

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2010-156666

THE STATE,

Respondent,

vs.

MICHAEL MILLEDGE,

Appellant.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Any issue regarding the trial judge's denial of Appellant's pre-trial motion to suppress the narcotics and firearm discovered during the frisk search was not preserved for appellate review because defense counsel waived his pre-trial objection to the admission of the evidence by affirmatively indicating he had no objection at the time the evidence was introduced during trial. Regardless, the trial judge properly denied Appellant's pre-trial suppression motion and admitted the evidence during trial because the circumstances known to the officers at the time of the frisk search, including that Appellant was present in a high crime and drug area, Appellant was extremely nervous, Appellant avoided eye contact with the officers, Appellant unsuccessfully attempted to place a phone call during the traffic stop, and Appellant did not respond when asked if he was armed, reasonably led the officers to believe Appellant posed a danger to the officers and was armed and dangerous.

II.

The trial judge properly denied Appellant's directed verdict motion because the evidence and testimony presented during trial established each element of the indicted offenses, including that Appellant knowingly possessed over ten grams of crack cocaine and that Appellant possessed a firearm during the commission of the violent offense of trafficking in crack cocaine.

STATEMENT OF THE CASE

In June of 2007, Appellant Michael Milledge was arrested after officers discovered a firearm and narcotics in Appellant's pants during a traffic stop. In September of 2007, the Greenville County grand jury indicted Appellant for trafficking in crack cocaine, possession of cocaine with intent to distribute, possession of ecstasy, and possession of a weapon during the commission of a violent crime. On March 29, 2010, a jury trial was held in the Greenville County court of general sessions with the Honorable Robin B. Stilwell, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant of all of the indicted charges. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty-five years for trafficking in crack cocaine, twenty-five years for possession of cocaine with intent to distribute, five years for possession of a weapon during the commission of a violent crime, and one year for possession of ecstasy. Appellant then filed a timely notice of appeal.

Subsequently, Appellant's appellate counsel filed an Anders brief and a petition to be relieved as counsel. Thereafter, on February 2, 2012, the Court of Appeals denied the petition to be relieved as counsel and directed the parties to brief the following issue from trial along with any other issues counsel believed were present and of arguable merit: "Was the officer's frisk of Milledge permissible under the Fourth Amendment?"

STATEMENT OF FACTS

On June 27, 2007, Deputy John Lanning, Deputy Patrick Swift, and Deputy Fred Miller of the Greenville County Sheriff's Office were jointly patrolling a high crime and drug trafficking area in Greenville County when they observed Appellant Michael Milledge driving a vehicle with a large crack in its windshield. (R. pp. 24-25; p. 28; p. 33; p. 41; pp. 71-73; pp. 86-88). When the officers encountered Appellant's vehicle, Appellant was approximately one quarter of a mile away from an apartment complex where drugs were located two weeks earlier, and he was coming from the direction of the apartments. (R. p. 24; pp. 43-44). Based on the observed equipment violation, the officers decided to initiate a traffic stop, pulled over Appellant's vehicle, and approached it to speak with him. (R. p. 25; pp. 74-75; p. 88).

Upon approaching Appellant's vehicle, Deputy Lanning noticed Appellant was nervous, he was avoiding making eye contact with the officer, his hands were shaking, and he had a cell phone in one hand and his driver's license and registration in the other hand, which was unusual to the officer because he had not yet asked for those documents. (R. pp. 25-26; pp. 35-36; p. 39; p. 89). Deputy Lanning then obtained the license and registration from Appellant and moved to the rear of the vehicle while he verified Appellant's information. (R. p. 26; p. 89). Meanwhile, Deputy Swift approached Appellant's vehicle and made contact with Appellant. (R. p. 26; p. 42; p. 75). Upon doing so, Deputy Swift immediately noticed Appellant was extremely nervous and was attempting to place a call on his cell phone.¹ (R. p. 42; p. 76). However, Appellant was unable to dial the phone because his hands were shaking too violently. (R. p. 42; p. 76).

¹ During trial, Deputy Lanning, who had thirteen years of law enforcement experience, testified he was trained to look for people attempting to make phone calls during traffic stops because there had been incidents where drivers called for support against officers after being stopped. (R. p. 23; p. 26).

