STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2011-187486

THE STATE,

Respondent,

vs.

TROY TERRELL BAXTER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

United States Supreme Court Cases:

Federal Appellate Court Cases:

Other State Cases:

Other Authorities:

STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's motion to suppress the marijuana discovered during the course of the traffic stop because the stop was conducted in a reasonable manner and the officer who stopped Appellant's rental vehicle developed sufficient probable cause to justify a search of the vehicle after he observed a substance he recognized through his training and experience as marijuana at the outset of the stop.

STATEMENT OF THE CASE

On September 11, 2009, Appellant Troy Terrell Baxter was arrested following a traffic stop that resulted in the discovery of marijuana in Appellant's vehicle. In March of 2010, the York County grand jury indicted Appellant for one count of possession of marijuana with intent to distribute. On February 28, 2011, a jury trial was commenced in the York County court of general sessions with the Honorable John C. Hayes, III, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant of the lesser-included offense of simple possession of marijuana. Following the verdict, the trial judge sentenced Appellant to a one-year term of imprisonment.[1] Subsequently, Appellant filed a timely notice of appeal.

[1] Appellant was jointly tried with his co-defendant, Larick Pierre Burris, who was also indicted for possession of marijuana with intent to distribute. At the conclusion of trial, Burris was convicted of simple possession of marijuana and sentenced to a one-year term of imprisonment.

STATEMENT OF FACTS

Shortly after 5:00 p.m. on September 11, 2009, Officer Lonnie Vinesett, an officer with the York County Sheriff's Office assigned to the York County Multi-Jurisdictional Highway Interdiction Team, encountered a vehicle driven by Appellant Troy Terrell Baxter while patrolling Interstate 77 in Fort Mill, South Carolina. (Tr. p. 25; pp. 77-79; p. 116). At the time of the encounter, Appellant was speeding and weaving in traffic, so Officer Vinesett initiated a traffic stop of Appellant's vehicle. (Tr. pp. 25-26; p. 37; pp. 78-79).

After stopping the vehicle at approximately 5:07 p.m., Officer Vinesett approached from the passenger's side and asked Appellant for his driver's license and vehicle registration. (Tr. p. 26; State's Ex. # 1 – Recording of Traffic Stop). As he spoke with Appellant, he noticed several particles of a suspicious green plant material on the shirt of the passenger, Larick Pierre Burris. (Tr. p. 26; p. 29; p. 36; p. 38; p. 81; p. 84; p. 140; p. 142). Believing that substance to be marijuana based on his roughly twelve years of law enforcement training and experience, Officer Vinesett radioed for assistance from Officer William Gibson, an officer with the York County Sheriff's Office who worked with a drug-detection dog, and asked Appellant to step out and move to the rear of the vehicle after Appellant produced his license and a rental agreement for the car. (Tr. pp. 26-27; p. 51; p. 77; pp. 80-81; p. 84; pp. 153-155).

Once Appellant exited the vehicle, Officer Vinesett explained the purpose of the stop to him, asked him where he was travelling to and from, and began preparing a warning citation. (Tr. p. 27; p. 39; pp. 81-82; p. 118; State's Ex. # 1). In response, Appellant stated they were coming from Rock Hill, South Carolina, and indicated they visited their sick grandmother who had been hospitalized, ate at a restaurant called the

Shrimp Boat, and were in the process of returning to Charlotte, North Carolina. (Tr. p. 27; p. 30; p. 82; State's Ex. # 1). After speaking with Appellant, Officer Vinesett again approached the passenger's side of the rental vehicle, requested Burris' identification, and asked Burris where he and Appellant had been and where they were going.[2] (Tr. p. 28; p. 82). Burris produced his identification, and Officer Vinesett noticed he was shaking "pretty bad" when he handed it over. (Tr. p. 82). Burris then claimed they were coming from "the court," which Officer Vinesett interpreted as a basketball court, and also indicated they ate lunch at the Shrimp Boat. (Tr. p. 30; p. 82). However, he made no mention of his grandmother. (Tr. p. 30; p. 82). As they spoke, Officer Vinesett realized that the green plant material he had observed on Burris' shirt at the outset of the stop was no longer present or visible and further noticed Burris began smoking a cigarette during the course of the stop. (Tr. p. 28; p. 41; p. 50; p. 123).

Meanwhile, Officer Gibson arrived on the scene. (Tr. pp. 29-30; p. 84; p. 154; State's Ex. # 1). Once Officer Vinesett finished speaking with Burris, he met with Officer Gibson, advised him he initially saw what he believed to be marijuana on Burris' shirt during the stop, and asked him to look as well. (Tr. pp. 29-30; p. 84; p. 154; State's Ex. # 1). Officer Gibson then approached the passenger's side of the rental vehicle, looked inside, returned to Officer Vinesett, and indicated he only saw cigarette ashes on Burris' clothing. (Tr. p. 31; p. 85; pp. 154-155; State's Ex. # 1).

