTON,

APPELLANT

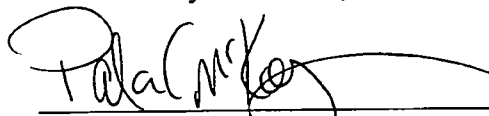
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of October, 2014.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 16th day of October, 2014.


(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013-002089

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

STEPHENO JEMAIN ALSTON,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's motion to suppress the cocaine found in his car where the officer had reasonable suspicion to stop Appellant's vehicle based upon the car's drifting back and forth in its lane and probable cause to stop the vehicle based upon the car's failure to properly maintain its lane; where the officer had not measurably detained Appellant beyond the normal course of the traffic stop at the time the officer requested consent to search; where, even if there was a prolonged detention of Appellant, it was justified based on the reasonable suspicion acquired by the officer; and where Appellant's consent to search was given freely and voluntarily and was not an exploitation of any unlawful detention.

STATEMENT OF THE CASE

Appellant was indicted in Spartanburg County in June of 2011 for trafficking in cocaine. On March 18, 2013, Appellant's case was called for trial before the Honorable J. Derham Cole and a jury. Appellant was tried in his absence after he failed to appear for trial. On March 19, 2013, the jury found Appellant guilty as charged, and Judge Cole sealed the sentence. On September 19, 2013, the sealed sentence of twenty-five years was opened and read in Appellant's presence. A timely notice of appeal was served and filed.

ARGUMENT

The trial judge properly denied Appellant's motion to suppress the cocaine found in his car where the officer had reasonable suspicion to stop Appellant's vehicle based upon the car's drifting back and forth in its lane and probable cause to stop the vehicle based upon the car's failure to properly maintain its lane; where the officer had not measurably detained Appellant beyond the normal course of the traffic stop at the time the officer requested consent to search; where, even if there was a prolonged detention of Appellant, it was justified based on the reasonable suspicion acquired by the officer; and where Appellant's consent to search was given freely and voluntarily and was not an exploitation of any unlawful detention.

Relevant Facts

In a pre-trial hearing on Appellant's motion to suppress, Sheriff's Deputy Donnie Gilbert testified regarding the facts leading up to Appellant's arrest for trafficking in cocaine. (See R. p. 9-84). Initially, Deputy Gilbert testified that he had been working in law enforcement for approximately fourteen years. (R. p. 9, lines 19-21). Deputy Gilbert started with the South Carolina Highway Patrol in 1999, and in 2004, he was transferred to the Aggressive Criminal Enforcement Team and was assigned to work the Midstate Team as a K-9 officer. (R. p. 9, line 24 – p. 10, line 9). The next year Deputy Gilbert was transferred to the Upstate Team as a K-9 officer, and in 2009, he came to work in Spartanburg County. (R. p. 10, lines 10-16). In 2010, he left Highway Patrol and began working for the Spartanburg County Sheriff's Office in the traffic division as a member of the Interstate Criminal Enforcement Team. (R. p. 10, line 16 – p. 11, line 3). Deputy Gilbert stated he had received approximately 500 to 600 hours of interdiction training through the National Criminal Enforcement Association and "Desert Snow." (R. p. 11, line 16 – p. 12, line 12).

On March 28, 2011, around 1:00 pm, Deputy Gilbert was monitoring traffic on Interstate 85 in Spartanburg County when a Hyundai Santa Fe, which was traveling in the

middle of the three lanes going northbound, passed him and failed to maintain its lane of travel. (R. p. 12-13; p. 19, line 24 – p. 20, line 4). Specifically, the Santa Fe's left tire struck the dotted line dividing the middle lane from the "fast lane," rode on top of the line, and then drifted back into the middle of its own lane. (R. p. 13-14; p. 44, lines 24-25). The Santa Fe repeated this action "several times" in the time it took Deputy Gilbert to catch up to the vehicle. (R. p. 14, lines 2-3). Deputy Gilbert explained that the "drifting" he observed could be a sign of a driver who is sleepy, having a medical condition, under the influence of alcohol or drugs, or on the phone. (R. p. 45, lines 4-11). He also noted that sometimes drifting results when a person notices an officer parked on the side of the road, is concerned about the officer's presence for some reason, and decides to keep an eye on the officer in the rearview mirror. (R. p. 46-47).

Deputy Gilbert activated his blue lights and the Santa Fe pulled over to the right emergency shoulder of the road. (R. p. 14, lines 8-10). When approaching the vehicle, Deputy Gilbert noticed some luggage covered by a blanket in the rear cargo area. (R. p. 16, lines 3-6). This aroused Deputy Gilbert's suspicions because it was "not common with the motoring public that I come into contact with every day" since most people simply place luggage in their vehicles without taking the time to cover it with a blanket. (R. p. 40, line 23 – p. 41, line 2). Deputy Gilbert then made contact with the driver through the passenger side window. (See State's Exhibit #2, DVD, at 00:54:55). The driver, the sole occupant of the vehicle, immediately began asking Deputy Gilbert why he was being stopped.¹ (R. p. 16, lines 8-9; p. 20, lines 16-18). After identifying Appellant

¹ Deputy Gilbert stated this was "not consistent with the innocent motoring public," and that "ninety-nine percent of the time" people allow him to "get to that point" himself of explaining the reason for the traffic stop. (R. p. 17, lines 2-6).

via his driver's license as Stepheno J. Alston from Rome, Georgia,² Deputy Gilbert explained that Appellant had been drifting in his lane and driving on the lane marker and that he was checking to be sure Appellant was not impaired or under the influence. (See R. p. 14, lines 11-17; p. 17, lines 12-13; see State's Exhibit #2, DVD, at 00:55:19-52).

Deputy Gilbert next requested the paperwork regarding the vehicle, and Appellant produced a rental contract. (R. p. 18, lines 10-13). A review of the rental contract informed Deputy Gilbert that Appellant's vehicle had been rented two days before near Atlanta, Georgia. (R. p. 19, lines 12-23). The vehicle had been rented by a Tomeka Harris, who was not present in the vehicle with Appellant. (R. p. 20, lines 13-18). Appellant told Deputy Gilbert that Tomeka Harris was his girlfriend. (R. p. 25, lines 18-23). The third-party rental raised Deputy Gilbert's suspicions because in his training and experience, it is "very common when it comes to criminal activity" to use a third-party rental so that if the person is caught, his or her personal vehicle will not be seized. (R. p. 20, line 19 – p. 21, line 2). It further raised a red flag for Deputy Gilbert that the vehicle was rented by a female because in his training and experience, drug trafficking organizations typically rent vehicles to be used in criminal activity in a woman's name to try to throw off suspicion. (R. p. 21, lines 3-11). The rental agreement Appellant produced listed five states in which the vehicle was allowed to be operated. (R. p. 21, lines 12-19). These states included Georgia, Tennessee, Kentucky, Virginia, and West

² The fact that Appellant was from an area near Atlanta, Georgia, caused some concern for Deputy Gilbert because it was common knowledge in the "interdiction community" that Atlanta is a "major hub" for criminal activity in the southeast. (R. p. 17, lines 14-25). Deputy Gilbert also pointed out that Interstate 85 is a "major criminal activity corridor" connecting Atlanta to many routes to the south and north of it. (R. p. 18, lines 1-6).

Virginia.³ (R. p. 21, lines 16-19). South Carolina was not one of the states in which the vehicle was permitted to be driven. (R. p. 21, lines 20-24).

Deputy Gilbert also noticed that two house keys had been placed on the key ring along with the rental car key. (R. p. 22, lines 13-17). Deputy Gilbert found this “very odd” and stated that in his training and experience, Appellant was trying to “personalize” the vehicle by placing his house keys on the same ring as the rental car key. (R. p. 22, line 13-25). Deputy Gilbert also found it odd that an old “mushroom” type air freshener had been placed in the driver’s door pocket. (R. p. 23, lines 2-8). Notably, Appellant denied being a smoker. (See State’s Exhibit #2, DVD, at 00:56:24). Deputy Gilbert found the placement of the air freshener to be particularly unusual because most people do not rent a vehicle and then immediately place an air freshener in it. (R. p. 24, lines 18-20). Deputy Gilbert stated that in his training and experience, air fresheners are often used as “masking agents” to hide odors of drugs or other things. (R. p. 24, line 21 – p. 25, line 2).