In response, Deputy Swift asked Appellant why his hands were shaking, and Appellant replied because he was hot. (R. p. 42; p. 76). Deputy Swift thought Appellant's response was unusual because people's hands usually shake when they are cold as opposed to hot, and he relayed that information to Appellant. (R. pp. 42-43; p. 76). Thereafter, Appellant stopped answering any of the officer's questions and began staring straight ahead while avoiding making eye contact with any of the officers. (R. pp. 43-44; p. 76).

In light of Appellant's responses and behavior, Deputy Swift grew nervous for his and his fellow officers' safety, and he asked Appellant to step out of the vehicle. (R. p. 27; pp. 43-44; p. 46; p. 77). Appellant complied with the officer's request, exited his vehicle, walked towards Deputy Lanning at the rear of the car, and continued staring straight ahead without looking at any of the officers. (R. p. 27; p. 90). Deputy Lanning then asked Appellant if he had any weapons or other objects that could be used to hurt him. (R. p. 27; p. 77; p. 91). However, Appellant did not look at the officer or offer any response to Deputy Lanning's question. (R. pp. 27-28; p. 77; p. 91). Concerned by Appellant's behavior and failure to respond to the question, Deputy Lanning asked Appellant to put his hands on the trunk, conducted a brief pat down search of Appellant's clothing, and felt a revolver in Appellant's right front pocket. (R. pp. 27-29; p. 39; pp. 91-92). After locating the weapon, he then immediately handcuffed Appellant, and a loaded revolver along with several plastic bags of suspected narcotics were removed from Appellant's pockets while a set of digital scales was recovered from inside Appellant's vehicle. (R. p. 29; pp. 77-79; pp. 92-94; pp. 98-99). Thereafter, Appellant was arrested and indicted for trafficking in crack cocaine, possession of cocaine with intent to distribute, possession of ecstasy, and possession of a weapon during the commission of a violent crime, and he subsequently proceeded to trial. (R. pp. 5-6; pp. 172-177).

At the outset of trial, Appellant moved to suppress the narcotics and firearm discovered during the traffic stop, arguing the frisk search was unlawful because there was allegedly no reason to believe he was armed and dangerous at the time of the search. (R. pp. 19-22). In response, the solicitor asserted the officer's decision to conduct the frisk search was reasonable in light of the fact Appellant was in one of the highest crime areas in Greenville County at the time of the traffic stop, Appellant was displaying signs of extreme nervousness, and Appellant stopped answering the officers' questions during the course of the stop. (R. p. 22). Thereafter, the trial judge conducted an in camera hearing on Appellant's suppression motion, and Deputy Lanning and Deputy Swift testified about the circumstances of the traffic stop that led up to the frisk search and the discovery of Appellant's drugs and firearm.² (R. pp. 24-29; pp. 41-46).

At the conclusion of the pre-trial hearing, the trial judge found the frisk search was justified and reasonable under the totality of the circumstances. (R. pp. 47-48). In reaching that decision, the trial judge held:

None of these in and of themselves I think would rise to the level, but in the aggregate you have, first and foremost, the knowing and volitional transgression of a traffic law, which was defective equipment. Extreme nervousness, not nervousness as is customarily incident to a traffic stop but extreme nervousness to the extent that the phone couldn't be dialed. The fact that there was a phone called that being attempted at the time. The fact that it was a high drug use area, the reluctance or recalcitrance of the defendant to respond to any questions. And the dubiousness of the explanation for the shaking that the officer received when he asked or posed the first question. All of those things in the aggregate give me cause to believe that there was probable cause for the search.

(R. p. 49). Following the trial judge's ruling, the solicitor noted several additional factors supported the officer's decision to conduct the frisk search, including Appellant's

² Deputy Miller did not testify during the hearing because he was out of the country at the time. (R. p. 28).

avoidance of eye contact, Appellant's presence in a known drug area as opposed to a suspected drug area, and Appellant's nervousness and trembling hands. (R. pp. 49-50).

Thereafter, during trial, Deputy Swift and Deputy Lanning testified about the traffic stop of Appellant's vehicle and the ensuing frisk search that led to the discovery of Appellant's narcotics and firearm.³ (R. pp. 72-79; pp. 86-94). Following Deputy Lanning's testimony, the solicitor moved to introduce the revolver, ammunition, and set of digital scales discovered during the traffic stop into evidence. (R. p. 106). Defense counsel responded: "Without objection." (R. p. 106). The trial judge then admitted the proffered exhibits into evidence "[w]ithout objection[.]" (R. p. 106).