Thereafter, Officer Vinesett asked Officer Gibson to attempt to obtain consent for a search of the rental vehicle and to walk his drug-detection dog around the vehicle if consent was refused. (Tr. p. 31; pp. 41-42; p. 85; p. 154). While Officer Gibson

[2] During the pre-trial hearing, Officer Vinesett noted he routinely asks for identification from passengers during traffic stops. (Tr. p. 47).

attempted to obtain consent, Officer Vinesett called in Appellant's information to dispatch to determine the status of his driver's license and information.[3] (Tr. pp. 41-42; p. 85; State's Ex. # 1). Officer Gibson then unsuccessfully requested consent to search, asked Burris to exit the vehicle, performed a frisk search, and walked Justice, his drug-detection dog, around the rental vehicle. (Tr. p. 32; p. 43; p. 85; pp. 154-155; State's Ex. # 1). As Justice walked around the car, the dog pulled away from the car several times, did not always perform a sniff search where it was directed to do so, and did not alert to the presence of narcotics.[4] (Tr. p. 32; p. 44; pp. 85-86; pp. 155-156; State's Ex. # 1).

While Officer Gibson was walking the drug-detection dog around Appellant's vehicle, dispatch notified Officer Vinesett that Appellant's license was clear at approximately 5:19 p.m. (Tr. p. 31; p. 44; State's Ex. # 1). Dispatch further noted Appellant had a prior narcotics conviction. (State's Ex. # 1). Officer Vinesett then asked dispatch to check Burris' information, returned to the vehicle, and looked inside the passenger's side window with a flashlight to determine if the marijuana he had observed earlier had been brushed onto the floor. (Tr. pp. 32-33; p. 36; p. 44; p. 86; State's Ex. # 1). When he looked inside, he observed marijuana particles on the side of the passenger seat and on the passenger's side floorboard of the car, opened the door, and secured the evidence. (Tr. p. 33; p. 36; pp. 44-45; pp. 48-49; pp. 86-87; State's Ex. # 1). He then looked under the passenger's seat and found a mason jar full of marijuana wrapped in a wet t-shirt. (Tr. p. 33; pp. 88-89; p. 91; State's Ex. # 1). Thereafter, he placed Appellant and Burris under arrest at approximately 5:22 p.m. (Tr. pp. 100-101; State's Ex. # 1).

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[3] Officer Vinesett contacted dispatch at approximately 5:15 p.m., which was roughly eight minutes into the traffic stop. (State's Ex. # 1).

[4] During trial, Officer Vinesett noted the drug-detection dog appeared to want to play as opposed to perform a sniff search. (Tr. p. 143; pp. 150-151).

Officers then searched the remainder of the vehicle and located marijuana in numerous other locations, including on the floorboard of the driver's side of the vehicle and in a dashboard coin holder. (Tr. pp. 33-34; p. 103; p. 105; p. 162; State's Ex. # 1).

Subsequently, the suspected narcotics discovered during the traffic stop were submitted for testing and were analyzed by Cynthia Mitchum, a drug analyst with the York County Sheriff's Office and an expert in chemical analysis and the identification of substances. (Tr. pp. 165-166). Upon analysis, Mitchum determined the items recovered from the rental vehicle were marijuana. (Tr. p. 173; pp. 175-176; pp. 178-179; p. 181; p. 183; State's Ex. # 17 – Drug Report). The total weight of the marijuana recovered during the stop was 32.58 grams. (Tr. pp. 175-176; pp. 178-179; p. 183; State's Ex. # 17).

Appellant and Burris were subsequently indicted for possession of marijuana with intent to distribute, and they jointly proceeded to trial. (Tr. p. 5; Indictment). At the beginning of trial, Appellant moved to suppress the drugs discovered during the traffic stop, and the trial judge conducted a pre-trial hearing on the motion. (Tr. pp. 24-25). During the hearing, Officer Vinesett testified about the circumstances of the traffic stop and indicated he observed what he believed to be marijuana based on his training and experience on Burris' shirt at the outset of the stop. (Tr. pp. 25-34; p. 51). Following Officer Vinesett's testimony, Appellant argued the officer's testimony about observing marijuana at the outset of the stop was "somewhat in question." (Tr. p. 55). Appellant further maintained nothing that occurred during the traffic stop established reasonable suspicion to believe Appellant was engaged in criminal activity. (Tr. p. 56). Finally, Appellant contended the stop was unlawfully extended and the search that was conducted was not supported by probable cause. (Tr. p. 58). In response, the solicitor argued the traffic stop was not unlawfully extended beyond its initial purpose. (Tr. p. 59).