Another issue that caused Deputy Gilbert some concern was that Appellant initially stated that his license had never previously been suspended. (See R. p. 29, lines 11-24; see State’s Exhibit #2, DVD, at 00:59:05). However, after receiving information from dispatch indicating the contrary, Deputy Gilbert asked Appellant again whether or not his license had ever been suspended and Appellant then admitted he had been arrested for driving under the influence in the past and that his license had been suspended at that time. (R. p. 29, lines 11-24; see State’s Exhibit #2, DVD, at 1:00:03).

³ Deputy Gilbert stated that the fact that these five states were listed on the rental contract raised another big red flag for him because it appeared that “from the beginning of the trip [Appellant] was trying to avoid Interstate 85.” (R. p. 26, lines 10-14).

When Deputy Gilbert asked Appellant about where he was headed, Appellant stated he was going to pick up his mother in New Jersey. (R. p. 25, line 24 – p. 26, line 1). This aroused the deputy's suspicions because New Jersey was not listed on the rental contract as a permissible destination. (R. p. 26, lines 2-9). Appellant elaborated that he was going to stay with his mother, who was depressed, for about a week and then bring her home with him for Mother's Day. (R. p. 26, lines 18-25). This raised more red flags for Deputy Gilbert because the car rental was for only seven days and Appellant was already on the third day of the rental; additionally, Mother's Day was approximately a month-and-a-half away. (R. p. 27, lines 2-24). After more casual conversation, during which time Deputy Gilbert called in Appellant's information and filled out a warning ticket, Deputy Gilbert asked if anyone else had access to the vehicle. (R. p. 32, lines 8-9). Appellant said he had "no idea." (R. p. 32, line 10). When asked again, Appellant indicated no one had access to the vehicle and that it was not a good idea "nowadays" to let anybody use your rental car. (R. p. 32, lines 14-19). Deputy Gilbert found both of Appellant's responses to be suspicious. (R. p. 32, line 10 – p. 33, line 6). Deputy Gilbert and Appellant then began discussing what Appellant did for a living and his children. (R. p. 33). When the deputy inquired about the ages of Appellant's children, Appellant said he had six children but then provided the ages of seven children. (R. p. 33, lines 11-23). Deputy Gilbert found Appellant's response odd and stated that he felt the "stress of the situation" was getting to Appellant at that point. (R. p. 33, line 22 – p. 34, line 11).

Approximately sixteen minutes into the stop, Deputy Gilbert requested consent to search Appellant's vehicle. (R. p. 37, lines 1-6; p. 62-66). Although another officer, Sergeant Barnett, had just arrived on the scene to assist if needed, he parked behind

Deputy Gilbert's car and stayed away from Deputy Gilbert and Appellant. (R. p. 65, lines 3-19). Notably, Appellant's back was turned "the whole time" when Sergeant Barnett arrived. (R. p. 65, line 20 – p. 66, line 2). Deputy Gilbert could not recall exactly when he completed writing out the warning ticket, but he believed the warning was not completed until after the other officer arrived. (R. p. 58-66). He testified at one point on cross-examination that after the other officer arrived and he finished writing the citation, but had not given the citation to Appellant, he "basically went straight into consent, asking for consent to search." (R. p. 66, lines 3-7). Deputy Gilbert also stated that he never ended up handing the citation to Appellant or returning any of Appellant's paperwork to him. (R. p. 59, lines 15-16).

Appellant responded to Deputy Gilbert's request for consent to search by saying he was trying to figure out what "all this" was about. (R. p. 37, lines 6-9). Appellant then agreed to a search. (R. p. 37, lines 10-11). However, rather than immediately searching the vehicle, Deputy Gilbert specifically informed Appellant he had the right to refuse consent to search. (R. p. 37, lines 12-23). Deputy Gilbert never pulled out his weapon or coerced Appellant into giving consent, and no other officers were present in the immediate vicinity of Appellant and Deputy Gilbert. (R. p. 38, line 25 – p. 39, line 14). Appellant seemed to have the education necessary to understand what Deputy Gilbert was asking him. (R. p. 39, lines 15-17). After receiving a definite "yes" answer from Appellant, Deputy Gilbert proceeded to search the car. (R. p. 38, lines 18-24). Appellant never withdrew his consent while the search was ongoing. (R. p. 38-39; p. 40, lines 14-18). The search revealed approximately 434 grams of cocaine hidden in the

plastic molding underneath the steering column. (R. p. 133, lines 10-20; p. 169, lines 11-25).

Applicable Law

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) (“[W]e will review the trial court’s ruling like any other factual finding and reverse if there is clear error. We will affirm if there is any evidence to support the ruling.”). The reviewing court may conduct its own review of the record to determine whether the trial judge’s ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court must affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009), *overruled in part on other grounds by* State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (citations omitted).

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. That guarantee protects against unreasonable searches and seizures,

including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. “The touchstone of the Fourth Amendment is reasonableness.” Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) (“It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]”).

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). The reasonableness of a stop or detention “is measured in objective terms by examining the totality of the circumstances.” Ohio v. Robinette, 519 U.S. 33, 39 (1996). The test regarding whether reasonable suspicion exists is an objective assessment of the circumstances, and the officer's subjective motivations are irrelevant. State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (citations omitted). However, the initiation of a traffic stop is reasonable *per se* when probable cause exists to believe a traffic violation has occurred. State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002). A traffic stop is also not unreasonable under the Fourth Amendment when an officer has a reasonable suspicion the occupants are involved in criminal activity. State v. Burgess, 394 S.C. 407, 412, 714 S.E.2d 917, 919 (Ct. App. 2011); see also State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (“[A] policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion.”) (citations

omitted). A law enforcement officer's subjective intentions generally play no role in a Fourth Amendment analysis. See State v. Corley, 383 S.C. 232, 241, 679 S.E.2d 187, 192 (Ct. App. 2009).

A lawful traffic stop begins at the point an officer stops a vehicle to investigate a traffic violation and "ordinarily continues, and remains reasonable, for the duration of the stop." Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer may order the driver and any passengers out of the vehicle pending completion of the stop and "may request a driver's license and vehicle registration, run a computer check, and issue a citation." Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see Maryland v. Wilson, 519 U.S. 408, 415 (1997) ("[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop."). "Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure so long as the unrelated questioning does not *measurably* extend the duration of the stop. Id.; see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). "Notwithstanding that an officer may not lawfully extend the duration of a traffic stop in order to engage in off-topic questioning, this rule does not limit the scope

of the officer's questions to the motorist during the traffic stop.” State v. Provet, 405 S.C. at 108-109, 747 S.E.2d at 457.

Even if a traffic stop is initially lawful, the detention “can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.” Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (“Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.”). However, a further detention extending the scope of a traffic stop beyond its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. “The officer's observations while conducting the traffic stop may create reasonable suspicion to justify further search or seizure.” Provet, 405 S.C. at 109, 747 S.E.2d at 457 (citation omitted).

Reasonable suspicion consists of “‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting U.S. v. Cortez, 449 U.S. 411, 417 (1981)). 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.” U.S. v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004) (citation omitted). “In this highly fact-specific inquiry, reasonable suspicion ‘is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.’” State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781). The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably

less than preponderance of the evidence[.]” Illinois v. Wardlow, 528 U.S. 119, 123 (2000). “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 State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (“Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.”).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In reviewing the totality of the circumstances, the individual factors of the traffic stop must not be considered piecemeal or in isolation. See U.S. v. Branch, 537 F.3d 328, 337 (4th Cir. 2008). Instead, all of the circumstances of the stop must be considered as a whole to determine whether the officer’s actions were reasonable in light of all of the information available to him at the time. See U.S. v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) (“[J]ust as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”). “In applying the concept of reasonable suspicion to the various facts of a case, ‘[i]t is the entire mosaic that counts, not single tiles.’” Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting U.S. v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)); see also U.S. v. Arvizu, 534 U.S. 266, 273-78 (2002) (rejecting the lower court’s “evaluation and rejection of seven of the listed [reasonable suspicion] factors in isolation from each other” because it failed to take into account the totality of the circumstances, and holding that although “each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others,” taken together they

sufficed to form a particularized and objective basis for the stop, “making the stop reasonable within the meaning of the Fourth Amendment.”). Thus, courts must look at the cumulative information available to an officer and “may not find a stop unjustified based merely on a piecemeal refutation of each individual fact and inference.” State v. Taylor, 401 S.C. 104, 112, 736 S.E.2d 663, 667 (2013) (citations omitted).

