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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of General Sessions
The Honorable George James, Circuit Court Judge

Appellate Case No. 2017-000774

THE STATE,

Respondent,

v.

MICHAEL FULWILEY,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court properly admitted goods seized from a car in which Appellant was a passenger where Appellant did not object to the admission of the goods when offered at trial, Appellant had no possessory interest or reasonable expectation of privacy in the car, the seizure of Appellant's person was reasonable, and the length of Appellant's detention had no causal relationship to the discovery of the goods.

II.

Whether the trial court erred by admitting Appellant's recorded roadside statements where the statements were not given during custodial interrogation.

STATEMENT OF THE CASE

Appellant was indicted by a Lexington County Grand Jury for Shoplifting. Appellant had previously been convicted of property crimes that enhanced his potential sentence pursuant to S.C. Code § 16-1-57. The case was called for trial in the Lexington County Court of General Sessions on August 10, 2016, before the Honorable George James. Sally Henry, Esquire and Jael Gilreath, Esquire represented Appellant. Assistant Solicitors Kate Usry and Bradley Pogue represented Respondent (the State). Appellant failed to appear for trial and was tried in his absence. Appellant was convicted and sentenced, and his sentence was sealed. After being arrested pursuant to the resulting bench warrant, Appellant appeared before the Honorable William Keesley on March 15, 2017. Judge Keesley published the eight-year sentence imposed by Judge James in the presence of Appellant. This appeal follows.

STATEMENT OF FACTS

This incident occurred on June 7, 2014. Officer William Lawler with the City of Lexington Police Department (Officer) was on routine patrol in the town of Lexington. He observed a car in which Appellant was the front seat passenger drive past him and saw that Appellant was not wearing his seatbelt. R. 45-46. For this reason, Officer initiated a traffic stop. R. 143. Officer approached the car and asked to see the vehicle's registration and both men's identification.[1] Complying with Officer's request, Appellant produced his identification card and admitted he had not been wearing his seatbelt. Appellant did not have a valid driver's license. R. 37.

The driver, Willie Butler (Driver), was unable to produce a driver's license, so Officer attempted to have the police dispatcher check the status of his license using only his name and date of birth. R. 33. During this time, Appellant got out of his seat and started to adjust his pants. He also lit a cigarette. Officer instructed him to get back in the car while he completed his work. Officer testified he had previously noticed Appellant leaning forward and apparently reaching under his seat, and that these observations aroused his suspicion. R. 126; 226; 103-04.

Dispatch was unable to access Driver's records based on this information alone, so Officer went back to the vehicle to gather Driver's social security number.[2] Officer relayed the additional information and moments later learned from dispatch that Driver's license was suspended and that he had an active arrest warrant from Charleston County. R. 35; 152-153; 159. Officer testified that, pursuant to normal policy, he had dispatch contact Charleston County

[1] The best evidence of what occurred during the traffic stop is Officer's in-car video, State's Exhibit One. Unless otherwise noted, all factual citations are to the video. Evidence of Officer's perceptions and state of mind will be cited from his testimony.
[2] This occurred roughly nine minutes after the initiation of the stop.

to confirm the warrant. Officer testified that this usually takes around ten minutes, and that the traffic stop would continue until this information was received. R. 35-36. Officer then used information received from dispatch to locate Driver's records directly from the computer in his police cruiser. R. 34; 153. Officer testified he checked his computer to find the underlying reason for the suspension because this would determine whether Driver would be arrested for DUS or issued a citation and released. R. 34-35; 184. Officer discovered Driver had a prior conviction for DUS, which meant Driver would have to be arrested. R. 34; 159. Because Appellant did not have a valid driver's license, and because department policy dictated that an arrestee's vehicle could only be released to its owner or their spouse, the vehicle had to be towed. R. 38. Officer testified that department policy dictated that when a car is towed, passengers are not allowed to go back into the vehicle, but that officers will retrieve any of their property for them. R. 102. Officer spent the next several minutes entering information into his computer. R. 32-34; 158. Because of Driver's lack of identification, DUS status, active warrant, and the additional work that these issues created for the officer, the traffic stop lasted longer than normal. R. 32-36. Officer waited for backup to arrive before going back to speak with Driver and Appellant. R. 36, l. 23.