However, she noted it could have been extended after Officer Vinesett observed the marijuana because that observation established probable cause for a search. (Tr. pp. 58-60). After considering the arguments of counsel, the trial judge determined the officer's initial observation of marijuana on Burris' shirt provided probable cause for the search that was conducted and concluded the existence of reasonable suspicion or probable cause was not diminished simply because Officer Vinesett's observations were not confirmed by other sources. (Tr. pp. 62-63). For those reasons, the trial judge denied the suppression motion. (Tr. p. 63).

Thereafter, Officer Vinesett and Officer Gibson testified during trial about the details of the traffic stop and their discovery of marijuana in numerous places in Appellant's rental car. (Tr. pp. 78-105; pp. 154-157). During his testimony, Officer Vinesett confirmed he observed a substance he believed to be marijuana on Burris' shirt at the outset of the stop while noting he was specifically trained in the detection and identification of illegal substances. (Tr. p. 78; pp. 80-81; p. 84; p. 112). He further stated he did not cease his investigation after Officer Gibson informed him he only saw ashes and after Justice failed to alert to the presence of narcotics because he personally saw marijuana at the beginning of the stop. (Tr. p. 142; p. p. 144). Following Officer Vinesett's testimony, Officer Gibson indicated he assisted with the traffic stop, did not observe any green plant material at the time he looked at Burris' shirt, and did not detect an alert from his drug-detection dog when the dog performed a sniff search on the rental vehicle. (Tr. pp. 154-156; pp. 158-159). However, he noted he later found marijuana in the vehicle when he participated in the subsequent search. (Tr. pp. 156-157; p. 162).

Subsequently, Mitchum testified about her analysis of the evidence recovered in the search of Appellant's rental vehicle and confirmed the recovered substances were

marijuana. (Tr. pp. 173-183). At the conclusion of her testimony, the solicitor moved to introduce the marijuana and Mitchum's analysis report into evidence, and defense counsel objected on the grounds raised prior to trial. (Tr. pp. 184-185). However, the trial judge overruled the objection, and the marijuana and report were admitted into evidence. (Tr. p. 190).

Thereafter, at the conclusion of the evidentiary phase of trial, the trial judge instructed the jury on the applicable law, including on the indicted offense of possession of marijuana with intent to distribute and the lesser-included offense of simple possession of marijuana. (Tr. p. 232; pp. 239-241). At the conclusion of trial, the jury convicted Appellant and Burris of simple possession of marijuana. (Tr. p. 248). Following the verdict, the trial judge sentenced Appellant and his co-defendant to one-year terms of imprisonment. (Tr. pp. 252-253).

ARGUMENT

The trial judge properly denied Appellant's motion to suppress the marijuana discovered during the course of the traffic stop because the stop was conducted in a reasonable manner and the officer who stopped Appellant's rental vehicle developed sufficient probable cause to justify a search of the vehicle after he observed a substance he recognized through his training and experience as marijuana at the outset of the stop.

Appellant contends the trial judge erred in failing to suppress the marijuana discovered during the traffic stop of Appellant's rental vehicle. Appellant maintains the stop was unlawfully extended without reasonable suspicion or probable cause and, even if the officer had sufficient reasonable suspicion to extend the stop, the officer's suspicions were dispelled prior to discovering the marijuana. To the contrary, Officer Vinesett did not measurably extend the duration or scope of the approximately fifteen-minute-long traffic stop through any of his investigative actions and, even if the stop was extended into a second detention, developed reasonable suspicion and probable cause to believe a crime had been committed after he observed what he believed to be marijuana based on his training and experience on the shirt of the passenger at the outset of the traffic stop. Furthermore, even though a drug-detection dog failed to alert on the vehicle and another officer failed to observe any marijuana on the passenger's shirt, Officer Vinesett's probable cause to search the vehicle for contraband was not dispelled because he personally observed marijuana on the passenger's shirt and on the floor of the vehicle. Therefore, the trial judge properly denied Appellant's motion to suppress the marijuana, and his ruling was supported by the evidence. Appellant's conviction should be affirmed.

STANDARD OF REVIEW

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). Critically, 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).