Appellant’s Case

Justification for the Initial Stop

In this case, Deputy Gilbert had both reasonable suspicion and probable cause to stop Appellant’s vehicle. First, Appellant’s drifting back and forth within his lane several times provided Deputy Gilbert with reasonable suspicion that Appellant was impaired or under the influence; consequently, Deputy Gilbert was justified in performing an investigatory stop. See People v. Loucks, 481 N.E.2d 1086, 1087 (Ill. App. Ct. 1985) (“Weaving within the lane of traffic in which a vehicle is traveling provides a sufficient basis for an investigatory stop of a motor vehicle, and in the instant case the evidence was undisputed that the vehicle the defendant was driving was weaving within its own lane of travel continuously for a distance of about two blocks. Such erratic driving provided Officer Cassidy with articulable facts that there was a substantial possibility that the defendant had committed, was committing, or was about to commit an offense. The undisputed evidence showed that Officer Cassidy had sufficient basis for making an investigative stop of the defendant’s motor vehicle.”); State v. Dorendorf, 359 N.W.2d 115, 116-17 (1984) (after noting that “[c]ourts in other jurisdictions have held that the observation of a vehicle weaving within its own lane of traffic gives rise to probable cause to stop a vehicle for investigation,” the court held that “an examination of the facts

in this case leads us to conclude that the officers were justified in stopping Dorendorf for investigation. Officers Fulwider and Clock observed the weaving of the Dorendorf vehicle as it approached them. Fulwider then turned the patrol car around and followed Dorendorf, at which time both Fulwider and Clock observed Dorendorf's smooth, continuous weave within his own lane of traffic.”); State v. Bailey, 51 Or.App. 173, 175, 624 P.2d 663, 664 (1981) (“We now hold . . . that the observation of a vehicle weaving within its own lane for a substantial distance gives rise to probable cause to believe that the driver is driving under the influence of intoxicants and justifies a stop for further investigation.”); State v. Ellanson, 293 Minn. 490, 491, 198 N.W.2d 136, 137 (1972) (holding that an officer had the right to stop the defendant in order to investigate the cause of his unusual driving where the officer observed the defendant’s automobile weaving within its own lane on the highway); State v. Lange, 255 N.W.2d 59, 63 (1977) (“Although [the defendant] places great emphasis on the fact that his vehicle did not at any time cross the center line, we do not think a police officer who has been alerted to a possible DWI suspect and who observes the vehicle wandering in its lane of traffic need wait for the driver to commit a traffic offense or become involved in an accident before he has probable cause to stop the vehicle.”); State v. Hodge, 147 Ohio App.3d 550, 559, 771 N.E.2d 331, 338-39 (Ohio App. Ct. 2002) (indicating that officers may have a duty to investigate the cause of weaving or erratic driving in order to protect the public and also the driver against such possible causes as the driver being under the influence, the driver being unduly mentally fatigued or sleepy, or even some mechanical defect of the car); see also Murphy v. State, 392 S.C. 626, 628, 709 S.E.2d 685, 686 (Ct. App. 2011) (stating that the officer pulled the defendant over after noticing her “swerving and weaving”; the

defendant was subsequently arrested for driving under the influence); State v. Knighton, 334 S.C. 125, 127, 512 S.E.2d 117, 118 (Ct. App. 1999) (defendant was stopped by a trooper after the trooper received reports of his erratic driving and then personally observed him weaving between lanes and saw his tire cross over the shoulder of the road; defendant was subsequently charged with driving under the influence). In that vein, Interstate 85 is a large and often busy roadway and officers should be permitted to investigate the cause of erratic driving which could pose a threat to the safety of the motoring public. Notably, Deputy Gilbert clearly expressed his concern about Appellant's possible impairment at the very outset of the traffic stop. (See State's Exhibit #2, DVD, at 00:55:19-52).

Second, Appellant's driving on the lane marker several times provided Deputy Gilbert with probable cause that Appellant violated S.C. Code § 56-5-1900. In pertinent part, this statute states as follows: "Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply: (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety." S.C. Code § 56-5-1900(a). In State v. Vinson, this Court addressed a similar issue under this statute. See State v. Vinson, 400 S.C. 347, 349, 734 S.E.2d 182, 183 (Ct. App. 2012), *cert. denied* Dec. 19, 2013. In Vinson, a trooper observed the defendant's vehicle drift back and forth between the double yellow lines that separated the two opposing lanes of traffic. *Id.* at 349, 734 S.E.2d at 183. The trooper activated his dash camera and followed the defendant for approximately two-tenths of a mile, but the vehicle did not drift again into the center of

the double yellow lines and it did not completely cross into the opposing lane. Id. This Court held that the defendant's action of crossing into the area between the double yellow lines that separated the opposing lanes of traffic was, in and of itself, a violation of S.C. Code § 56-5-1900(a). Id. at 353-54, 734 S.E.2d at 185. This Court pointed out there was testimony establishing there were no other cars on the road that would have prompted the defendant's decision to cross the center line; consequently, this Court concluded it was practicable for the defendant to remain within his lane of traffic. Id. at 353, 734 S.E.2d at 185. Therefore, this Court found that the trooper's stop of the defendant's vehicle was justified. Id. at 353-54, 734 S.E.2d at 185.

The Vinson court noted that there is a "split of authority" in cases from other jurisdictions regarding the interpretation of similar "failure to maintain a single lane" statutes; however, the court stated it was "persuaded by the line of cases in which courts have found the purpose of the 'as nearly as practicable' language is to keep both drivers and pedestrians safe, not to allow motorists the option of when they will or will not abide by a lane requirement." Id. at 354, 734 S.E.2d at 185 n3 (citing U.S. v. Bassols, 775 F.Supp.2d 1293, 1300-01 (D.N.M.2011); People v. Smith, 172 Ill.2d 289, 216 Ill.Dec. 658, 665 N.E.2d 1215, 1218-19 (1996); State v. Hodge, 147 Ohio App.3d 550, 771 N.E.2d 331, 338 (2002); and State v. McBroom, 179 Or.App. 120, 39 P.3d 226, 228-29 (2002)).

In the first case cited by the Vinson court, the United States District Court addressed the issue of "whether a driver who drives on the line or stripe that divides a lane of traffic from another lane or on the line or stripe that separates a lane from the shoulder of the road violates a New Mexico statute that requires persons to drive 'as

nearly as practicable entirely within a single lane.” Bassols, 775 F.Supp.2d at 1295-96. More specifically, the New Mexico statute stated as follows: “Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply: A. a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.” N.M. Stat. Ann. § 66-7-317. Note that with the exception of one word (“such” instead of “the”), New Mexico’s statute is identical to South Carolina’s statute. The Bassols court looked to the plain language of the statute and concluded that the purpose of the statute was clearly to promote roadway safety. Bassols at 1300. In rejecting the defendant’s argument that a person who drives on top of a dividing lane marker is still “entirely within a single lane,” the court pointed out that “if a lane of traffic is defined to include the lane dividing lines, then there would be an overlap between each lane on a roadway and two vehicles could legally occupy the same physical space at the same time despite the fact that the vehicles would collide.” Id. at 1300-01. The court concluded that construing the statute in the manner advocated by the defendant would lead to an absurd result and be contrary to the legislature’s purpose of promoting roadway safety. Id. at 1301. Thus, the Bassols court held that the “single lane” as contemplated by the New Mexico legislature encompasses only the portion of the roadway that is between the lines or stripes that demarcate the “single lane,” and that a driver who drives on a lane marker has necessarily failed to drive entirely within a single lane. Id.