Nearly twenty minutes after the initiation of the traffic stop, but while still waiting for Charleston to confirm the warrant, officer approached the car and removed driver from the vehicle and briefly questioned him.[3] Driver told officer that he did not understand why he would have a warrant, and that he had legal troubles in the past but that he'd cleared them up. Officer asked Driver whether there was anything illegal in the car, to which Driver emphatically responded that there was nothing *stolen*. R. 44. Driver also told Officer that they were taking

[3] This interaction took roughly one and a half minutes, and was redacted by consent from the video introduced at trial, State's Exhibit 6.

some goods to the flea market to sell. R. 45. Officer testified that Driver seemed nervous. R. 45.

Officer then approached the passenger side and asked Appellant to exit the car. Through the passenger window, Officer saw a large number of packages of medicines underneath the passenger seat. R. 38. The medicines were still in their retail packaging. Officer asked Appellant whether he had anything illegal on his person or in the car and Appellant responded that he did not. When Officer told Appellant that it appeared that he had been hiding something under his seat, Appellant stated that he was leaning forward because his back was hurting. Officer walked several steps back to the passenger side of the car and again looked through the windshield and passenger window at the items under the seat. R. 41. Appellant then asked whether he was under arrest, and whether he could take his things and go. Officer impliedly answered in the negative, explaining that he still needed to finish his paperwork.

After explaining to Driver and Passenger that Driver would be detained until he heard back from Charleston confirming the warrant, Officer cuffed Driver and put him in the back of his patrol car. Officer then returned to continue speaking with Appellant. Officer asked Appellant specifically about the items under the seat. After first saying that the items were *from* the flea market and belonged to Driver, Appellant later said the items belonged to both of them and they were going to sell them. Appellant asked officer whether he could take possession of the car, and Officer informed him that he would not be allowed to take the car because he did not have a valid driver's license. Appellant responded by saying that he would take his things and go, to which officer responded by asking what items belonged to him. Officer testified that Appellant seemed nervous and hesitant to answer. R. 103-104. Officer testified that he also wanted to ensure that there were no weapons in the car. R. 43. Appellant again claimed all the

items belonged to both him and the driver. Officer proceeded to look underneath both the driver's and passenger's seats and removed a large amount of products still in their retail packaging, including medicines and razors. The razors were still in their plastic antitheft containers. R. 168-169; 200. Officer also discovered a CVS receipt for a Pepsi from that same day. R. 160-161. Officer testified that the discovery of the items (which taken together had significant value) combined with Driver and Appellant's inconsistent answers and suspicious demeanors, led him to believe the items may have been stolen. R. 45.

While Officer was searching the car, dispatch confirmed that the Charleston warrant for Driver was active.[4] At this point, officer read Appellant his Miranda warnings and placed Appellant in investigative detention in the back seat of his cruiser, along with Driver. Officer continued to investigate the suspicious items by calling the CVS store on the receipt to inquire whether they had anything shoplifted from the store that day. Officer's in-car camera audio-recorded Appellant and driver's conversation. Appellant made several incriminating statements, telling Driver to stick with the flea market story, and that the surveillance video from CVS would show him in the store, but would not show him shoplifting. Because Officer did not immediately receive information from CVS confirming the goods were stolen, and because the CVS store was outside of his jurisdiction, Officer ultimately let Appellant leave the scene with only a seatbelt ticket. R. 182. Another officer gave Appellant a ride to a location near the interstate, where Appellant had arranged for someone to pick him up. R. 167.

A CVS employee testified that an inventory taken that day showed that razorblades were missing from the store. R. 187. The store's surveillance camera showed Appellant entering the store on the day the stop occurred and buying only a Pepsi. After making his purchase,

[4] Exhibit 1 at 27:28.

Appellant did not leave the store. Instead, he continued to walk around the store for around twenty minutes, including in areas that were not within view of the security camera. The CVS employee testified that their cameras did not capture the area of the store were the razors were displayed. He also testified that it appeared from the video that as Appellant finally left the store, his baggy pants appeared to have several bulges that were not present when Appellant entered the store. R. 187-195.

ARGUMENT

I.

Appellant's argument that the trial court erred by admitting goods seized from a car in which Appellant was a passenger is not preserved for review because Appellant did not object to the admission of the goods when offered at trial. Even if the issue is preserved, the trial court properly admitted the goods because Appellant had no possessory interest or reasonable expectation of privacy in the car, the seizure of Appellant's person was reasonable, and the length of Appellant's detention had no causal relationship to the discovery of the goods.