ANALYSIS

A. Reasonableness of the Detention

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. That guarantee protects against unreasonable searches and seizures, including those involving only a brief detention. Pichardo, 367 S.C. at 97, 623 S.E.2d at 847. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

For Fourth Amendment purposes, a traffic stop of a vehicle, along with the detention of individuals during the stop, constitutes a seizure. State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002). The reasonableness of a stop or detention "is measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39 (1996). However, the initiation of a traffic stop is reasonable per se when probable cause exists to believe a traffic violation has occurred. State v. Williams, 351 S.C. 591, 598, 571 S.E.2d 703, 707 (Ct. App. 2002). Furthermore, "a minor traffic violation arrest will not be rendered invalid by the fact it was a 'mere pretext for a narcotics search.' " State v. Corley, 383 S.C. 232, 240, 679 S.E.2d 187, 191-192 (Ct. App. 2009) (citations omitted). "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813 (1996).

A lawful traffic stop begins at the point an officer stops a vehicle to investigate a traffic violation and "ordinarily continues, and remains reasonable, for the duration of the stop." Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer may order the driver and any passengers out of the vehicle pending completion of the stop and "may request a driver's license and vehicle registration, run a computer check, and issue a citation." Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see Maryland v. Wilson, 519 U.S. 408, 415 (1997) ("[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop."). "Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure so long as the unrelated questioning does not measurably extend the duration of the stop. Id.; see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory traffic stop must be temporary and last no longer than necessary to effectuate its purpose. Pichardo, 367 S.C. at 98, 623 S.E.2d at 848; see also United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) ("The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose.").

Even if a traffic stop is initially lawful, the detention "can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 ("Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention."). However, a further detention extending the scope of a traffic stop beyond its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Instead, continued questioning beyond the duration of an initial traffic stop is lawful and permissible where: (1) the officer has a reasonable articulable suspicion of other illegal activity; or (2) the traffic stop becomes a consensual encounter. Id.

Reasonable suspicion consists of " 'a particularized and objective basis' that would lead one to suspect another of criminal activity." State v. Lesley, 326 S.C. 641,

644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). "Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.' " 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)). "In this highly fact-specific inquiry, reasonable suspicion 'is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.' " State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781). The reasonable suspicion standard "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]" Illinois v. Wardlow, 528 U.S. 119, 123 (2000). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) ("Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.").

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In reviewing the totality of the circumstances, the individual factors of the traffic stop must not be considered piecemeal or in isolation. See Branch, 537 F.3d at 337 ("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, including

the officer's own experience and specialized training, must be considered as a whole to determine whether the officer's actions were reasonable in light of all of the information available to him at the time. See 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."); see also 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)). "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 the case sub judice, the traffic stop of Appellant's vehicle was objectively reasonable under the totality of the circumstances, and any further extension of the scope of the stop was supported by reasonable articulable suspicion and probable cause. Initially, Officer Vinesett unquestionably had probable cause to initiate the traffic stop after observing Appellant commit a traffic infraction by exceeding the speed limit. See State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("As a general matter, the decision to stop an automobile is reasonable where police have probable cause to believe that a traffic violation has occurred."). Thereafter, during the course of the ensuing traffic stop, Officer Vinesett developed reasonable suspicion and probable cause based on

the suspicious factors he observed, which permitted the officer to extend the scope and duration of the stop.

Most critically, Officer Vinesett, who was specifically trained in the detection and identification of marijuana and other illegal substances, directly observed green plant material he believed to marijuana on the shirt of Appellant's passenger when he initially approached the vehicle at the outset of the traffic stop. See Cortez, 449 U.S. at 418 ("[A] trained officer draws inferences and makes deductions – inferences and deductions that might well elude an untrained person."). Based on his training and experience, Officer Vinesett immediately recognized the green plant particles on Burris' shirt as marijuana, which provided the officer with reasonable suspicion and probable cause to believe the crime of possession of marijuana was being committed. See Foster, 269 S.C. at 379, 237 S.E.2d at 592 ("[The officer] immediately spotted what looked to be heroin, which gave him probable cause for arrest."); see also United States v. Burnett, 791 F.2d 64, 67 (6th Cir. 1986) (finding an officer had probable cause to search an entire vehicle and seize evidence during a traffic stop after he observed a clear plastic bag containing a leafy green vegetable substance that was determined to be marijuana on the floorboard of the vehicle); United States v. Orozco, 715 F.2d 158, 160 (5th Cir. 1983) ("Once he had observed the marijuana, Officer Michalke unquestionably had the authority to look into the glove compartment and to arrest Orozco."); People v. Clark, 92 Ill. 2d 96, 100, 440 N.E.2d 869, 871-872 (Ill. 1982) (holding an officer had probable cause to conduct a warrantless search of an automobile during a traffic stop after observing a green leafy substance that appeared to be marijuana on the floor in front of the driver's seat during the course of the stop); Gillard v. State, 662 S.W.2d 34, 36 (Tex. Ct. App. 1983) (finding an officer's observation of a green leafy substance believed to be marijuana on the