In another case cited by this Court in Vinson, People v. Smith, the defendant argued that two “momentary” drifts into an adjacent lane did not violate the state’s failure

to maintain a single lane statute (which is also nearly identical to South Carolina's statute) and that a person could only violate this statute by endangering others while moving from a lane of traffic. People v. Smith, 172 Ill.2d 289, 296, 665 N.E.2d 1215, 1218 (1996). In rejecting this argument, the Illinois Supreme Court found as follows:

The plain language of the statute establishes two separate requirements for lane usage. First, a motorist must drive a vehicle as nearly as practicable entirely within one lane. Second, a motorist may not move a vehicle from a lane of traffic until the motorist has determined that the movement can be safely made. It follows that when a motorist crosses over a lane line and is not driving as nearly as practicable within one lane, the motorist has violated the statute. Once Officer Charles saw defendant cross over a lane line and drive in two lanes of traffic, Officer Charles had probable cause to arrest defendant for a violation of the Code.

Id. at 296-97, 665 N.E.2d at 1218-19.

The Oregon Court of Appeals reached a similar conclusion in State v. McBroom, 179 Or.App. 120, 39 P.3d 226 (Or. App. Ct. 2002). In McBroom, an officer stopped the defendant after observing him driving on top of the closer of the double yellow dividing lines and staying on that line for at least three-hundred feet. McBroom at 122, 39 P.3d at 227. The statute at issue in that case stated that a person commits the offense of "failure to drive within a lane" if the person operates a vehicle on a roadway that is divided into two or more clearly marked lanes for traffic and the driver does not "(a) operate the vehicle as nearly as practicable entirely within a single lane; and (b) [r]efrain from moving from that lane until the driver has first made certain that the movement can be made with safety." Id. at 123, 39 P.3d at 228. Looking to the statute's text and policy, the court rejected the defendant's argument that he stayed within a single lane even though his tires were on the double yellow line. Id. at 123-24, 39 P.3d at 228. The court reasoned that the text of the statute indicated the legislature intended that drivers stay

“within” the lines that mark the lanes and that “the legislature did not intend to permit opposing motorists to vie for control of the center dividing line.” Id. The court also pointed out that the policy of the statute - to provide maximum safety for all persons who travel or otherwise use the public highways of the state - was defeated if the defendant’s position was correct. Id.

The McBroom court pointed out that the statutory requirement that a driver stay “entirely within a single lane” is not absolute because it modifies the phrase with “as nearly as practicable.” Id. The court stated that “[p]racticable means ‘possible to practice or perform,’ ‘capable of being put into practice, done or accomplished’ or ‘feasible,’” and that what is practicable or feasible will vary with the circumstances of each case. Id. at 124-25, 39 P.3d at 228. The court then stated that “[t]here is nothing in this record, however, to suggest the defendant failed to stay within his lane because he was responding to an apparent hazard or because he had some other valid reason for leaving his lane. Rather, defendant drove for more than 300 feet on the center line for no apparent reason. Given those facts, the officer reasonably believed that defendant had failed to stay ‘within his lane’ in violation of subsection (a) of the statute.” Id. at 125, 39 P.3d at 228-29. The court then noted that “[t]his is not a case in which the defendant’s car tires touched the center line only briefly. We accordingly need not decide whether that act, standing alone, would give an officer probable cause to believe that a driver had failed to operate his or her car ‘as nearly as practicable entirely within a single lane.’” Id.

The defendant in McBroom also argued in the alternative that, even if he failed to stay entirely within a single lane, he still did not violate the statute unless he also failed to comply with part (b), which required that a driver refrain from moving from his or her

lane until the driver has first made certain the movement can be made with safety. Id. The court rejected this argument, stating that it disagreed that subsection (b) “permits a driver to stray from his or her lane (or straddle two lanes) as long as he or she can do so safely.” Id. The court reasoned as follows:

Subsection (a) thus states the general rule - a driver should operate his or her vehicle “as nearly as practicable entirely within a single lane.” Subsection (b) states when a driver may depart from that rule. By its plain language, however, subsection (b) does not excuse drivers from staying within their lanes unless (1) they are moving from one lane to another and (2) they first make certain that they can do so safely.

Id. at 125-26, 39 P.3d at 229. The court pointed out that the defendant was not claiming he was moving from one lane to another at the time of the alleged violation, and, in any event, “the officer reasonably could have concluded that defendant was not moving from one lane to another when he failed to stay within his lane.” Id. Thus, the McBroom court held that the officer had probable cause to believe the defendant violated the statute and that the trial court correctly denied the motion to suppress. Id.

In State v. Hodge, 147 Ohio App.3d 550, 771 N.E.2d 331 (Ohio App. Ct. 2002), the Ohio Court of Appeals also addressed the propriety of a traffic stop for an alleged violation of a nearly identical “failure to maintain a single lane” statute. In Hodge, the officer observed the defendant drifting over into an adjacent lane, although the officer testified this partial crossing posed little danger because there was no other traffic on the road at the time. Hodge at 552-53, 771 N.E.2d at 333. The appellate court first noted that beginning in 1994, the Ohio courts repeatedly held that “insubstantial drifts” across lane lines did not give rise to reasonable and articulable suspicion to make a traffic stop. Id. at 555, 771 N.E.2d at 335. However, the court found that these cases were of limited precedential value in light of the United States Supreme Court’s decision in Whren v.

United States, 517 U.S. 806 (1996), which held that even a *de minimis* violation of a traffic law gives rise to a reasonable suspicion to make an investigatory stop of a vehicle. Id. at 555-57, 771 N.E.2d at 335-36. Thus, the court explicitly overruled these pre-Whren cases. Id. at 557, 771 N.E.2d at 337.

The Hodge court then stated that the necessary analysis focuses upon the meaning of “practicable” in reference to maintaining a vehicle within a lane pursuant to the statute. Id. Using the ordinary definition of the word and common sense, the court stated that “practicable” meant “performable, feasible, possible.” Id. at 558, 771 N.E.2d at 337. The court noted that other jurisdictions generally agree with this definition. Id. at 558, 771 N.E.2d at 338. The court then ruled that “[w]hen read in this context, the statute without question mandates drivers to maintain their vehicle (sic) within a lane without some kind of exigent circumstance forcing the vehicle operator to do otherwise.” Id. The court explained:

The legislature did not intend for a motorist to be punished when road debris or a parked vehicle makes it necessary to travel outside the lane. Nor, we are quite certain, did the legislature intend this statute to punish motorists for traveling outside their lane to avoid striking a child or animal. We are equally certain the legislature did not intend the statute to give motorists the *option* of staying within the lane at their choosing. Common sense dictates that the statute is designed to keep travelers, both in vehicles and pedestrians, safe. The logical conclusion is that the legislature intended only special circumstances to be valid reasons to leave a lane, not mere inattentiveness or carelessness. To believe that the statute was intended to allow motorists the option of when they will or will not abide by the lane requirement is simply not reasonable.

Id. (emphasis in original). The court concluded that “Hodge committed a readily apparent traffic violation: he left the lane in which he was traveling when it was practicable to stay within his own lane of travel.” Because of this, and because the officer also witnessed

two other traffic violations, the court concluded the officer had a reasonable and articulable suspicion that a violation of the law occurred. Id. at 560, 771 N.E.2d at 339.

In Appellant's case, Deputy Gilbert had probable cause to stop Appellant's vehicle for a violation of S.C. Code § 56-5-1900(a) based upon Appellant's driving on top of the lane marker "several times." (R. p. 13, line 23 – p. 14, line 3). As noted in Vinson, a motorist cannot be driving "entirely within" a single lane if he or she is driving on top of the lane marker because such an interpretation would lead to the absurd result that two vehicles could both properly occupy the same space at the same time. Vinson at 354, 734 S.E.2d at 185 n3 (citing U.S. v. Bassols, 775 F.Supp.2d 1293, 1300-01 (D.N.M.2011)). Further, as was also noted in Vinson, the purpose of the statute is to keep both drivers and pedestrians safe, "not to allow motorists the option of when they will or will not abide by a lane requirement." Id.; cf. State v. Parker, 271 S.C. 159, 161, 245 S.E.2d 904, 905 (1978) (construing S.C. Code § 56-5-1810, which requires, among other things, that vehicles be driven on the right half of the roadway subject to certain exceptions). Therefore, Appellant's driving on top of the lane marker meant he was not "entirely within" a single lane.

Moreover, just as in the Vinson case, there was no evidence it was not "practicable" for Appellant to stay entirely within his lane at the time.⁴ "Practicable" has been defined as "reasonably capable of being accomplished, feasible." Black's Law Dictionary (9th ed. 2009). Our Supreme Court has defined it in other settings to mean "reasonably possible" or "that which is possible of reasonable performance" or "capable of and being done or performed." See Woody v. S.C. Power Co., 202 S.C.

