

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Letitia H. Verdin, Circuit Court Judge

THE STATE

RESPONDENT,

v.

VICTORIA LORRAINE SANCHEZ

APPELLANT.

APPELLATE CASE NO. 2018-002163

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the Court erred in denying Appellant's motion to suppress the drugs found in her vehicle when the officer engaged in broad, off-topic questioning to unreasonably prolong the traffic stop beyond its original scope, withheld giving Appellant the warning tickets, then requested consent to search without reasonable suspicion that Appellant was engaged in criminal activity, and then exceeded the scope of consent since this constituted an illegal search and seizure under the totality of the circumstances, and violated Appellant's right to privacy under the South Carolina Constitution?

2.

Whether the Court erred in denying Appellant's motion for a directed verdict since there was no substantial circumstantial evidence presented that Appellant knew there were drugs in the vehicle?

3.

Whether the Court erred in refusing to charge the jury the State v. Logan circumstantial evidence instruction when the state relied exclusively on circumstantial evidence to attempt to prove the element of knowledge of the drugs since the Supreme Court held this instruction should be given when requested by a defendant?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County grand jury for trafficking more than 28 grams of heroin and unlawful conduct towards a child. R. 235-238. Appellant's jury trial was held before the Honorable Letitia H. Verdin from December 4, 2018 through December 5, 2018.

R. 1. Appellant was represented by Michael Martinez and Stuart Sarratt and the state was represented by Katrina Owens. R. 1.

The jury found Appellant guilty of both counts and the Court sentenced her to thirty-two years imprisonment on the drug trafficking and concurrent ten years imprisonment on the unlawful conduct charge.

This appeal follows.

ARGUMENT

1.

The Court erred in denying Appellant's motion to suppress the drugs found in her vehicle because the officer engaged in broad off-topic questioning to unreasonably prolong the traffic stop beyond its original scope, withheld giving Appellant the warning tickets, then requested consent to search without reasonable suspicion that Appellant was engaged in criminal activity, and then exceeded the scope of consent since this constituted an illegal search and seizure under the totality of the circumstances and violated Appellant's right to privacy under the South Carolina Constitution.

Standard of Review

An appeal of a trial court's ruling on a motion to suppress evidence based on Fourth Amendment grounds is reviewed for clear error only. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010). The appellate courts must affirm if there is any evidence to support the decision of the trial judge. State v. Provet, 405 S.C. 101, 107, 747 S.E.2d 453, 456 (2013). "However, this deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." Tindall, 388 S.C. at 521, 698 S.E.2d at 205 citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002).

Relevant Facts

On June 28, 2017, Greenville County Sheriff's Office received a tip from the Department of Homeland Security that a silver Kia left a suspected drug location in Atlanta, Georgia and was driving North on I-85 towards Greenville. R. 9, l. 22 – 10, l. 7. The tip did not include any information about the identity of the driver or whether there was anything illegal in the car. R.

18, ll. 18 – 22. Homeland Security asked Greenville Sheriff's Office if they could "intercept" the car. R. 33, l. 23 – 34, l. 2. The plan of the Greenville County deputies was to keep an eye out for this car and stop the car "if [they] can find a reason." R. 18, l. 23 – 19, l. 2. Deputy David Harrison ("Harrison") with the Greenville County Sheriff's Office referred to their attempting to initiate a traffic stop as "just a poke and a hope." R. 34, ll. 4 – 5.

Deputy Andrew Reese ("Reese") with the Greenville County Sheriff's Office initiated a traffic stop on this silver Kia for allegedly crossing over the dotted line and traveling too close behind a tractor trailer. R. 9, ll. 4 – 21. Reese approached the passenger side of the vehicle to obtain basic information like license, registration and insurance. R. 10, ll. 13 – 20; State's Ex. 9 at 1:00-1:13 (Dash cam video on file with this Court). Appellant, who was the driver of the silver Kia, provided Reese with a Texas identification card, vehicle registration and proof of insurance. R. 10, ll. 21 – 25. The registration and insurance were in two different people's names. R. 10, ll. 21 – 25. Reese noticed that Appellant also had her minor child in the back seat of the vehicle. R. 13, ll. 10 – 16; State's Ex. 9 at 1:55.