Appellant argues that the goods seized from the car should have been suppressed because he was unlawfully detained while Officer went on a "fishing expedition" to investigate crimes unrelated to the purpose of the stop. This argument is without merit because Appellant's detention was reasonable in the circumstances, and bears no causal relationship to the discovery of the goods.

Issue Preservation

As a threshold matter, this issue is not preserved for appellate review. Although Appellant did move for the court to suppress the goods during a pre-trial hearing, Appellant did not object to their admission when offered into evidence during trial. R. 167-169. The failure to object when evidence is offered constitutes a waiver of the right to raise the issue on appeal. *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). A pre-trial ruling on the admission of evidence is not considered final and a party must renew his objection at the time the evidence is admitted. *State v. Schumpert*, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993). Unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. *State v. Smith*, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) (citation omitted). Significantly, when the State moved the goods into evidence, defense counsel specifically stated "no objection." This amounted to an express waiver of Appellant's objection.

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."); *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."). This issue is not preserved for review.

Standard of Review

On appeals from a motion to suppress based on Fourth Amendment grounds, South Carolina appellate courts apply a deferential standard of review and will reverse only if there is clear error. *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011).

Fourth Amendment Standing to Contest Search of the Automobile

As a preliminary matter, Appellant has not demonstrated a possessory interest or reasonable expectation of privacy in the vehicle where the goods were recovered. *United States v. Manbeck*, 744 F.2d 360, 392 (4th Cir. 1984) ("Where a constitutional violation is alleged, the party claiming this violation carries the burden to establish the standing required to raise that claim."). The car in this case belonged to Driver's mother. R. 31-32. As a mere passenger in someone else's car, Appellant had no reasonable expectation of privacy in the area underneath the passenger's seat. A person who is aggrieved by an illegal search and seizure only through

the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. *Rakas v. Illinois*, 439 U.S. 128, 148 (1978) (explaining that automobile passengers had no reasonable expectation of privacy in and therefore had no right to challenge evidence seized from beneath a passenger's seat because they "asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized"); *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992). Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). Fourth Amendment rights are personal rights that may not be asserted vicariously. *Alderman v. United States*, 394 U.S. 165, 174 (1969). Because Appellant had no legitimate privacy interest in the vehicle that would entitle him to contest its search, his suppression claim rests solely on the seizure of his person.

Fourth Amendment Reasonableness

Appellant argues that the goods seized from the car in which he was a passenger should be suppressed because, despite the lawfulness of his initial seizure for a seatbelt violation, his continued detention while the officer arrested Driver transformed his lawful seizure into an unlawful one. Appellant alleges that he should have been ticketed and released rather than made to wait while the officer investigated and arrested Driver. However, the record shows that Officer's conduct of the stop was reasonable from its outset to its conclusion. Officer acted within his discretion not only when he seized Appellant for a seatbelt violation, but also when he investigated Driver's warrant and license status, and finally while he oversaw the lawful inventory of the vehicle.

The touchstone Fourth Amendment analysis is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio,* 392 U.S. 1, 19 (1968). Reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *United States v. Brignoni-Ponce,* 422 U.S. 873, 878 (1975). Reasonableness is measured in objective terms by examining the totality of the circumstances. *Ohio v. Robinette,* 519 U.S. 33, 39 (1996).

The Initial Stop

"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]. An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." *Whren v. United States,* 517 U.S. 806, 809–10 (1996) (citations omitted). The decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. *Id.* Because there was clear evidence of a traffic violation— the officer observed Appellant not wearing his seatbelt— the decision to stop the vehicle was reasonable.

Extenuating Circumstances

The lawfulness of the remainder of Appellant's seizure must be evaluated based on the totality of the circumstances. The appropriate inquiry is "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992). Despite Appellant's claims, the traffic stop in this case involved much more than seatbelt violation. As the trial judge noted, the discovery that Driver was driving under

suspension and had an active warrant "extend[ed] the scenario," and the traffic stop became "more than a seatbelt ticket." R. 22. Officer was well within his rights to ask for Driver's license and registration. *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004) (explaining "the law has become well established that during a routine traffic stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation"). After discovering that Driver was driving under suspension and had an active warrant, the officer would have been derelict in his duty had he not taken appropriate action. *State v. Dean*, 282 S.C. 136, 140, 317 S.E.2d 744, 746 (1984) ("For the officers to have ignored the facts they had observed and had been informed of would have constituted a dereliction of duty."). Under the circumstances, it was reasonable for the officer to continue to detain both occupants while he diligently investigated Driver's warrant and license. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985) ("In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.").