⁴ Note that Appellant did not argue at trial or on appeal that it was not practicable for him to drive within his lane. (See R. p. 84-88; see Brief of Appellant, p. 13-16).

73, 24, S.E.2d 121 (1943); Fort Sumter Hotel v. S.C. Tax Comm., 201 S.C. 50, 21 S.E.2d 393, 396 (1942). Taken in context, the term "as nearly as practicable" means that a driver must remain in his single lane unless an exigent circumstance makes the operation of the vehicle in the single lane impossible. Other jurisdictions have construed this statutory term similarly. See People v. Smith, 665 N.E.2d 1215 (Ill. 1996); Texas Dep't of Public Safety v. Chang, 994 S.W.2d; State v. Hodge, 771 N.E.2d 331 (Ohio 2002); Unverzagt v. Prester, 13 A.2d 46 (Pa. 1940); Beech Fork Coal Co. v. Pocahontas Corp., 152 S.E.785 (W.Va. 1930); People. ex rel. Williams v. Errant, 82 N.E.271 (1907).

In Appellant's case, it is clear from the record and the video of the traffic stop that there were no exigent circumstances or adverse driving conditions making in impracticable for Appellant to stay entirely within his lane of travel. It was early afternoon on a clear day and Appellant was driving on a well-maintained, normal interstate. (See State's Exhibit #2, DVD, at 00:54:20-30). Significantly, after the officer explained the reason for the stop, i.e., Appellant's driving on top of the lane marker several times, Appellant made no claim that some emergency or road condition made it impracticable for him to stay within his lane. (See State's Exhibit #2, DVD, at 00:55:17-52). Accordingly, since Appellant failed to stay entirely within his lane despite the fact that it was "practicable" for him to do so, Deputy Gilbert had probable cause to stop Appellant's vehicle. See, e.g., State v. Williams, 351 S.C. at 598, 571 S.E.2d at 707 (the initiation of a traffic stop is reasonable *per se* when probable cause exists to believe a traffic violation has occurred).

Appellant argues for the first time on appeal that because he “could have legally and safely changed lanes at the time he allegedly struck the white dotted line dividing the middle lane and the far left lane, [he] did not violate § 56-5-1900(a).” (Brief of Appellant, p. 15-16). (See R. p. 84-88). In addition to not being preserved for review, this argument is without merit. As explained in the Smith and McBroom cases discussed above - which were both cited in this Court’s opinion in Vinson - the failure to maintain a single lane statutes generally state two distinct requirements for lane usage. The first part requires that a motorist drive a vehicle as nearly as practicable entirely within one lane. The second part states that a motorist may not *move* a vehicle from a lane of traffic - i.e., change lanes - until the motorist has determined the movement can be safely made. The second part of the statute does not, however, excuse drivers from staying within their lanes as required by first part unless they are actually moving from one lane to another and they first make certain that they can do so safely. In Appellant’s case, the second part of the statute does not apply because Appellant was not performing a lane change. At the very least, Deputy Gilbert could have reasonably concluded Appellant was not changing lanes at the time he failed to stay entirely within his lane. See McBroom at 125-26, 39 P.3d at 229. Therefore, Appellant’s argument that he could have legally changed lanes is of no avail.

The two Texas cases Appellant cites in support of his position are, in the State’s view, poorly reasoned, and are in any event distinguishable. (See Brief of Appellant, p. 16). In both cases, the Texas Court of Appeals construed a statute that required drivers to drive “as nearly as *practical*” entirely within a single lane. See State v. Cerny, 28 S.W.3d 796, 800 (Tex. App. Ct. 2000) & Hernandez v. State, 983 S.W.2d 867, 871 (Tex. App.

Ct. 1998) (emphasis added). Our South Carolina statute requires motorists to drive “as nearly as *practicable*” entirely within a single lane. See S.C. Code § 56-5-1900(a) (emphasis added). The terms “practical” and “practicable” have different meanings and the distinction was not lost on the Texas Court of Appeals. In Hernandez, the Texas Court of Appeals explained the difference in the two terms as follows: the term “practicable” has “a somewhat more definite meaning: ‘capable of being accomplished; feasible; possible,’” while the term “practical” “is more ambiguous: manifested in practice; capable of being put to good use.” Hernandez at 871 (citation omitted). Since the statute discussed in Appellant’s Texas cases contains language meaningfully different than the language in South Carolina’s statute, this Court should give little or no weight to these cases as persuasive authority.

In sum, the initial stop of Appellant was justified because Appellant’s drifting back and forth within his lane several times provided Deputy Gilbert with reasonable suspicion that Appellant was impaired or under the influence, and because Appellant’s driving on top of the lane marker several times provided Deputy Gilbert with probable cause that Appellant violated S.C. Code § 56-5-1900(a).

Detention of Appellant

Discussion of Recent Cases

In State v. Provet, an officer stopped the defendant on I-85 in Greenville County for following another vehicle too closely and driving with a burned-out tag light. 405 S.C. 101, 105, 747 S.E.2d 453, 455 (2013). As the defendant produced his license and registration, the officer - who had fourteen years of experience with the South Carolina Highway Patrol and four years of experience in the Aggressive Criminal Enforcement

("ACE") unit - noticed that the defendant's hands were shaking excessively and that his breathing was accelerated. Id. at 105-106, 747 S.E.2d at 455-56. After discovering that the vehicle was registered to a third party, the officer asked the defendant to step to the rear of the car and he performed a pat-down search which did not yield any weapons. Id. at 106, 747 S.E.2d at 455-56. As the officer prepared a warning citation for the traffic violations, he asked the defendant where he was coming from, and the defendant stated he had been visiting a girlfriend at a nearby Holiday Inn; however, the officer had just observed the defendant pass the exit at which the only Holiday Inn in Greenville was located. Id. at 106, 747 S.E.2d at 456. The defendant was unable to tell the officer the exit number of the Holiday Inn he had just left and denied having gone anywhere else after leaving the Holiday Inn. Id. In response to further questions, the defendant explained that the car he was driving belonged to a different girlfriend than the one he had just visited; that he had recently graduated from technical college and was unemployed; and that he had been in Greenville for two days but did not have any luggage. Id. At that point the officer called for a canine drug detection unit and also called dispatch to check on the status of the defendant's license and the vehicle's registration. Id.

When the officer approached the car to check the vehicle identification number, he noticed that the car contained several air fresheners, several fast food bags, a cell phone, some receipts, and a bag on the rear seat. Id. The canine unit arrived prior to the officer's receipt of the dispatcher's return call regarding the status of the license and registration; however, when dispatch reported no problems with either the license or registration, the officer returned the license and registration papers to the defendant and

issued him a warning citation. Id. After doing so, the officer requested permission to search the defendant's vehicle, and the defendant consented. Id. As another officer prepared the drug detection dog to perform a search, the defendant fled the scene on foot but was apprehended. Id. The dog alerted to a fast food bag in the car, and the subsequent search of the bag yielded a substance that field tested positive for cocaine. Id.

At trial, the defendant moved to suppress the cocaine found in the fast food bag, arguing that the cocaine was obtained as a result of an illegal detention and search. Id. The trial court found that the second detention of the defendant, which began when the officer requested permission to search the vehicle, was justified by the officer's reasonable suspicion that the defendant was involved in criminal activity and also found that the defendant voluntarily consented to the search. Id. at 106-107, 747 S.E.2d at 456. The Court of Appeals affirmed. See State v. Provet, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011). Regarding the initial detention, the Court found the stop was proper as the officer's questioning was tangentially related to the traffic stop. Id. at 499, 706 S.E.2d at 516. The Court further found the questioning did not unreasonably extend the traffic stop because the officer had not completed the initial purpose of the stop and the stop was only eleven minutes long. Id. at 499-500, 706 S.E.2d at 516.

Regarding the extension of the traffic stop after the warning was issued, the Court determined the officer possessed reasonable suspicion to extend the stop based on the presence of the following factors: (1) Provet's nervous behavior; (2) the fact third-party vehicle registration is common in drug trafficking; (3) Provet's inconsistent or deceptive responses to several questions; (4) the presence of numerous fast food bags, a cell phone, and some receipts; and (5) the presence of numerous air fresheners. Id. at 504-505, 706

S.E.2d at 518-519. Based on the factors present coupled with the officer's considerable experience, the Court of Appeals concluded the trial court did not err in finding an extension of the stop was justified under the circumstances. Id. at 506, 706 S.E.2d at 519-520.