Appellant informed Reese that she was heading to New Jersey. R. 13, ll. 4 – 9; State's Ex. 9 at 1:42 – 1:45. She also informed him that she recently purchased the vehicle and provided him with a bill of sale. R. 11, ll. 4 – 7. Reese claimed that he noticed some "indicators of criminal behavior" to include that Appellant was drinking Red Bull, was in possession of two cell phones¹ and that the vehicle key was the only key on her keychain. R. 11, l. 8 – 42, l. 2. Reese informed Appellant that it was "not a big deal" that she did not have a driver's license but

¹ Although Reese testified during the suppression hearing that one of the reasons he was suspicious of Appellant was the fact that she had two cell phones, it appears from the dash cam video that Reese does not actually discover this until well into the search. State's Ex. 9 at 23:00 – 24:00. The video was reviewed by the Court and on it, Reese can be heard stating "flip phone" while searching through the driver's seat area of the vehicle. State's Ex. 9 at 23:40.

still asked her to step out of the vehicle and leave her child in the car on the side of the interstate while he ran her information.. State's Ex. 9 at 3:23 – 3:43.

Reese then engaged in very broad, off-topic questioning of Appellant to include her educational background, her personal background, her place of employment, her romantic life and her children. State's Ex. 9 at 3:50 – 12:00. While Appellant was standing outside the passenger side door of Reese's patrol car, he began questioning her about where she was from. State's Ex. 9 at 4:00. Appellant informed Reese that she was from Laredo, Texas and had flown to Georgia to visit her cousin. State's Ex. 9 at 4:00 – 5:05. While she was there, she purchased the vehicle that she was currently driving. State's Ex. 9 at 4:00.

Reese asked Appellant how much she paid for the car, what she was going to be doing in New Jersey and he also asked about her employment history. State's Ex. 9 at 4:00 – 5:00. When Reese asked Appellant if she had been saving money so she could take time off work she informed him that her family in New Jersey "has money." State's Ex. 9 at 5:45. Reese continued his off-topic questioning by asking Appellant where her other children were, how long she had been dating her boyfriend, why "he ain't [sic] put a ring on [her] finger yet" and if she was "not pushing him to." State's Ex. 9 at 6:25 – 6:40. Reese also asked Appellant what her boyfriend did for work. State's Ex. 9 at 6:40.

At this point, Reese asked Appellant if there were drugs in the car. State's Ex. 9 at 6:55. Reese specifically asked if there was any "marijuana, methamphetamine, crack-cocaine, ecstasy, [or] large amounts of drug tainted US currency." State's Ex. 9 at 7:00. Appellant said "no" to all of them. State's Ex. 9 at 7:00. Reese then began to question Appellant about her ethnicity and whether she ever lived in Mexico or if she had any family that lived in Mexico. State's Ex. 9 at 7:00 – 7:45. Reese asked Appellant if she went to college, how she learned to cook and what

she did with the food she cooked while she was in culinary school. State's Ex. 9 at 8:00 – 9:00. Reese went back to asking Appellant about her employment history and also asked about the size of her hometown, Laredo, Texas. State's Ex. 9 at 9:30 – 10:20.

Throughout Reese's questioning of Appellant, she remained calm, answered his questions and denied illegal activity. R. 25, ll. 2 – 19; State's Ex. 9 at 3:50 – 12:00. She did not appear to be nervous and did not exhibit nervous behaviors like sweating or shaking. R. 25, ll. 2 – 19.

After conducting his computer checks on Appellant and the vehicle, Reese made the decision to issue Appellant warning tickets. R. 13, l. 17 – 14, l. 4. He "explained the warning to her . . . to make sure . . . she understood what she did wrong." R. 13, ll. 21 – 23. Appellant indicated that she understood the warnings and did not have any questions. State's Ex. 9 at 12:00. However, before Reese handed her the warning tickets, he asked Appellant for permission to search the car. State's Ex. 9 at 12:10. Appellant responded "sure." Reese then asked Appellant to pull her three-year-old daughter out of the car while 18-wheeler trucks were driving by and stand on the side of the interstate while he began to look through their personal belongings. State's Ex. 9 at 12:10 – 12:40.