Once the officer discovered Driver's warrant and suspended license, the stop took on a new— but legitimate— purpose, expanding its scope. "A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration 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." *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). "Observing a traffic violation provides sufficient justification for a police officer to detain the offending vehicle **for as long as it takes to perform the traditional incidents of a routine**

traffic stop." *United States v. Branch*, 537 F.3d 328, 335 (4th Cir. 2008). "Typically such inquiries involve checking the driver's license, **determining whether there are outstanding warrants against the driver**, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) (citations omitted). Where probable cause to tow a vehicle arises during a traffic stop, the stop is not completed until the tow is accomplished. *United States v. Oliver*, 550 F.3d 734, 738 (8th Cir. 2008) (explaining the traffic stop was still at a point where "the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.").

Additionally, society's interest in ensuring officers' safety gives officers the discretion "as a matter of course" to control the scene of a traffic stop by ordering automobile passengers to exit (or remain in) a vehicle as needed in the circumstances. *See Maryland v. Wilson*, 519 U.S. 408 (1997).[5] Even Justice Kennedy's dissent in *Wilson* acknowledged that "special latitude is given to the police in effecting searches and seizures involving vehicles and their occupants." *Id.* at 423; *see also United State v. Sanders*, 510 F.3d 788, 791 (8th Cir. 2007) (finding it permissible to require passenger to remain in car during traffic stop because "[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety"); *Rogala v. District of Columbia*, 161 F.3d 44, 45 (D.C.Cir.1998) (holding that police officers can take reasonable steps to control a traffic stop including requiring a passenger "to

[5] Unfortunately, the *Wilson* court specifically declined to answer whether "an officer may forcibly detain a passenger for the entire duration of the stop." *Maryland v. Wilson*, 519 U.S. at 422, n. 3.

remain in the car, rather than in the street or on the sidewalk, in light of ... concerns about [officer] safety, [the] creation of a traffic hazard, and ... interference with" police activity); *Coffey v. Morris*, 401 F. Supp. 2d 542, 546 (W.D. Va. 2005) ("It is reasonable under the Fourth Amendment for an officer to order a passenger to remain in an automobile due to the generalized concerns for officer safety discussed in *Wilson*, and the need for officers to exercise control during a traffic stop."). In this case, officer safety was one of the reasons cited by Officer to explain why he normally requires passengers to remain in a vehicle during a traffic stop. R. 97-98.

Reasonableness did not require the officer to suspend his investigation of Driver's warrant and DUS in order to write Appellant's ticket. Although this would have been one course of action, the officer acted reasonably by dealing with the driver's separate, more serious, infractions first. Although this stop was lengthier than a normal traffic stop, the delay was caused by Driver's illegal actions. In retrospect, one "can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But the fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, itself, render the search unreasonable. The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *United States v. Sharpe*, supra, 470 U.S. at 686–87 (rejecting "the contention that a 20-minute stop is unreasonable when the police have acted diligently and a suspect's actions contribute to the added delay about which he complains") (internal citations and quotations omitted).

This case is distinguishable from those where courts have found that officers unreasonably extended traffic stops to perform an investigation of unrelated matters unsupported

by reasonable suspicion. Unlike the cases where police questioning takes place after the purpose of the stop are accomplished and all citations have been issued, e.g. *State v. Pichardo*, 367 S.C. 84, 623 S.E.2d 840 (Ct. App. 2005), in this case the traffic stop was ongoing. Officer was still waiting to hear back from Charleston County confirming the warrant; Appellant had not collected his property from the soon-to-be-towed car; and Officer had yet to complete Appellant's traffic citation. *Cf. State v. Jones*, 364 S.C. 51, 58, 610 S.E.2d 846, 850 (Ct. App. 2005) (explaining traffic stop not unreasonably extended where "the purpose of the original stop had not yet been fulfilled"). Not only did Officer have to prepare a citation for both Appellant and an incident report for Driver, Officer testified that it "takes a while" for the printer in his police cruiser to print tickets. R. 76; 102. And unlike the cases involving delays made for the purpose of summoning a drug dog, e.g. *State v. Morris*, 395 S.C. 600720 S.E.2d 468 (Ct. App. 2011), the officers in this case had no incentive to unduly delay Appellant. There was nothing to be gained from holding Appellant longer than necessary because his presence had no causal relationship with the discovery of the goods. *See* discussion of exclusionary rule, infra. The officer's actions did not "measurably extend the duration of the stop." *State v. Provet*, 405 S.C. 101, 109, 747 S.E.2d 453, 457 (2013).