floorboard of a vehicle during a traffic stop provided probable cause to conduct a warrantless search of the vehicle); see, e.g., United States v. Burge, 683 F.3d 829, 832 (7th Cir. 2012) ("Absent some reason to doubt the veracity of the affidavit, the officers' direct observations of what they believed from training and experience to be marijuana plants provided probable cause to issue a search warrant."); State v. Casillas, 393 So. 2d 694, 696 (La. 1981) ("[E]ven if the entire package was not in plain view (as [Casillas] contends), the officer had probable cause to search, once he saw what he reasonably believed to be marijuana, under the existing circumstances."); State v. Moore, 659 S.W.2d 252, 255 (Mo. Ct. App. 1983) ("A police officer with some training and experience in the recognition of controlled substances who sees through a window material he believes to be marijuana has probable cause to believe *someone* inside is or recently was unlawfully in possession of a controlled substance." (italics in original)); People v. Clark, 172 A.D.2d 848, 848, 569 N.Y.S.2d 211, 211 (N.Y. App. Div. 1991) (holding the conduct of the officers in conducting a search during a lawful traffic stop was entirely proper where the officers observed packages containing what appeared to be marijuana and cocaine based on the officers' training and experience during the course of the stop).

Furthermore, as the traffic stop progressed, Officer Vinesett observed several other factors raising his suspicions, including: (1) Appellant and his passenger presented inconsistent stories about where they were coming from, with Appellant claiming they had visited their hospitalized grandmother and Burris claiming they were coming from a basketball court; (2) Appellant was driving a rental car, which has been recognized as an indicator of drug activity; and (3) Burris' hands were visibly shaking when he interacted with Officer Vinesett. See Wallace, 392 S.C. at 55, 707 S.E.2d at 455 (finding

inconsistent stories from a driver and passenger, nervousness, and third-party vehicle ownership to be relevant factors in establishing a reasonable articulable suspicion of drug activity); Provet, 391 S.C. at 504, 706 S.E.2d at 518 (considering the fact third-party vehicle ownership is commonly connected with drug trafficking in finding the officer had reasonable suspicion to extend a traffic stop). However, even without consideration of those additional factors, the fact that Officer Vinesett personally observed a substance he reasonably believed to be marijuana based on his training and experience in the detection of illegal substances established reasonable suspicion of criminal activity and probable cause to believe a crime was being committed under the totality of the circumstances. See Arvizu, 534 U.S. at 273 ("[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."). Therefore, Officer Vinesett was justified in expanding the scope of his investigation and the duration of the traffic stop.

In challenging the reasonableness of the stop, Appellant contends the stop was unlawfully extended after the purpose of the initial traffic stop had been completed. Initially, the length of the detention from the moment the officer stopped Appellant's rental vehicle to the moment Appellant and Burris were arrested after the officers found the hidden jar of marijuana was approximately fifteen minutes. Cf. Provet, 391 S.C. at 499, 706 S.E.2d at 516 (finding the initial traffic stop was not unreasonably extended even if the officer's questioning was unrelated to the purpose of the traffic stop where the entire stop lasted less than eleven minutes). While there is no firm rule as to the appropriate length of a stop and detention, the traffic stop of Appellant's vehicle was not measurably extended by any of the investigative actions undertaken by Officer Vinesett

and was arguably reasonable in duration notwithstanding the existence of reasonable suspicion to expand the scope of the stop. See Johnson, 555 U.S. at 333 ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries **do not measurably extend** the duration of the stop." (emphasis added)); see also United States v. Sharpe, 470 U.S. 675, 683 (1985) (finding a twenty-minute detention during an investigatory traffic stop was objectively reasonable); see also Branch, 537 F.3d at 338 ("We begin with the basic fact that much of Branch's 30-minute detention was justified by the 'ordinary inquiries incident' to a routine traffic stop." (citations omitted)); United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (finding a fifteen-minute traffic stop to be reasonable); see, e.g., United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) (approving of a thirty-minute traffic stop); United States v. Hardy, 855 F.2d 753, 761 (11th Cir. 1988) (finding a fifty-minute investigatory stop to be reasonable). Furthermore, at the time the officer decided to conduct the search based on his observation of the marijuana in the vehicle, the purpose of the traffic stop had not yet been completed due to the fact the officer was still waiting to hear back from dispatch in regards to Appellant's passenger's information.[5] Compare State v. Tindall, 388 S.C. 518, 522, 698 S.E.2d 203, 205 (2010) ("At this point, the purpose of the traffic stop was accomplished except for the issuance of the warning ticket. However, rather than issue the ticket, the officer continued to question Tindall for an additional six to seven