Reese told Appellant to stand with another officer, Deputy Wasserman, while he began to search the vehicle. R. 27, ll. 16 – 18; State's Ex. 9 at 12:50. Reese looked through the interior of the car including through Appellant's purse and her luggage in the trunk. R. 28, ll. 9 – 19. Appellant's purse and luggage both contained personal items. R. 28, ll. 20 – 22. When Harrison arrived, Reese was searching through the trunk of the car. R. 35, ll. 11 – 15. Harrison claimed that he believed the vehicle might contain a hidden compartment because it was a newly purchased car that had registration and insurance in two different people's names, that the vehicle was heading from Atlanta to New Jersey, both known drug source areas, and that there

was nothing fancy or flashy about the vehicle to draw attention from law enforcement. R. 36, ll. 2 – 24.

Over three minutes into the search, Reese started taking Appellant and her child's luggage out of the trunk and putting it down on the side of the interstate. State's Ex. 9 at 16:35. After five minutes of searching inside the vehicle, including rummaging through Appellant and her three-year-old daughter's luggage, Harrison began looking underneath the vehicle. State's Ex. 9 at 18:50. Harrison claimed that he could tell that the fuel tank appeared to have been lowered and the bolts holding it in were elongated and freshly painted. R. 38, l. 5 – 10. At that point Harrison pulled the three-year-old girl's car seat out of the back and put it on the ground on the side of the interstate. State's Ex. 9 at 20:25. For the next several minutes the officers tried to figure out a way to gain access to the supposed hidden compartment they believed to be under the back seat. State's Ex. 9 at 20:30 – 28:00.

In trying to gain access to what the officers believed to be a hidden compartment, Reese pulled the rear seat cushion out of the car and threw it on the ground. State's Ex. 9 at 24:45. Harrison then retrieved his crow bar which he referred to as his "'master key' because we do have to break into a lot of these compartments." R. 39, ll. 16 – 21. Harrison brought the crow bar with him to the back seat of the car to try to pry open the compartment. State's Ex. 9 at 27:40. Harrison then stated:

I went to pry the lid up or see if I [could] pry it up, and one of the screws . . . had been sawed off and then glued to the lid to make it look like the screws were still being used. . . . [T]hey had taken a trunk lock, which is what would hold your trunk lid down for your car, and they had welded it inside of the compartment and then welded a small hook to the factory fuel pump cover. And that was the access door for the compartment. When I went to go pry it, it was loose. I turned it. Picked it up.

R. 40, ll. 1 – 11. Inside the compartment were several Ziploc bags that had rectangular packages inside them. R. 16, ll. 9 – 15. After opening the packages, they revealed a brown powder substance which ultimately was confirmed to be heroin. R. 16, ll. 13 – 15; R. 165, ll. 21 – 25.

Motion to Suppress

Defense counsel made a pre-trial motion to suppress the drugs found in the silver Kia. R. 5, l. 11 – 7, l. 9. During the suppression hearing the state called Andrew Reese and David Harrison. R. 7, l. 11 – 44, l. 25. Their testimony, along with the dash cam video of the traffic stop and subsequent search of the vehicle established the above referenced facts. See State's Ex. 9; R. 7, l. 11 – 44, l. 25.

At the conclusion of the testimony defense counsel moved to suppress the drugs found during the search. Counsel argued that Reese unreasonably prolonged the traffic stop in violation of Rodriguez v. United States, 135 S.Ct. 1609 (2015), by engaging in broad off-topic questioning. R. 47, l. 18 – 50, l. 6. Counsel argued that this off-topic questioning into Appellant's education, place of origin, romantic life, employment history and the whereabouts of her children all unreasonably extended the duration of the stop. R. 47, l. 18 – 50, l. 6. Counsel further argued that Reese did not have reasonable suspicion to continue detaining her. R. 49, ll. 16 – 22. Specifically, defense counsel argued that Appellant had luggage in her car with personal items for her trip, she had documentation that supported her purchase of the car from the day before and she had a clear itinerary of traveling to New Jersey to see family. R. 49, ll. 5 – 15.