Subsequently, James Armstrong, a drug chemist with the Greenville County Department of Public Safety and an expert in drug analysis, testified he examined the suspected bags of narcotics recovered during the traffic stop. (R. p. 107; p. 109; p. 113). Based on his analysis, Armstrong determined the first of the recovered bags contained 0.63 grams of ecstasy pills, the second bag contained 0.85 grams of crack cocaine, the third bag contained 4.04 grams of cocaine, and the final bag contained 12.42 grams of crack cocaine in powder form.⁴ (R. pp. 110-112). Following Armstrong's testimony, the solicitor moved to introduce each of the bags of narcotics into evidence. (R. p. 2; p. 116). Once again, defense counsel responded: "Without objection." (R. p. 116). The trial judge then admitted all of the drugs into evidence "[w]ithout objection[.]" (R. p. 116).

At the conclusion of the State's case, defense counsel moved for a directed verdict on all of the charges except the ecstasy charge, which he noted Appellant "ha[d] not

³ During his testimony, Deputy Lanning stated he conducted field testing on the drugs discovered during the traffic stop and suspected the two bags of white powder to be cocaine. (R. pp. 97-88). However, he stated the final determination of what the substances were was made by laboratory testing. (R. p. 102).

⁴ During trial, Armstrong explained field testing usually would not be able to distinguish between cocaine and crack cocaine, which he noted could be in a rock-like form or in a powder form. (R. p. 115; p. 117).

really contested[.]” (R. p. 119). In support of the motion, defense counsel argued the officers believed the white powder discovered during the traffic stop was cocaine as opposed to crack cocaine, which he claimed was usually in rock-like form. (R. p. 120). In light of the officers’ testimony, defense counsel contended Appellant was entitled to a directed verdict on the trafficking in crack cocaine charge because “the only evidence of crack” was the rock-like substance found in the smaller bag, which he asserted was not of a sufficient weight to establish the offense of trafficking. (R. p. 120). Defense counsel further argued Appellant was entitled to a directed verdict on the possession of a firearm charge because that charge was associated with the trafficking in crack cocaine charge. (R. p. 120). In response, the solicitor asserted the fact the officers mistakenly believed one of the bags of crack cocaine to be cocaine was irrelevant in light of the expert’s testimony correctly identifying the substance in the bag as crack cocaine. (R. pp. 120-121). The trial judge then denied the directed verdict motion. (R. p. 122).

Subsequently, at the conclusion of trial, the jury convicted Appellant of all four of the indicted charges. (R. pp. 160-161). During the ensuing sentencing proceedings, the solicitor recounted Appellant’s substantial prior criminal record, and Appellant claimed the powder substance discovered in his pocket during the traffic stop was not crack cocaine. (R. pp. 164-166). The trial judge then sentenced Appellant to an aggregate term of imprisonment of twenty-five years. (R. p. 170).

ARGUMENT

I.

Any issue regarding the trial judge's denial of Appellant's pre-trial motion to suppress the narcotics and firearm discovered during the frisk search was not preserved for appellate review because defense counsel waived his pre-trial objection to the admission of the evidence by affirmatively indicating he had no objection at the time the evidence was introduced during trial. Regardless, the trial judge properly denied Appellant's pre-trial suppression motion and admitted the evidence during trial because the circumstances known to the officers at the time of the frisk search, including that Appellant was present in a high crime and drug area, Appellant was extremely nervous, Appellant avoided eye contact with the officers, Appellant unsuccessfully attempted to place a phone call during the traffic stop, and Appellant did not respond when asked if he was armed, reasonably led the officers to believe Appellant posed a danger to the officers and was armed and dangerous.

Appellant asserts the trial judge erred in admitting the evidence discovered during the frisk search. Appellant maintains the frisk search was unconstitutional because the circumstances known to the officers at the time of the search were allegedly insufficient to indicate he was armed and dangerous. Initially, any issue with the trial judge's decision to deny Appellant's pre-trial suppression motion and admit the revolver and narcotics discovered during the frisk search into evidence was not preserved for appellate review in light of the fact the evidence was admitted "without objection" during trial. By indicating he had no objection to the admission of the evidence at the time it was introduced, defense counsel waived any issue regarding the admission of that evidence. Therefore, the issue could not properly be raised or reviewed on appeal. However, regardless of any issue preservation concerns, Deputy Lanning's decision to conduct the frisk search was entirely justified and reasonable because the circumstances known to the officers at the time of the frisk search, including that Appellant was present in a high drug and crime area, Appellant was extremely nervous, Appellant avoided eye contact with the officers, Appellant unsuccessfully attempted to place a phone call during the traffic stop,

and Appellant did not respond when asked if he was armed, reasonably led the officers to believe Appellant posed a danger to the officers and was armed and dangerous.