The South Carolina Supreme Court also upheld the denial of the defendant's motion to suppress. Provet at 109-13, 747 S.E.2d at 457-59. The Supreme Court held that the officer's off-topic questioning did not measurably extend the duration of the stop, where the time from initial seizure up until the point the officer requested consent to search the defendant's vehicle was only approximately ten minutes.⁵ Id. at 109, 747 S.E.2d at 457-58. Importantly, the Supreme Court also took the opportunity to clarify that, to the extent that State v. Rivera, 384 S.C. 356, 682 S.E.2d 307 (Ct.App. 2009), suggested that police questioning must bear some relationship to the purpose of the stop in order to withstand Fourth Amendment scrutiny, it was incorrect. Id. at 110, 747 S.E.2d at 458. The Provet court also stated that "[t]o the extent Rivera suggests that shifting the conversation to another topic marks the end of the lawful seizure even though the citation has not been issued, regardless whether such off-topic conversation measurably extends the duration of the initial seizure, it is also incorrect." Id. Further, "[t]o the extent other South Carolina cases contain similar language, we note that language has likewise been superseded." Id. at 111, 747 S.E.2d at 458.

The Supreme Court also concluded that the officer had reasonable suspicion to detain the defendant in order to request his permission to search the vehicle. Id. at 111-

⁵ The Court also noted that "the proper inquiry is not whether an officer 'unreasonably' extended the duration of the traffic stop with his off-topic questions but whether he 'measurably' extended it. This is a temporal inquiry, not a reasonableness inquiry." Provet at 111, 747 S.E.2d at 458 (citation omitted).

12, 747 S.E.2d at 459. The following factors were relevant to the reasonable suspicion determination: (1) the officer's testimony that the defendant exhibited extreme nervousness, as evidenced by shaking hands and accelerated breathing, which was excessive in comparison to people he pulled over who were not involved in criminal activity other than a traffic violation; (2) the vehicle's registration to a third party; (3) the defendant's apparent deception regarding where he was coming from; (4) the defendant's claim that he was unemployed yet was able to afford to stay in a hotel and buy large quantities of gasoline for his large vehicle; (5) the presence of numerous air fresheners in the vehicle, which indicated to the officer that the defendant was seeking to mask odors; (6) the presence of numerous fast food bags, receipts, and the cell phone, which the officer testified were all consistent with the tight schedule maintained by drug traffickers; and (7) the fact that the defendant claimed to have no luggage but the officer observed a bag on the rear seat that could have been a luggage bag. *Id.* at 111-12, 747 S.E.2d at 459. The Supreme Court held that the officer had reasonable suspicion supported by articulable facts that criminal activity was afoot, justifying a second seizure, and that because the record contained evidence supporting the trial court's finding of reasonable suspicion, the Court was required to affirm due to the deferential standard of review. *Id.* at 112, 747 S.E.2d at 459.

In State v. Wallace, Wallace was stopped on Interstate 85 for committing a traffic violation. Wallace, 392 S.C. at 50, 707 S.E.2d at 452. The officer took twelve minutes to complete the traffic stop and issued Wallace a citation. *Id.* However, based on his observations during the stop, the officer continued to question Wallace after issuing the ticket and requested consent to search the vehicle. *Id.* Wallace refused consent, and the

officer walked a drug-sniffing dog around the vehicle. Id. The dog alerted on Wallace's car, and a substantial quantity of cocaine was discovered inside. Id. During trial, Wallace moved to suppress the drugs found in his vehicle, and the trial judge denied the motion. Id.

On appeal, the Court of Appeals affirmed the trial judge's ruling. Id. The Court determined the following factors observed by the officer during the traffic stop established a reasonable articulable suspicion to extend the duration of the stop: (1) Wallace's abnormal braking after the officer initiated the stop; (2) Wallace's fumbling of his paperwork for an unusually long period of time; (3) the fact the passenger stared straight ahead and did not acknowledge the officer; (4) Wallace and the passenger's inconsistent responses about their trip; (5) Wallace's increasing nervousness throughout the stop; (6) the fact an unknown car pulled up behind Wallace's vehicle for several minutes during the stop; (7) Wallace's cell phone ringing during the stop; (8) the fact drug dealers frequently use decoy cars and communicate via cell phones; (9) the fact the passenger would not look at the officer while they were talking; (10) the fact the passenger was sweating and visibly nervous on a mild day; (11) the fact Wallace changed his story after the officer spoke with his passenger; (12) the fact the car was owned by a third-party, which is common in drug cases; (13) Interstate 85's status as a known drug corridor; and (14) Atlanta's status as a known drug hub. Id. at 55, 707 S.E.2d at 455. While noting none of the factors taken in isolation established a reasonable articulable suspicion of criminal activity, this Court held the presence of all of the factors established a reasonable suspicion when examined in totality as required. Id.

Similarly, in State v. Jones, Jones was stopped for speeding on I-85 in Spartanburg County. 364 S.C. 51, 53, 610 S.E.2d 846, 847 (Ct. App. 2005). While in the process of issuing a traffic ticket, the officer, as a part of his routine procedure, asked Jones where he had been coming from. Id. Jones indicated he and the other two occupants of the vehicle had been in Greenville visiting his cousin and stated that they had stayed in a hotel. Id. However, Jones was unable to provide the name or location of the hotel. Id. Jones then changed his story and told the officer he stayed with his cousin, but was unable to provide his cousin's name or the location of his cousin's residence. Id. at 53-54, 610 S.E.2d at 847. Jones appeared "very nervous" and was sweating profusely despite the fact that it was a cool day. Id. at 54-55, 610 S.E.2d at 847-48.

Although Jones had provided his driver's license, he did not produce the vehicle's registration; therefore, the officer requested the passenger's assistance in locating the registration. Id. As the passenger fumbled through some paperwork looking for the registration, the officer asked him where they were coming from. Id. The passenger responded that they had been in Spartanburg for the last two days but could not remember specifically where they had been. Id. Then the backseat passenger stated that they had been in Atlanta that morning, not Spartanburg. Id. At that point, the officer asked Jones if there were any weapons in the vehicle or any other items he needed to know about; Jones responded that there were not. Id. The officer then asked for permission to search the vehicle and Jones consented. Id. at 54, 610 S.E.2d at 847-48. Immediately thereafter, approximately seven minutes into the stop, the officer made a call requesting backup. Id. It took three to four minutes for the backup officer to arrive, and during this time, the initial officer continued to fill out paperwork related to the speeding

ticket. Id. at 54, 610 S.E.2d at 848. About the time the backup officer arrived, the front seat passenger jumped out of the vehicle with a white towel in his hand. Id. The officers gave chase and observed the passenger throwing objects in the bushes as he ran. Id. at 55, 610 S.E.2d at 848. These objects were subsequently retrieved and were determined to contain more than 230 grams of crack cocaine. Id.

Jones moved to suppress the crack cocaine, arguing it was found as a result of an unconstitutionally prolonged detention. Id. He further argued that the questioning of Jones and the passengers was a deliberate ruse so the officer could eventually search the car. Id. The trial judge denied the motion, finding that the traffic stop lasted a reasonable amount of time; that any prolonging was due to the fact that Jones did not immediately produce the car's registration; and that there was no constitutional violation with regard to the officer's casual conversation with Jones and the passengers regarding where they had been coming from. Id. Finally, the trial judge determined that whether or not Jones gave valid consent to search was irrelevant where no search was carried out pursuant to the consent because the passenger jumped out and fled with the drugs after being detained no more than eleven minutes. Id. at 55-56, 610 S.E.2d at 848.