The assistant solicitor responded by arguing that Reese's off-topic questioning did not extend the duration of the stop because the whole time he was questioning Appellant he was typing on his computer filling out his paperwork. R. 50, l. 9 – 51, l. 9. The solicitor argued that

as soon as Reese finished the warning tickets, he explained them to Appellant and gave them to her. R. 51, ll. 9 – 11. The solicitor further argued that Reese did have reasonable suspicion to request Appellant's consent to search because she had Red Bull cans, no driver's license and that the registration and insurance were in different people's names. R. 52, ll. 1 – 9. The solicitor also argued that reasonable suspicion was supported by the fact that the bill of sale Appellant gave to Reese indicated a purchase price of \$10,000 but Appellant said she had only paid \$4,000 so far. R. 52, ll. 10 – 20.

The Court ruled that the stop was not unreasonably prolonged by the off-topic questioning and that Reese did have reasonable suspicion based on the "Red Bull can; no driver's license is a very big one; the third-party insurance; and unclear ownership of the car." R. 53, ll. 12 – 24. Defense counsel pointed out that Appellant had not received the title to the car yet because she had only paid \$4,000 of the \$10,000 purchase price. R. 54, ll. 6 – 12.

Counsel then argued that in addition to the off-topic questioning, Reese also seized Appellant anew by withholding the warning tickets from Appellant and asking for consent to search her car without reasonable suspicion. R. 54, l. 21 – 55, l. 8. Counsel argued that a roadside consent request is different from a field interview because there has already been a seizure and therefore a reasonable person would not feel free to leave. R. 55, ll. 5 – 14. Counsel argued that Appellant had already been stopped and pulled out of her car and questioned for nearly ten minutes about unrelated topics; there were two uniformed, armed police officers present; she was not told that she was free to leave and the transition from the stop to the request for consent to search happened so quickly that she would not have realized the initial seizure had ended. R. 55, ll. 14 – 25. Counsel again argued that there was no reasonable suspicion because Appellant was not nervous or shaking and she answered Reese's questions calmly. R. 56, ll. 1 –

7. Therefore, Appellant's consent was obtained as an exploitation of the initial seizure. R. 56, ll. 11 – 12.

The Court ruled that there was enough reasonable suspicion to request consent to search and that the stop was not extended. R. 57, ll. 18 – 22. The Court also ruled that Appellant's consent was not coerced and was given voluntarily. R. 57, ll. 18 – 22.

Defense counsel also argued that the officers exceeded the scope of consent. R. 57, ll. 23 – 24. Counsel argued that the South Carolina Constitution's express right to privacy prevents officers from having carte blanche to search wherever they want even when an individual does not specifically limit the scope of consent. R. 57, l. 24 – 58, l. 5. Counsel cited to Florida v. Jimeno, 500 U.S. 248 (1991) and State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) in support of this position. Counsel argued that the search performed by Reese and Harrison far exceeded what a reasonable person would have believed the request to search entailed because parts of the vehicle were removed. R. 58, ll. 11 – 25.

The Court ruled that consent was voluntarily given by Appellant, she was present for the search and that she never objected or attempted to limit the scope of the officers' search at any point. R. 59, ll. 1 – 8. The trial judge cited to State v. Funderburk,² stating that "that case is practically on all fours with this factual scenario" and that the scope of consent was not exceeded. R. 59, ll. 4 – 11. The trial judge then denied Appellant's motion to suppress. R. 59, ll. 15 - 17.

² 367 S.C. 236, 625 S.E.2d 248 (2006). Although the transcript reads "State v. Funderburg," it appears from the context of the trial judge's comments and her reference to Judge Miller that this is a scrivener's error and the actual case she was referring to was State v. Funderburk.