[5] Notably, although Officer Vinesett waited to conduct the search even though he possessed sufficient probable cause to do so when he first observed the marijuana at the outset of the stop, the officer was not required to conduct a search at the moment he first believed he had enough probable cause to do so lawfully. See Hoffa v. United States, 385 U.S. 293, 310 (1966) ("The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.").

minutes[.]") with Provet, 391 S.C. at 504, 706 S.E.2d at 518 ("Conversely, Owens' series of questions and observations occurred prior to the conclusion of the traffic stop because Owens was waiting to hear from dispatch regarding Provet's license and registration and a warning citation had yet to be issued."). However, regardless of whether the traffic stop was extended into a second detention due to its duration and scope, Officer Vinesett was justified in extending the stop under the totality of the circumstances after he observed what he believed to be marijuana based on his training and experience.

Appellant further contends the officer's observation of marijuana on Burris' shirt did not establish reasonable suspicion or probable cause because the officer could not **conclusively** say the observed particles were marijuana. However, the officer's observations of the marijuana established reasonable suspicion and probable cause because the officer's belief that the substance he observed was marijuana was based on his training and experience in identifying controlled substances and was not simply an unfounded or unsupported general hunch. See Ornelas v. United States, 517 U.S. 690, 700 (1996) ("[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists. . . . An appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable."). Furthermore, contrary to Appellant's contentions, Officer Vinesett was **not** required to know conclusively or with absolute certainty that the substance was marijuana in order to possess reasonable suspicion or probable cause regarding the illegal nature of the substance. See Foster, 269 S.C. at 379, 237 S.E.2d at 592 ("[The officer] immediately spotted **what looked to be** heroin, which gave him probable cause for arrest." (emphasis added)); see also Cortez, 449 U.S. at 418 (instructing the reasonable suspicion analysis "does not deal with hard certainties, but with probabilities."). Accordingly, due to the

fact Officer Vinesett observed a green plant substance he reasonably believed to be marijuana based on his training and experience in recognizing such a substance, he possessed reasonable suspicion and probable cause to extend the traffic stop.

Applying the appropriate deferential standard of review, the evidence and testimony presented during the suppression hearing established Officer Vinesett conducted the traffic stop in a reasonable manner and developed reasonable suspicion and probable cause justifying an extension of the stop assuming one occurred. See 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 suppression motion after finding the traffic stop to be proper under the totality of the circumstances, and his ruling was supported by the evidence. See State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling."); Provet, 391 S.C. at 506, 706 S.E.2d at 520 ("[W]e conclude the trial court did not err in finding reasonable suspicion existed to further detain Provet **because there is evidence in the record to support the trial court's ruling**." (emphasis added)). Appellant's conviction should be affirmed.

B. Propriety of the Search

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). The well-settled rule is warrantless searches are unreasonable per se unless they fall under an exception to the Fourth Amendment's warrant requirement. State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). South Carolina courts have

recognized several exceptions to the warrant requirement, including the automobile exception. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981).

The automobile exception is based on: (1) the ready mobility of automobiles along with the potential that evidence may be lost or removed before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). Under this exception, law enforcement officers can conduct a warrantless search of an automobile based on probable cause alone. State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995). "If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Weaver, 374 S.C. at 320, 649 S.E.2d at 482.

Probable cause is "a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved." Bultron, 318 S.C. at 332, 457 S.E.2d at 621. "Probable cause may be found somewhere between suspicion and sufficient evidence to convict." State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). However, the probable cause standard does not require absolute certainty. In re Care and Treatment of Brown v. State, 372 S.C. 611, 619, 643 S.E.2d 118, 122 (Ct. App. 2007); see also Illinois v. Gates, 462 U.S. 213, 235 (1983) ("[I]t is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' " (citations omitted)).