Accordingly, the trial judge properly denied the pre-trial suppression motion and admitted Appellant's revolver and narcotics into evidence during trial. Appellant's convictions should be affirmed.

A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Generally, a motion in limine seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial evidence to the jury, and a ruling on such a motion is preliminary and subject to change based on developments during trial. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999). A ruling on a motion in limine does not constitute a final ruling on the admissibility of evidence. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Therefore, an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review. State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993). "However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); see State v. Wiles, 383 S.C. 151, 156-157, 679 S.E.2d 172, 175 (2009) ("This exception is based

on the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection.”).

In the case at bar, any issue with the admission into evidence of the narcotics and the firearm discovered during the frisk search was not properly preserved for appellate review. At the outset of trial, defense counsel made a motion in limine seeking the suppression of the evidence discovered through the frisk search, and the trial judge issued a preliminary ruling denying the suppression motion after conducting a pre-trial hearing on the matter. Thereafter, when the solicitor moved to introduce the firearm into evidence during trial, defense counsel did not renew his pre-trial objection and, instead, affirmatively stated the evidence could be admitted without objection. Subsequently, when the solicitor moved to introduce the narcotics into evidence during trial, defense counsel again affirmatively stated the evidence could be admitted without objection. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (“Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had ‘no objection.’ We find this amounted to a waiver of any issue Dicapua had with the videotape.”). By indicating he had no objection to the narcotics or the firearm when the evidence was introduced during trial, defense counsel expressly waived his pre-trial objection to the introduction of that evidence. See Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) (“When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review.”); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287

(Ct. App. 2005) (“A party cannot complain of an error which his own conduct induced.”); State v. Burton, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997) (“This testimony was admitted without objection. Because Burton failed to object, he is barred from raising this issue on appeal.”). Accordingly, any issue related to the introduction of the narcotics or the firearm cannot properly be raised or reviewed on appeal. See Dicapua, 373 S.C. at 455-456, 646 S.E.2d at 152 (finding the appellate court could not consider an objection to the admission of evidence where Dicapua’s counsel expressly waived his pre-trial objection to the evidence during trial). Appellant’s convictions should be affirmed.

B. Propriety of the Officer’s Frisk of Appellant

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).

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). However, a traffic stop seizure 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); see Whren v. United States, 517 U.S. 806, 810 (1996) (“An automobile stop is thus subject to the constitutional imperative that it not be ‘unreasonable’ under the circumstances. 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.”).

Once a lawful traffic stop is initiated, an officer “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)). Additionally, based on “the inordinate risk” to his or her safety that an officer faces while

conducting a traffic stop, the officer may order the driver and any passengers to exit the vehicle pending the completion of the stop. Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977); 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.”); see, e.g., United States v. Sakyi, 160 F.3d 164, 168 (4th Cir. 1998) (“[E]very traffic stop poses a meaningful level of risk to the safety of police officers. . . . [T]he substantial risk to police officers during traffic stops is ‘too plain’ for argument.” (citations omitted)).

During the course of the stop, an officer may also conduct a frisk search of the driver or any passenger in the vehicle if the officer harbors “reasonable suspicion that the person subjected to the frisk is armed and dangerous.” Arizona v. Johnson, 555 U.S. 323, 327 (2009); see State v. Adams, 397 S.C. 481, 492, 725 S.E.2d 523, 529 (Ct. App. 2012) (“An officer conducting a lawful traffic stop may conduct a pat-down search for weapons if the officer ‘has reason to believe that the person is armed and dangerous.’ ” (citations omitted)). For a frisk search to be reasonable and justified, “[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” Terry v. Ohio, 392 U.S. 1, 27 (1968); see also United States v. Swann, 149 F.3d 271, 274 (4th Cir. 1998) (recognizing “the standard justifying a frisk is not onerous”). “Among the circumstances to be considered in connection with [the] issue [of the propriety of a stop and frisk] are the ‘characteristics of the area’ where the stop occurs, the time of the stop, whether late at night or not, as well as any suspicious conduct of the person accosted such as an obvious attempt to avoid officers or any nervous conduct on the discovery of their presence.” United States v. Bull, 565 F.2d 869, 870-871 (4th Cir. 1977).

Reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law enforcement officers. Mimms, 434 U.S. at 109. "Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.'" State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). It 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 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).

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 United States v. Branch, 537 F.3d 328, 337 (4th Cir. 2008) ("Courts must look at the 'cumulative information available' to the officer . . . and not find a stop unjustified based merely on a 'piecemeal refutation of each individual' fact and inference[.]" (citations omitted)). 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 the officer at the time. See

United States v. Arvizu, 534 U.S. 266, 273 (2002) (“[W]e have said repeatedly that [reviewing courts] must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing. The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’ ” (citations omitted)); see also United States 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 United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)).

In State v. Smith, 329 S.C. 550, 553, 495 S.E.2d 798, 800 (Ct. App. 1998), Smith was lawfully stopped for speeding. When an officer approached Smith’s vehicle, he noticed Smith was acting in an “edgy” manner and was looking around. Id. at 553-554, 495 S.E.2d at 800. Fearing Smith might be looking for a weapon inside of the vehicle, the officer ordered Smith to step out and walk to the rear of the vehicle. Id. at 554, 495 S.E.2d at 800. The officer then asked Smith if he had any weapons on his person, and Smith did not respond. Id. After Smith failed to respond, the officer conducted a frisk search, felt a bulge in Smith’s jacket that he knew to be narcotics, and asked Smith if the bulge was Smith’s “reefer.” Id. Smith confirmed that it was, and the officer arrested Smith after Smith unsuccessfully attempted to avoid arrest. Id. Following Smith’s arrest, officers discovered marijuana and crack cocaine on Smith’s person. Id. Subsequently, during trial, Smith moved to suppress the narcotics discovered by the officers, and the

trial judge denied Smith's motion. Id. Following his conviction, Smith appealed, and the Court of Appeals affirmed the trial judge's ruling. Id. In reaching that decision, the Court concluded the circumstances known to the officer at the time of the search, including his observations of Smith's edgy behavior, "gave rise to a reasonable suspicion Smith might be armed and dangerous and justified [the officer's] patdown of Smith." Id. at 557, 495 S.E.2d at 802.

In the case sub judice, Appellant contends the officers violated his constitutional rights by conducting the frisk search because there allegedly was nothing known to the officers at the time of the frisk search that would have led them to believe he was armed and dangerous. (App. Br. p. 10). Contrary to Appellant's contentions, the circumstances known to the officers at the time of the search coupled with the officers' training and experience led the officers to harbor a reasonable suspicion Appellant was armed and dangerous.⁵ Therefore, under the totality of the circumstances, Deputy Lanning's decision to conduct the frisk search was a reasonable one, and the trial judge properly denied Appellant's pre-trial motion to suppress the revolver and narcotics discovered during the frisk search.

Establishing the reasonableness of the officers' suspicions, the traffic stop itself occurred in a high crime area known for drug activity, and Appellant was observed coming from the direction of an apartment complex where drugs had been discovered only two weeks earlier. See Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (recognizing a person's presence in a high crime area is one relevant contextual consideration in a Terry analysis); see also State v. Banda, 371 S.C. 245, 253, 639 S.E.2d 36, 40 (2006)

⁵ Notably, the officers' suspicions proved to be correct because Appellant indisputably **was** armed and dangerous at the time of the frisk search due to the fact he had a loaded revolver concealed in his pocket. (R. p. 29; pp. 91-92; p. 94).

("This Court has recognized that because of the 'indisputable nexus between drugs and guns,' where an officer had reasonable suspicion that drugs are present in a vehicle lawfully stopped, there is an appropriate level of suspicion of criminal activity and apprehension of danger to justify a frisk of both the driver and the passenger in the absence of other factors alleviating the officer's safety concerns." (citations and footnotes omitted)). Additionally, Appellant behaved in an unusual manner from the outset of the traffic stop, appeared extremely nervous, avoided eye contact with the officers, and unsuccessfully attempted to place a phone call during the course of the stop, which the officers knew to be a sign of potential danger to the officers. Notably, Appellant's attempt to place the phone call was unsuccessful because his hands were shaking in such an extreme manner, and he informed one of the officers that his hands were shaking because he was hot, which was an illogical and nonsensical response. Furthermore, Appellant stopped answering the officers' questions during the course of the traffic stop and, critically, refused to respond to Deputy Lanning's inquiry about whether he was armed, which led the officer to believe Appellant might be in possession of a weapon.