Jury Trial

Reese and Harrison both testified in front of the jury as to their involvement in the search of the silver Kia. R. 72, l. 17 – 99, l. 16; R. 103, l. 1 – 123, l. 22; R. 89, l. 17 – 106, l. 12. At trial, Harrison testified that in order to have installed the hidden compartment a person would have had to remove the fuel tank from underneath the car, then the person would have had to weld the compartment to the underside of the car's frame and then reinstall the fuel tank using extended screws and bolts to hold it in. R. 139, l. 11 – 141, l. 5.

The state also admitted the video of the dash cam showing the traffic stop and search of the car, State's Ex. 9. R. 110, ll. 2 – 11. The state moved to introduce the drugs found in the vehicle, State's Ex. 7 and 8 and defense counsel renewed his objection. R. 166, ll. 8 – 16. The Court admitted the evidence over counsel's objection. R. 166, ll. 17 – 18.

Discussion

“The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures.” State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001). When evidence against a criminal defendant is obtained in violation of the Fourth Amendment it cannot be used against him in court. Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court of the United States made this exclusionary rule applicable to the States in Mapp v. Ohio, 367 U.S. 643 (1961). “Therefore, all citizens enjoy this federal constitutional protection in every criminal proceeding.” Forrester, 343 S.C. at 643, 541 S.E.2d at 840.

The South Carolina Constitution also contains a provision protecting people from unreasonable searches and seizures. S.C. Const. art. I, § 10. However, our State Constitution goes further than the U.S. Constitution by including an express right of the people against “unreasonable invasions of privacy.” Id. “Thus, this Court can interpret the state protection

against unreasonable searches and seizures in such a way as to provide greater protection than the federal Constitution.” Forrester, 343 S.C. at 644, 541 S.E.2d at 840.

A. The Court erred in denying Appellant’s motion to suppress because Reese engaged in broad off-topic questioning and withheld the warning tickets which unreasonably prolonged the traffic stop beyond its scope in violation of Rodriguez v. United States.

A traffic stop is a seizure under the Fourth Amendment and must be reasonable under the circumstances. Whren v. United States, 517 U.S. 806 (1996). In general, a traffic stop is reasonable if it is supported by probable cause that a traffic violation has occurred. Id. During a traffic stop, police officers are permitted to request typical documents associated with the stop like driver’s license, vehicle registration and proof of insurance. United States v. Sullivan, 138 F.3d 126, 131 (4th Cir.1998). They also may run a computer check and issue a citation. Id. However, “when the purpose justifying the stop is exceeded, the detention becomes illegal unless a reasonable suspicion of some other crime exists.” Id.

The Supreme Court of the United States held in Rodriguez v. United States, 135 S.Ct. 1609, 1612 (2015) that “[a] seizure justified only by a police-observed traffic violation . . . ‘becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation.’” Id. quoting Illinois v. Caballes, 543 U.S. 405, 407 (2005). The Rodriguez Court noted that when the purpose of a stop is addressing a traffic violation, the stop cannot last any longer than what is necessary to address that traffic violation. Rodriguez, 135 S.Ct. at 1614. “Authority for the seizure thus ends when tasks tied to the traffic infraction are – *or reasonably should have been* – completed.” Id. (emphasis added).

In this case, Reese claimed that he initially stopped Appellant for crossing the dotted line and following too close. R. 9, ll. 4 – 21. The scope and purpose for the stop then should have been only to investigate those violations and to issue a ticket or warning. The purpose of a

traffic stop for alleged traffic infractions is not to go on a fishing expedition in search of criminal activity. However, the record in this case strongly suggests that is exactly what the purpose of this stop was. R. 9, l. 22 – 10, l. 7; R. 33, l. 18 – 34, l. 5; R. 74, l. 20 – 75, l. 1; R. 129, l. 23 – 130, l. 21.