In the case at bar, the search of Appellant's rental vehicle was reasonable because Officer Vinesett had probable cause to conduct the search under the totality of the

circumstances based on his observations during the traffic stop. Most significantly, Officer Vinesett testified he observed particles of marijuana on Burris' shirt at the beginning of the stop and again on the floor of the car on the passenger's side when he looked inside the vehicle later during the stop. After observing a substance he believed to be marijuana based on his training and experience in detecting and identifying controlled substances, Officer Vinesett had a probable cause basis to believe the crime of possession of marijuana was being committed. See Foster, 269 S.C. at 379, 237 S.E.2d at 592 ("[The officer] immediately spotted what looked to be heroin, which gave him probable cause for arrest."); see also Nodd v. State, 549 So. 2d 139, 142 (Ala. Crim. App. 1989) ("After the defendant was stopped and the marijuana had been observed inside the vehicle, the officer's reasonable suspicion to investigate ripened into probable cause to arrest."); People v. Mills, 93 A.D.3d 1198, 1199, 940 N.Y.S.2d 400, 401 (N.Y. App. Div. 2012) ("The officer acquired the requisite probable cause to search defendant and the vehicle when he looked into the vehicle and observed what appeared to be baggies of marihuana in plain view." (citations omitted)); People v. Brown, 116 A.D.2d 727, 729, 497 N.Y.S.2d 934, 936-937 (N.Y. App. Div. 1986) ("Once the Trooper observed what he believed to be marihuana, which was in plain view, the police had the right to conduct a thorough search of the vehicle for additional contraband and the fruits, instrumentalities, or evidence of the crime in question." (citations omitted)); see, e.g., United States v. Andrew, 417 F. App'x 158, 163 (3rd Cir. 2011) ("As Andrew was exiting his car, one of the officers observed a plastic bag in the car containing a leafy green substance. Upon viewing the plastic bag containing that substance, the officer had probable cause to search for marijuana."); United States v. Shakur, 394 F. App'x 974, 976 (4th Cir. 2010) ("Clearly, the marijuana was properly seized after being observed in plain view.").

Accordingly, the officer had probable cause to search anywhere in the vehicle where marijuana might have been hidden. See United States v. Ross, 456 U.S. 798, 825 (1982) ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.").

In challenging the propriety of the search, Appellant argues Officer Vinesett's observation of a substance he recognized as marijuana based on his training and experience was not sufficient to establish probable cause for a search because the officer was not conclusively certain the substance was, in fact, marijuana and further maintains the officer's suspicions regarding the identity of the substance were dispelled prior to the search because Officer Gibson failed to also observe the marijuana and because Officer Gibson's drug-detection failed to alert to the presence of narcotics during a sniff search of the rental vehicle. To the contrary, the fact Officer Vinesett directly observed what he recognized to be marijuana based on his training and experience unquestionably established probable cause for the officer to believe the crime of possession of marijuana was being committed regardless of whether the officer was conclusively certain as to the identity of the marijuana. See State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995) ("The term 'probable cause' does not import absolute certainty."); see also Gillard, 662 S.W.2d at 36 ("When the officer looked inside the Camaro from a position where he had a right to be, he saw a green leafy substance in the console on the floorboard – marihuana. . . . When Officer King entered the Camaro he had probable cause to do so because the recognized contraband provided a reasonable and probable basis for his belief that the automobile contained marihuana; **a sure and certain belief not being required**." (emphasis added)). Furthermore, the fact neither Officer Gibson nor the drug-detection dog confirmed Officer Vinesett's observations did not require the

officer to ignore the inferences and deductions he drew from what he had personally and directly observed during the course of the traffic stop. Cf. State v. Morris, 395 S.C. 600, 603-605, 720 S.E.2d 468, 469-470 (Ct. App. 2011) (affirming the trial judge's determination that probable cause existed to search based on the officer's detection of suspicious factors, including the odor of marijuana, even though a drug-detection dog failed to alert on the vehicle during a sniff search). Instead, the drug-detection dog's failure to alert and Officer Gibson's failure to also see the marijuana were merely factors to be considered under the totality of the circumstances in deciding if probable cause existed and, critically, did not require Officer Vinesett to abandon his investigation in light of the other indicators of criminal activity he detected, including his personal observation of marijuana on Burris' shirt and on the floor of the car.[6] See United States v. Jodoin, 672 F.2d 232, 236 (1st Cir. 1982) ("The dog's failure to react does not, in our view, destroy the 'probable cause' that would otherwise exist. It is just another element to be considered by the magistrate."), abrogated on other grounds by Bloate v. United States, 559 U.S. 196 (2010); see also United States v. Jones, 700 F.3d 615, 623, n. 15 (1st Cir. 2012) ("[T]he failure of the dog to alert does not vitiate reasonable suspicion. It was simply a factor for the district court to consider."); United States v. Ramirez, 342 F.3d