Pursuant to *Arizona v. Johnson* and *United States v. Branch*, supra, the probable cause that prompted the traffic stop justified Appellant's continued detention until the "traditional incidents" of the stop were completed. The length of Appellant's seizure was caused by unforeseen events that were beyond the officer's control. In constitutional terms, the entire traffic stop was one continuous seizure of Appellant's person, and was not terminated the instant the officer became aware that he would have to arrest Driver. Because there is evidence in the

record to support the trial court's ruling that the Officer conducted the traffic stop reasonably and diligently, the trial court's ruling should be affirmed.

Reasonable Suspicion of Additional Criminal Activity

Even if the Court views Appellant's continued detention after Driver was arrested as a second seizure, the detention was still lawful because it was supported by reasonable suspicion of a separate crime. Once Officer discovered Driver's warrant and license suspension, department policy dictated that Driver would be arrested and his car towed. Officer testified that Appellant was going to be given an opportunity to collect his belongings from the car because he would not be allowed to take possession of the vehicle itself. R. 41, 160. Officer can be seen approaching the passenger's side of the car and asking both men out of the vehicle. Officer testified that only then did he see the goods underneath the passenger's seat. R. 38. At this point the officer had observed (1) Appellant lean forward and reach underneath his seat during the traffic stop; (2) Appellant exit the vehicle and suspiciously adjust his baggy pants; (3) a large number of medicines in their retail packing underneath the front seat; and (4) Driver's unprompted statement that the items were not stolen. These facts gave Officer reasonable cause to investigate his suspicions. After asking Appellant about the items underneath the seat and receiving hesitant and inconsistent answers (further arousing his suspicion), Officer then searched the vehicle. At the point the goods were seized, the constitutional analysis related to their suppression ends. *See* discussion of exclusionary rule, infra.

Under the Fourth Amendment, 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 suspicion. *United States v. Brignoni-Ponce,* supra, 422 U.S. at

881 (internal quotations omitted). Probable cause is not required for brief investigative detentions because the intrusion on an individual's liberty is "much less severe" than a formal arrest. *Dunaway v. New York*, 442 U.S. 200, 209 (1979). "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to **try to obtain information confirming or dispelling the officer's suspicions.**" *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

An officer's observations while conducting a traffic stop may create reasonable suspicion to justify further search and seizure. *Pennsylvania v. Mimms*, 434 U.S. 106, 111–12 (1977) (finding "little question the officer was justified" in conducting pat-down search after officer asked motorist to exit vehicle and then observed bulge in motorist's jacket). An officer may extend the duration of a traffic stop in order to question the motorist on unrelated matters if he possesses reasonable suspicion that warrants an additional seizure of the motorist. *United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir.1998); *State v. Butler*, 353 S.C. 383, 57 S.E.2d 498 (Ct. App. 2003) (holding officer was justified in extending the scope and duration of the traffic stop based on his suspicion that open containers of alcohol may have been in the van).

Just as it was reasonable for the officer to investigate Driver's warrant and license, even though this was not the justification for the initial stop, it was reasonable for the officer to continue to detain Appellant for a brief additional time to investigate the suspicious goods underneath the front seat. Not only was it necessary for the officer to resolve ownership of the items in order to perform an inventory of the car, his observations led him to reasonably believe that the items were potential evidence of a separate crime. The questioning of Appellant and search of Driver's vehicle was a "graduated response to the demands of the particular situation." *See United States v. Sharpe*, supra, 470 U.S. at 688 (1985) (internal brackets and citation

omitted); *United States v. Brigham*, 382 F.3d 500, 511 (5th Cir. 2004) (approving of a "graduated response to emerging facts" where officer's "investigative methods were reasonable, proceeded with deliberation in response to evolving conditions, and evince no purposeful or even accidental unnecessary prolongation").

Officer articulated specific facts to support his reason for asking Appellant about the goods and then retrieving them. While the traffic stop began as a simple seatbelt citation, it continued to expand into something more, culminating in the discovery of facts that justified the officer in continuing to detain Appellant in order to investigate an apparent crime.