Reese and Harrison both freely admitted during the suppression hearing that they were looking for this specific Kia only because they had a tip from the Department of Homeland Security that the vehicle left a location believed to be involved in narcotics. R. 9, l. 22 – 10, l. 7; R. 33, l. 18 – 34, l. 5. The tip did not include any information about the identity of the driver or whether there was anything illegal in the car. R. 18, ll. 18 – 22. The plan of the Greenville County deputies was to keep an eye out for this car and stop the car “if [they] can find a reason.” R. 18, l. 23 – 19, l. 2. Harrison even stated in the suppression hearing that Homeland Security “called us to see if we could possibly intercept [the silver Kia]” and that “[i]t was basically just a poke and a hope.” R. 34, ll. 1 – 5. Reese and Harrison’s testimony strongly suggested that the sole purpose for pulling over Appellant was to go on a fishing expedition for drug activity and in fact had nothing to do with legitimate enforcement of traffic laws.

After Appellant was pulled over, Reese made her get out of the vehicle, even though her three-year-old daughter was inside, while he did a computer check on the vehicle and her identity. State’s Ex. 9 at 3:30. During this time, Reese engaged Appellant in extremely broad and off-topic questioning that had nothing to do with the purpose of the stop. State’s Ex. 9 at 4:00 – 12:00. While our State Supreme Court has allowed off-topic questioning in the past, see, e.g., State v. Provet, 405 S.C. 101, 747 S.E.2d 453 (2013), Rodriguez, 135 S.Ct. 1609 makes clear that an officer cannot *unreasonably* extend a traffic stop beyond its original scope and

mission. By engaging in extremely broad and off-topic questioning of Appellant, Reese unreasonably prolonged the traffic stop resulting in an illegal seizure.

Throughout most of the questioning it appears that Reese is engaging in off-topic questioning for the sole purpose of delaying and prolonging the stop. This is supported by the fact that from the very beginning of the stop, Reese told Appellant that it was “not a big deal” that she did not have a driver’s license. State’s Ex. 9 at 3:23 – 3:43. However, despite Reese telling Appellant that it was “not a big deal” and despite Reese having no reason to believe that Appellant was a danger to herself or others, he ordered her out of the vehicle on the side of the interstate while her three-year-old child remained inside.

The dash cam video supports defense counsel’s contention to the trial judge that the off-topic questioning was used to unreasonably prolong the traffic stop beyond its initial scope. The record does not support the trial judge’s finding that the stop was not extended. Especially when after over three minutes of off-topic questioning, Reese asked Appellant directly if there were any drugs in the car. State’s Ex. 9 at 7:00. Appellant calmly and flatly denied that anything illegal was in the car. State’s Ex. 9 at 7:00. Reese then continued to engage Appellant in extremely broad and off-topic questioning for several more minutes after having specifically asked about the presence of drugs in the car. State’s Ex. 9 at 7:00 – 12:00. Reese even had the audacity to ask Appellant about her ethnicity and why her boyfriend had not proposed to her. State’s Ex. 9 at 6:25 – 6:40; State’s Ex. 9 at 7:00 – 7:45.

The Court erred in finding that Reese’s off-topic questioning of Appellant did not unreasonably prolong the traffic stop beyond its initial scope of investigating a minor traffic infraction. Therefore, the Court erred in denying Appellant’s motion to suppress and Appellant’s convictions and sentence should be reversed and this case remanded to the Greenville County

Court of General Sessions for a new trial. See Rodriguez v. United States, 135 S.Ct. 1609, 1612 (2015).

B. The Court erred in denying Appellant's motion to suppress because Reese did not have reasonable suspicion to continue detaining Appellant beyond the scope of the initial stop and therefore her consent to search was involuntary.