In light of Appellant's unsettling and excessively nervous behavior, Appellant's presence in a high drug and crime area, and Appellant's failure to respond to a question about whether he was armed, Deputy Lanning was fully justified in believing Appellant might be armed and dangerous and in conducting the brief frisk search to ensure Appellant did not pose a risk to him or his fellow officers. See Smith, 329 S.C. at 557, 495 S.E.2d at 802 (finding the officer was justified in conducting a frisk search after Smith behaved in an edgy manner and Smith did not respond when asked whether he was armed); State v. Abrams, 322 S.C. 286, 288, 471 S.E.2d 716, 717 (Ct. App. 1996) ("In this case, the officers had a reasonable suspicion which justified their stop of Abrams.

They saw him leaving an area known for drugs, where there had been a civil disturbance potentially involving drug activity, at 3:45 in the morning. The officers were therefore justified in frisking Abrams for weapons to ensure their safety.”); see also Terry, 392 U.S. at 24 (“When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.”). When viewing all of the circumstances known to the officers at the time of the search in totality, Deputy Lanning’s decision to conduct the frisk search was entirely prudent and reasonable. See Terry, 392 U.S. at 23 (“Certainly it would be unreasonable to require that police officers take unnecessary risk in the performance of their duties.”); see also Segura v. United States, 468 U.S. 796, 806 (1984) (“By its terms, the Fourth Amendment forbids only ‘unreasonable’ searches and seizures.”). Accordingly, the trial judge properly denied Appellant’s pre-trial suppression motion, and his ruling was supported by the evidence. See Pichardo, 367 S.C. at 96, 623 S.E.2d at 846 (“An appellate court must affirm the trial court’s ruling if there is *any* evidence to support the ruling.” (italics in original)). Appellant’s convictions should be affirmed.

II.

The trial judge properly denied Appellant's directed verdict motion because the evidence and testimony presented during trial established each element of the indicted offenses, including that Appellant knowingly possessed over ten grams of crack cocaine and that Appellant possessed a firearm during the commission of the violent offense of trafficking in crack cocaine.

Appellant contends the trial judge erred in denying the directed verdict motion as to the charges of trafficking in crack cocaine and possession of a weapon during the commission of a violent crime. In support of that contention, Appellant maintains there was confusion as to whether the narcotics discovered in his possession were actually cocaine or crack cocaine, which he claims meant his guilt was not established beyond a reasonable doubt. To the contrary, viewing the evidence in a light most favorable to the State, the evidence and testimony presented during trial showed Appellant possessed a revolver and over ten grams of crack cocaine, which constituted proof of his guilt for each element of the indicted offenses beyond a reasonable doubt. Therefore, the trial judge was required to deny Appellant's directed verdict motion and submit the indicted charges to the jury to allow it to resolve any factual disputes raised by the evidence. Accordingly, there is no basis to disturb the trial judge's ruling on appeal. Appellant's convictions should be affirmed.

When presented with a motion for a directed verdict, the trial judge is concerned with the existence or non-existence of evidence and not its weight. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). The trial judge should deny a directed verdict motion and submit the case to the jury if there is any substantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all

reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is **any** direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court **must** affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

"A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of" crack cocaine is guilty of trafficking in crack cocaine. S.C. Code Ann. § 44-53-375(C). In regards to trafficking, it is the amount of the controlled substance as opposed to the criminal act which triggers the trafficking statute and distinguishes the offense from distribution and simple possession. State v. Raffaltdt, 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995). The offense of trafficking can be committed in a wide variety of ways, including by knowingly possessing a specified quantity of narcotics. State v. Ezell, 321 S.C. 421, 426, 468 S.E.2d 679, 681 (Ct. App. 1996); see State v. Taylor, 323 S.C. 162, 165, 473 S.E.2d 817, 818 (Ct. App. 1997) (instructing the offender must act knowingly to be guilty of trafficking).