On appeal, Jones relied on this Court's decision in State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct. App. 2002), arguing that Williams mandated reversal of the trial judge. Jones at 56, 610 S.E.2d at 848. This Court disagreed and held that the Williams case was "easily distinguishable" because in Williams, the driver and passenger were clearly detained beyond the scope of the traffic stop where the officer did not begin to question them until after he had completed the ticket and returned the driver's license and registration. Id. at 57, 610 S.E.2d at 849. In other words, only **after** completing the

purpose of the traffic stop did the officer begin to ask questions that led to his becoming suspicious. See Williams, 351 S.C. at 595-96, 571 S.E.2d at 705-706; cf. State v. Tindall, 388 S.C. 518, 522, 698 S.E.2d 203, 205 (2010) (pointing out that, although at this point, the purpose of the traffic stop was accomplished except for the issuance of the warning ticket, rather than issue the ticket, the officer continued to question the defendant for an additional six to seven minutes). The Jones court found no Fourth Amendment violation where the officer did not question Jones and his passenger after returning Jones's license and registration; the questions the officer asked during the traffic stop did not exceed the scope of the traffic stop such as would convert the stop into an illegal detention, particularly where the detention was not for an unreasonably long time; and the purpose of the traffic stop had not yet been completed at the time Patterson ran with the drugs. Id. at 58, 610 S.E.2d at 850. In conclusion, this Court stated: "[i]n the case at hand, there is evidence to support the trial judge's findings and we cannot say his findings are clearly erroneous. We therefore find no abuse of discretion." Id. at 59, 610 S.E.2d at 850.

No Measureable Extension of the Traffic Stop

The State first submits that there was no unlawful detention beyond the scope of the traffic stop. As the Supreme Court stated in Provet, off-topic questioning by the officer is permissible where it does not **measurably** extend the traffic stop. See Provet, 405 S.C. at 108-111, 747 S.E.2d at 457-59; see also Arizona v. Johnson, 555 U.S. 323, 333 (2009); Muehler v. Mena, 544 U.S. 93, 100-101 (2005). In his Brief, Appellant indicates that the purpose of the traffic stop was completed around fifteen minutes and ten seconds into the stop, when Deputy Gilbert puts away his pen, rips the warning off the pad, and places the warning in his right hand. (See Brief of Appellant, p. 19).

Assuming Appellant's interpretation of the video is correct,⁶ the additional minute of discussion before Deputy Gilbert requested consent to search did not measurably extend the stop so as to render it an unlawful second detention. See Provet, Johnson, Mena; see also U.S. v. Mason, 628 F.3d 123, 131-32 (4th Cir. 2010) (stating that brief discussion about matters unrelated to the traffic violation does not violate the Constitution and finding that one to one and a half minutes of questioning on matters unrelated to the traffic stop did not measurably extend the traffic stop); U.S. v. Olivera-Mendez, 484 F.3d 505, 510 (8th Cir.2007) (“[A]n officer does not violate the Fourth Amendment by asking a few questions about matters unrelated to the traffic violation, even if this conversation briefly extends the length of the detention” (citing U.S. v. Alcaraz-Arellano, 441 F.3d 1252, 1259 (10th Cir.2006); U.S. v. Burton, 334 F.3d 514, 518–19 (6th Cir.2003); U.S. v. Childs, 277 F.3d 947, 951–54 (7th Cir.2002) (en banc))); U.S. v. Everett, 601 F.3d 484, 492–94 (6th Cir.2010) (relying on Mena and Johnson in holding that brief questioning unrelated to the purpose of a traffic stop does not violate the Fourth Amendment); U.S. v. Derverger, 337 F. App'x 34, 36 (2nd Cir. 2009) (concluding that five minutes of additional questioning did not significantly extend the time the defendant was detained); U.S. v. Harrison, 606 F.3d 42, 45 (2nd Cir. 2010) (finding that an officer who had all of the information necessary to issue a traffic ticket after speaking with the driver did not measurably extend the traffic stop by subsequently speaking with the passengers for several minutes in an attempt to corroborate the driver's story); cf. State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010) (holding that an officer's continued questioning of the defendant for “an additional six to seven minutes,” as the defendant sat in a patrol car

⁶ It is not entirely clear what is occurring in the video because Deputy Gilbert is mostly off-camera at this point. (See State's Exhibit #2, DVD, at 01:09:30).

with a police dog in the back and two other officers standing outside the patrol car, exceeded the scope of the traffic stop and constituted a second seizure).

In fact, at the time Deputy Gilbert requested consent to search, only about sixteen minutes had elapsed since the commencement of the traffic stop. Cf. Provet, 405 S.C. at 109, 747 S.E.2d at 457-458 (approving a ten-minute detention as reasonable and not measurably extended); U.S. v. Sharpe, 470 U.S. 675, 683 (1985) (concluding that a twenty-minute detention during an investigatory traffic stop was objectively reasonable); Branch, 537 F.3d at 338 (stating that a thirty-minute detention was justified by the ordinary inquiries incident to a routine traffic stop); U.S. v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (finding a fifteen-minute traffic stop to be reasonable); U.S. v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) (approving of a thirty-minute traffic stop); U.S. v. Hardy, 855 F.2d 753, 761 (11th Cir. 1988) (finding a fifty-minute investigatory stop to be reasonable); U.S. v. Jeffus, 22 F.3d 554, 557 (4th Cir.1994) (approving fifteen-minute traffic stop); U.S. v. Mincey, 321 Fed.Appx. 233, 240-42 (4th Cir.2008) (approving a thirty-five-minute stop); U.S. v. Jones, 289 Fed.Appx. 593, 598-600 (4th Cir.2008) (twenty minute stop); U.S. v. Ramirez, 29 Fed.Appx. 111, 113-14 (4th Cir.2002) (fifteen minute stop); U.S. v. Purcell, 236 F.3d 1274, 1279 (11th Cir. 2001) (fourteen minutes); U.S. v. Olivera-Mendez, 484 F.3d 505, 510 (8th Cir. 2007) (fifteen minutes).

Although Deputy Gilbert acknowledged he waited for another officer to arrive before he asked for consent to search Appellant's vehicle, any questioning of Appellant that was unrelated to the traffic stop, including the officer's request for consent to search, did not measurably extend the traffic stop. Further, the overall detention length of sixteen

minutes was also reasonable. Accordingly, there was no unlawful detention of Appellant beyond the scope of the traffic stop.

Reasonable Suspicion Supported a Continued Detention

However, even assuming there was a detention beyond the scope of the traffic stop, a continued detention was permissible because, prior to the time Deputy Gilbert requested permission to search Appellant's car, he had acquired reasonable suspicion of criminal activity. Specifically, Deputy Gilbert's decision to extend the stop was supported by the following factors: (1) Deputy Gilbert's fourteen years of experience in law enforcement and his extensive interdiction training; (2) the fact that as soon as Appellant passed Deputy Gilbert, who was parked on the side of the road, he began weaving in his lane, suggesting he was looking back at the officer in his rearview mirror and was concerned about his presence; (3) the fact that the cargo area of Appellant's vehicle contained luggage covered by a blanket, which could be viewed as a tactic to divert attention to the luggage and away from other areas in the vehicle;⁷ (4) the fact that Appellant immediately questioned Deputy Gilbert about the reason he was being stopped, which suggested Appellant was nervous and which Deputy Gilbert testified was unusual in his experience because ninety-nine percent of the time people allow him to reach that point on his own; (5) the fact that Appellant had placed an air freshener in the driver's door pocket of his rental vehicle despite the fact that he denied being a smoker; (6) the fact that Appellant had placed two house keys on the same ring as the rental car key, which Deputy Gilbert stated he had not seen in his fourteen years of experience and

⁷ This diversionary tactic worked well in Appellant's case as illustrated by the fact that Deputy Gilbert began his search with the luggage covered by a blanket and continued searching this area for an extended period. (See State's Exhibit #2, DVD, at 01:12:55 – 01:19:48).

which he interpreted as Appellant attempting to "personalize" the vehicle; the fact that Appellant's house keys were on the rental car key ring was especially suspicious where Appellant was, according to his story, not going home but was instead going to visit his mother in New Jersey; (7) the fact that Appellant was traveling in South Carolina, a state not permitted in the rental contract, and that Appellant stated he was going to New Jersey, another state not listed in the rental contract; (8) the fact that Appellant's stated travel plans did not match up with the information in the car rental contract, and that his story about bringing his mother back for Mother's Day, which was more than a month away, further conflicted with his previously-stated travel plans; (9) the fact that Appellant initially lied about the fact that his license had been suspended in the past and only admitted the previous suspension after Deputy Gilbert ran the license check; (10) the fact that Appellant was coming from the Atlanta area (a well-known drug hub) and was traveling on Interstate 85 (a major crime corridor); (11) the fact that the vehicle was rented by a third party who was not present in the vehicle, and that this third party rental was done in a female's name inasmuch as Deputy Gilbert stated that in his training and experience, many drug trafficking organizations rent vehicles using female names in an attempt to throw off suspicion; (12) the fact that Appellant stated he had six children but then gave the ages for seven children, which Deputy Gilbert stated indicated to him that the "stress of the situation" was affecting Appellant.