Causation and the Exclusionary Rule

Even if Officer's conduct had given rise to a constitutional violation, Appellant would not be entitled to have the goods suppressed in this case because there was no causal relationship between the length of his detention and the discovery of the stolen goods. The exclusionary rule is "a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Davis v. United States*, 564 U.S. 229, 231–32 (2011). "The 'fruit of the poisonous tree' doctrine provides that evidence must be excluded if it **would not have come to light** but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality." *State v. Copeland*, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996). But-for causality is a necessary condition for suppression. *Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (noting suppression of evidence is a "last resort" and emphasizing that not only must there be but-for causality, but the discovery of evidence must have been an exploitation of the illegal search or seizure). The illegal seizure must "enable" the discovery of evidence to occur. *United States v. Peralez*, 526 F.3d 1115, 1121 (8th Cir. 2008).

The exclusionary rule does not apply in this case because the goods would have been discovered regardless. Officer testified that the car was going to be towed pursuant to department policy. Officer further testified that an inventory would be performed on the car, meaning the goods would inevitably be discovered. Even more, the officer had already seen the goods through the window, meaning that they were in plain view and, in a sense, already discovered. Even if Appellant had been allowed to take what he wanted from the car without any further questioning, the officer surely would not have been required to allow him to walk away with armfuls of potentially stolen property. There was no causal relationship whatsoever between Appellant being detained for an additional two to three minutes and the discovery of the goods underneath the seat. The exclusionary rule does not apply.

II.

The trial court properly admitted Appellant's recorded roadside statements even though Appellant had not been read his Miranda warnings because the statements were not given during custodial interrogation.

Appellant next argues that the trial court should have suppressed statements given by Appellant in response to the officer's questions about the goods underneath the seat, citing *Miranda v. Arizona*, 384 U.S. 436 (1966). However, *Miranda* does not apply to this case because Appellant was not subjected to custodial interrogation.

Standard of Review

The trial court specifically found that Appellant was not in custody when the statements were made. R. 109-110. The decision of whether to admit or exclude evidence is within the sound discretion of the circuit court. *State v. Jackson*, 384 S.C. 29, 34, 681 S.E.2d 17, 19 (Ct. App. 2009). Appellate courts must affirm a trial court's ruling of whether a person is in custody when the ruling is supported by the record. *State v. Williams*, 405 S.C. 263, 272, 747 S.E.2d 194, 199 (Ct. App. 2013). Whether appellant was "in custody" presents a factual issue that cannot be resolved by an appellate court. *State v. Primus*, 312 S.C. 256, 258, 440 S.E.2d 128, 129 (1994).

Custodial interrogation

Miranda bars the admission of statements made by a criminal defendant in response to custodial interrogation unless the defendant is given prior warnings of his 5th and 6th Amendment constitutional rights. *Miranda*, supra, 384 U.S. at 473. The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody. *Bradley v. State*, 316 S.C. 255, 257, 449 S.E.2d 492, 493–494 (1994). Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving of Miranda protection, the ultimate inquiry is simply

whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

"The usual traffic stop is more analogous to a so-called 'Terry stop'... than to a formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (internal quotation and citation omitted). "[P]ersons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda." *Id.* 468 U.S. at 440; *Pennsylvania v. Bruder*, 488 U.S. 9, 11 (1988); *State v. Easler*, 322 S.C. 333, 340, 471 S.E.2d 745, 750 (Ct. App. 1996). Where there is no indication that the officer said anything or conducted himself in a way to suggest that a person is under arrest or was being detained as if he were under arrest, *Miranda* warnings are not required. *State v. Corley*, 383 S.C. 232, 244, 679 S.E.2d 187, 194 (Ct. App. 2009), aff'd as modified, 392 S.C. 125, 708 S.E.2d 217 (2011). Appellant was not cuffed or otherwise significantly deprived of his freedom when he made the statements in question, and was certainly not confined to a degree associated with formal arrest. Because the record supports the trial court's finding that Appellant was not in custody when the statements were made, the court's ruling should be affirmed.

CONCLUSION

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

Respectfully submitted,

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March 29, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable George James, Circuit Court Judge

Appellate Case No. 2017-000774

THE STATE,

Respondent,

v.

MICHAEL FULWILEY,

Appellant.

CERTIFICATE OF COUNSEL

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

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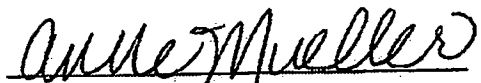
PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to Wanda H. Carter, 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 29th day of March 2018.



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