Possession of narcotics can be either actual or constructive. State v. Muhammed, 338 S.C. 22, 26, 524 S.E.2d 637, 639 (Ct. App. 2000). Actual possession occurs when the drugs are found to be in the actual physical custody of the person in possession of the narcotics. State v. Stanley, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct. App. 2005). Constructive possession occurs when the person charged with possession of the narcotics has dominion and control or the right to exercise dominion and control over either the narcotics or the premises upon which the narcotics were found. Id. at 42-43, 615 S.E.2d at 464. “When contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury.” State v. Hudson, 277 S.C. 200, 203, 284 S.E.2d 773, 775 (1981).

Knowledge in drugs cases is seldom susceptible to direct proof and may be proven circumstantially. State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975). “[Knowledge] can be proved by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances.” Id. Significantly, “[p]ossession gives rise to an inference of the possessor’s knowledge of the character of the substance.” State v. Gore, 318 S.C. 157, 163, 456 S.E.2d 419, 422 (Ct. App. 1995); see State v. Wise, 272 S.C. 384, 387, 252 S.E.2d 294, 295 (1979) (“[W]hen one possesses a controlled substance, he may be presumed to have knowledge of its nature and contents.”).

In Appellant’s case, Appellant contends he was entitled to a directed verdict on the charges of trafficking in crack cocaine and possession of a weapon during the commission of a violent crime “because there was confusion about whether the drug was actually crack cocaine or powder cocaine, and the state did not prove this element of the

indictment beyond a reasonable doubt.” (App. Br. p. 13). Contrary to Appellant’s contentions, the trial judge properly denied Appellant’s directed verdict motion because evidence and testimony was presented establishing each element of the indicted offenses, including the identity of Appellant’s narcotics.

During trial, Deputy Lanning testified he discovered two bags of white powder **suspected** to be cocaine in Appellant’s pockets along with a revolver while further noting laboratory testing was responsible for conclusively identifying the suspected cocaine. Thereafter, a drug chemist who analyzed the 12.42 grams of **suspected** cocaine collected from Appellant’s pocket testified the substance was, in fact, crack cocaine, which he confirmed could exist in powder form. Thus, testimony was presented during trial establishing the substance discovered in Appellant’s pocket was 12.42 grams of crack cocaine, which left no confusion as to the identity of the substance if the jury accepted the chemist’s testimony as accurate and truthful. By virtue of Appellant’s possession of over ten grams of a substance identified as crack cocaine, Appellant could be presumed to be in knowing possession of the crack cocaine. See State v. Mollison, 319 S.C. 41, 45, 459 S.E.2d 88, 91 (Ct. App. 1995) (“Possession gives rise to an inference of the possessor’s knowledge of the character of the substance.”). Therefore, viewing the evidence in a light most favorable to the State, the evidence presented during trial established Appellant’s guilt for each element of the offense of trafficking in crack cocaine by showing Appellant knowingly possessed ten or more grams of crack cocaine. See State v. Kimbrell, 294 S.C. 51, 54, 362 S.E.2d 630, 631 (1987) (“A person who is *knowingly* in actual or constructive possession of ten or more grams of cocaine is guilty of trafficking in cocaine.” (italics in original)).

Because the testimony and evidence presented during trial established each element of the offense of trafficking in crack cocaine, the trial judge was required to deny Appellant's directed verdict motion and submit the charge to the jury. See Attardo, 263 S.C. at 550, 211 S.E.2d at 869 (holding Attardo's actual possession of narcotics supported an inference of his knowledge in regards to the character of the substance and made the knowledge element a question for the jury to resolve). Furthermore, because the evidence supported the submission of the trafficking in crack cocaine charge to the jury, the trial judge was also required to submit the possession of a weapon during the commission of a violent crime charge to the jury based on Appellant's possession of a revolver during the commission of the trafficking offense. See S.C. Code Ann. § 16-23-490 ("If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime."); see also S.C. Code Ann. § 16-1-60 (listing trafficking in crack cocaine as a violent crime). Accordingly, the trial judge properly denied Appellant's directed verdict motion, and his ruling was supported by the evidence. See Gaster, 349 S.C. at 555, 564 S.E.2d at 92 ("On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling."). Appellant's convictions should be affirmed.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 15, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2010-156666

THE STATE,

Respondent,

vs.

MICHAEL MILLEDGE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 

Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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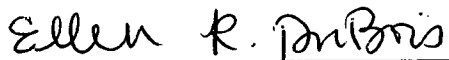
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 15th day of November, 2012.



ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727