Taking into account Deputy Gilbert's extensive experience and training, his observation of the above indicators, considered together under the totality of the circumstances, provided him with reasonable suspicion that Appellant was involved in drug activity, and this reasonable suspicion was sufficient to justify a brief continued

detention to allow Deputy Gilbert to request voluntary consent to search Appellant's car. See Wallace, 392 S.C. at 55, 707 S.E.2d at 455 (finding inconsistent stories, third-party vehicle ownership, and Atlanta's status as a drug hub to be relevant factors in establishing a reasonable articulable suspicion of drug activity); Provet, 391 S.C. at 504, 706 S.E.2d at 518 (considering the fact that third-party vehicle ownership is commonly connected with drug trafficking in finding that an officer had reasonable suspicion to extend a traffic stop); United States v. Davis, 636 F.3d 1281, 1291 (10th Cir. 2011) ("our cases note drug traffickers often use rental vehicles to transport narcotics"); see also Robinson v. State, 407 S.C. 169, 184, 754 S.E.2d 862, 870, n. 9 (2014) ("[T]he facts and inferences relied on by the officer must be articulable, not necessarily articulated.") (emphasis in original); cf. State v. Tindall, 388 S.C. 518, 523, 698 S.E.2d 203, 206 (2010) (finding that the following four factors were insufficient to establish reasonable suspicion: (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).

Although some of the factors observed by Deputy Hines might appear to be consistent with innocent travel to a person lacking the officer's experience and training, all of the factors **taken together** established a reasonable articulable suspicion Appellant was involved in drug activity. See Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014) (referencing the Provet opinion and pointing out that "[d]espite the fact that the Court agreed with the defendant that the existence of several factors were indicative of innocent travel, the Court noted, "we must affirm when any evidence in the record

supports” the trial court's finding.”) (emphasis in original), citing Provet at 112, 747 S.E.2d at 459; U.S. v. Arvizu, 534 U.S. 266, 277-78 (2002) (“A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct. Undoubtedly, each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for Stoddard's stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment.”) (citation omitted); Illinois v. Wardlow, 528 U.S. 119, 130 n4 (2000) (noting that in Terry v. Ohio, “reasonable suspicion was supported by a concatenation of acts, each innocent when viewed in isolation, that when considered collectively amounted to extremely suspicious behavior”); U.S. v. Sokolow, 490 U.S. 1, 10 (1989) (reiterating that in making a determination regarding probable cause, the relevant inquiry is not whether particular conduct is innocent or guilty but the degree of suspicion that attaches to particular types of *noncriminal acts*; that principle applies equally well to the reasonable suspicion inquiry) (citations omitted); see State v. Taylor, 401 S.C. at 113, 736 S.E.2d at 667 (reiterating the “well-settled principle that courts must give due weight to common sense judgments reached by officers in light of their experience and training”); State v. Burgess, 394 S.C. 407, 414, 714 S.E.2d 917, 920 (Ct. App. 2011) (failing to afford the proper weight to an officer's inferences stemming from his experience would be to fail to consider the totality of the circumstances) (citation omitted); Taylor at 108, 736 S.E.2d at 665 (instructing that courts must consider the cumulative information available to the officer and pointing out that each individual factor might not alone give rise to reasonable suspicion) (citations omitted); see also Mason, 628 F.3d at 129 (“[J]ust as one corner of a

picture might not reveal the picture's subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”). Accordingly, Appellant's detention for the brief period of time it took to request consent to search his car was not unlawful, and the trial judge's denial of Appellant's suppression motion should be affirmed. See Provet, 405 S.C. at 107, 747 S.E.2d at 456 (“South Carolina appellate courts review Fourth Amendment determinations under a clear error standard. We affirm if there is any evidence to support the trial court's ruling.” (citations omitted)); State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (“When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.”). Because reasonable suspicion justified a second detention of Appellant, this Court should affirm the trial court's denial of Appellant's suppression motion.

Consent to Search

“Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent.” Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999). “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. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005) (emphasis in original). Whether consent to a search is voluntary is a question of fact to be determined from the totality of the circumstances. State v. McKnight, 352 S.C. 635, 656, 576 S.E.2d 168, 179 (2003).

In Appellant's case, since Deputy Gilbert possessed reasonable suspicion of criminal activity at the time he requested permission to search Appellant's vehicle, Appellant's subsequent consent to the search was not the product of any unlawful detention. See Provet at 114-15, 747 S.E.2d at 460 (where the officer had reasonable suspicion for an additional seizure and the defendant's consent was voluntary, there was no Fourth Amendment violation); State v. Willard, 374 S.C. 129, 135-36, 647 S.E.2d 252, 256 (Ct. App. 2007) (same); see also U.S. v. Boone, 245 F.3d 352, 362 (4th Cir. 2001) ("If individual voluntarily consents to a search while justifiably detained on reasonable suspicion, the products of the search are admissible.") (citing Florida v. Royer, 460 U.S. 491, 502 (1983)).

The record also supports that Appellant's consent was freely and voluntarily given. Deputy Gilbert requested permission to search Appellant's vehicle only sixteen minutes into the stop. (R. p. 37, lines 1-6; p. 62-66). Appellant appeared to have the education necessary to understand what Deputy Gilbert was asking of him. (R. p. 39, lines 15-17). Deputy Gilbert had given no indication to Appellant that he was not free to leave and did not suggest Appellant would be detained if he declined to provide consent. Further, even though Appellant initially agreed to the search after asking what "all this" was about, rather than immediately searching Appellant's vehicle, Deputy Gilbert instead specifically informed Appellant that he had the right to refuse consent to search. (R. p. 37). Deputy Gilbert never pulled out his weapon or coerced Appellant into giving consent, and no other officers were present in the vicinity at the time Deputy Gilbert

requested consent.⁸ (R. p. 38, line 25 – p. 39, line 14). After receiving a definite “yes” answer from Appellant, Deputy Gilbert proceeded to search the car, and Appellant never withdrew his consent while the search was ongoing. (R. p. 38-39; p. 40, lines 14-18). Notably, Appellant did not testify during the pre-trial hearing and there was no testimony or evidence indicating Appellant’s will was overborne or that his giving consent was anything other than the independent product of his free will.

The record supports that Appellant’s consent was voluntary and that it was not the product of an unlawful detention. Accordingly, the trial judge’s finding that Appellant’s consent was valid should be upheld. (See R. p. 98, lines 16-20). See State v. Adams, 377 S.C. 334, 339-40, 659 S.E.2d 272, 275 (Ct. App. 2008) (finding the circuit court did not abuse its discretion in finding the defendant gave consent to search his vehicle and that the consent was voluntary in nature); State v. Mattison, 352 S.C. 577, 584–85, 575 S.E.2d 852 (2003) (applying a deferential standard of review to the trial court’s findings on issues of fact regarding the voluntariness of consent).

⁸ There was no evidence refuting Deputy Gilbert’s testimony that Appellant’s back was completely turned when a second officer arrived on the scene. (R. p. 65, line 20 – p. 66, line 2). See State v. Dye, 384 S.C. 42, 48-49, 81 S.E.2d 23, 27 (Ct. App. 2009) (citation omitted) (because no competing testimony was introduced to contradict the officer’s statements, the circuit court was free to accept the officer’s version of events in making a voluntariness determination); State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (pointing out that the appellant did not testify at the Jackson v. Denno hearing and his attorney’s questions did not constitute evidence; therefore, there was no evidence in the record to contradict the officers’ version of events).

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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October 16, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

The Honorable J. Derham Cole, Circuit Court Judge

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THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

STEPHENO JEMAIN ALSTON,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's most recent **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.


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PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Lara M. Caudy**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **16th** day of **October, 2014**.


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