[6] Significantly, Officer Vinesett's testimony established he no longer saw marijuana on Burris' shirt when he returned to the car a second time **before** Officer Gibson went to examine Burris' shirt to see if he could also spot the marijuana particles. (Tr. p. 28; pp. 30-31; p. 123). Thus, Officer Vinesett had no reason to believe Officer Gibson's failure to observe the marijuana established there was no marijuana inside of the vehicle and, instead, reasonably concluded the marijuana could have been brushed from Burris' shirt onto the floor, which was where the marijuana particles were subsequently discovered. (Tr. pp. 32-33). Furthermore, although the drug-detection dog failed to alert during the sniff search, Officer Vinesett noted he did not believe the dog appeared to be focused on performing the search and, instead, looked like it wanted to play. (Tr. p. 143; pp. 150-151). Thus, based on the fact he did not believe the drug-detection dog was fully attentive during the sniff search, Officer Vinesett had no reason to ignore his own observation of marijuana in Appellant's rental vehicle simply because the drug-detection dog did not confirm what he saw. Tellingly, Officer Vinesett's beliefs regarding the drug-detection dog's failure to alert were correct because the lack of an alert from the drug-detection dog was indisputably **not** due to the absence of marijuana in the vehicle. (Tr. pp. 33-34; pp. 88-89; p. 103; p. 105; p. 162; pp. 173-183).

1210, 1212-1213 (10th Cir. 2003) ("The factors giving rise to reasonable suspicion in the first place remained unchanged by the positive or negative results of the first sniff test. . . . We will not require investigators to cease an otherwise reasonable investigation solely because a dog fails to alert, particularly when we have refused to require that a dog sniff test be conduct at all."); United States v. Frost, 999 F.2d 737, 744 (3rd Cir. 1997) (finding a drug-sniffing dog's failure to alert on a suitcase did not eliminate probable cause justifying a search of the suitcase derived from the other existing factors); State v. Sanchez-Loredo, 42 Kan. App. 2d 1023, 1029, 220 P.3d 374, 378 (Kan. Ct. App. 2009) (holding a drug-detection dog's failure to alert to the presence of narcotics did not eliminate the probable cause already established by the other circumstances); State v. Jackson, 42 So. 3d 368, 374 (La. 2010) (finding the officer had probable cause to search the vehicle after detecting the odor of marijuana even though a drug-sniffing dog failed to alert on the vehicle); McKay v. State, 149 Md. App. 176, 188, 814 A.2d 592, 599 (Md. Ct. Spec. App. 2002) ("[A] drug sniffing dog's failure to detect drugs does not automatically negate probable cause. It is, instead, but one factor to be considered in the probable cause determination."); State v. Williamson, 146 N.M. 488, 499, 212 P.3d 376, 387 (N.M. 2009) (finding a drug-detection dog's failure to alert did not negate probable cause for the search where the dog's failure to alert was sufficiently explained under the circumstances); State v. Alexander, 151 Ohio App. 3d 590, 604, 784 N.E.2d 1225, 1236 (Ohio Ct. App. 2003) (holding a drug-sniffing dog's failure to alert on a bag did not negate the other circumstances establishing probable cause and, instead, was a single factor to consider when evaluating the totality of the circumstances); Commonwealth v. Brown, 924 A.2d 1283, 1289 (Pa. Super. Ct. 2007) ("[T]he failure of a trained dog to respond to the alleged presence of narcotics is but one factor to be considered in

adjudging whether the totality of the circumstances establishes probable cause. Given the recognized fallibility of the dogs' sense of smell and its vulnerability to confusion by other ambient odors, a dog's failure to alert will not defeat probable cause where other factors, viewed within the totality of the circumstances, continue to support it.").

During the course of the lawful traffic stop, Officer Vinesett observed a substance he recognized as marijuana based on his training and experience, which established probable cause to believe the crime of possession of marijuana was being committed. See Texas v. Brown, 460 U.S. 730, 741 (1983) (instructing probable cause is a flexible, common-sense standard). As a result, the officer's subsequent decision to conduct a search of the vehicle based on his observations was reasonable under the totality of the circumstances. See Foster, 269 S.C. at 378, 237 S.E.2d at 591 ("It is only unreasonable searches and seizures that are prohibited."). Accordingly, the trial judge properly denied Appellant's suppression motion, and his ruling was supported by the evidence. See Wright, 391 S.C. at 442, 706 S.E.2d at 326 ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling."). Appellant's conviction 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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February 27, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2011-187486

THE STATE,

Respondent,

vs.

TROY TERRELL BAXTER,

Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) Trial Transcript, Pages 1, 5, 22-64, 77-192, and 232-253;

(2) State's Ex. # 1 – Recording of Traffic Stop;

(3) State's Ex. # 17 – Drug Report;

(4) Indictment; and

(5) Sentencing Sheet.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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PROOF OF SERVICE

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

Breen Richard Stevens, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served. This 27th day of February, 2013.

Ellen R. DuBois

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