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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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

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[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,l. 3 – 90, l. 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.).

2.

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.).

3.

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.

"Undoubtedbly, 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,

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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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