“[A] law enforcement officer's continued questioning of a vehicle's driver and passenger outside the scope of a valid traffic stop passes muster under the Fourth Amendment either when the officer has a reasonable articulable suspicion of other illegal activity or when the valid traffic stop has become a consensual encounter.” State v. Pichardo, 367 S.C. 84, 99, 623 S.E.2d 840, 848 (Ct. App. 2005). An officer may conduct a warrantless search in compliance with the Fourth Amendment if voluntary consent is given for the search. State v. Provet, 405 S.C. 101, 113-114, 747 S.E.2d 453, 460 (2013). Whether consent was voluntarily given is to be determined under the totality of the circumstances and the burden of proving voluntariness is on the state. Id. “A consent to search procured during an unlawful stop is invalid unless such consent is both voluntary *and* not an exploitation of the unlawful stop.” State v. Robinson, 306 S.C. 399, 402, 412 S.E.2d 411, 414 (1991). Whether a suspect is in custody or not is a factor to be considered in determining whether the consent given was voluntary. State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 855 (Ct. App. 2003).

Further, it is important to recognize that a traffic stop is different from a field interrogation where an officer may engage a person in questions without reasonable suspicion. Pichardo, 367 S.C. at 101-102, 623 S.E.2d at 849. During a traffic stop, the individual has already been seized by law enforcement which “enhances the coercive nature of the situation.” Id. Reasonable suspicion is when officers have a particularized and objective reason to suspect a

person is engaged in illegal activity. Id., at 104, 623 S.E.2d at 851. The state has the burden of proving facts to support a finding of reasonable suspicion. Id.

In this case, the state failed to prove sufficient facts justifying the Court's finding that Reese had reasonable suspicion. Reese claimed that he had reasonable suspicion for the following reasons: (1) Appellant had recently purchased the vehicle by putting \$4,000 down payment towards the \$10,000 purchase price; (2) the registration and insurance of the vehicle were in two different individuals' names; (3) Appellant was drinking Red Bull; (4) Appellant only had a single car key in the ignition; (5) Appellant was traveling from Atlanta to New Jersey; and (6) Appellant had a minor child traveling with her but had two other minor children that she left at home. R. 10, l. 21 – 13, l. 16. Each of these reasons have innocent explanations whether taken individually or as a whole.

Appellant remained calm and collected the entire time Reese questioned her during the stop. R. 25, ll. 2 – 19; State's Ex. 9 4:00 – 12:00. She never showed signs of nervousness like sweating or shaking. R. 25, ll. 2 – 19. She showed Reese her bill of sale from the day before which explained why the registration and insurance were in different names and why she only had a single key in the ignition. R. 11, ll. 4 – 7; State's Ex. 9 at 2:00.

The fact that Appellant was drinking an energy drink while driving on the interstate a long distance demonstrates nothing more than that she was drinking an energy drink. Countless people drive on our nation's interstates every day and there can be little doubt that a large number of them drink some kind of caffeinated beverage to help them focus.

The fact that Appellant only had one of her three children with her for her trip is also not suspicious of anything. She was traveling to New Jersey to see family and stated to the officer that she could only bring one of her children because bringing all three would have been too

difficult to manage. State's Ex. 9 at 6:35. She left her other children in the care of her boyfriend at home which is not indicative of criminal activity in any way.

The record does not support the Court's conclusion that Reese had a reasonable articulable suspicion to continue to detain and question Appellant beyond the scope of the traffic stop. In incorrectly finding that reasonable suspicion did exist in this case, the trial judge pointed to the Red Bull can; the fact that Appellant did not have a driver's license; the fact that the car's insurance was in a different person's name; and the "unclear ownership of the car." R. 53, ll. 12 – 24. The trial judge's reliance on Appellant's not having a driver's license is belied by Reese's own statement that her not having a driver's license was "not a big deal." State's Ex. 9 at 3:23 – 3:43. Furthermore, Appellant immediately produced a Texas Identification Card, so it is not as if she attempted to conceal her identity. The issues with the insurance and registration paperwork are indicative only of possible traffic violations and do not in any way suggest *other* criminal activity.

The trial judge also referenced State v. Culbreath, 300 S.C. 232, 387 S.E.2d 255 (1990), abrogated on other grounds by Horton v. California, 496 U.S. 128 (1990), in concluding that Reese had reasonable suspicion. R. 53, l. 12 – 54, l. 4. However, the facts of Culbreath are quite different from this case. In Culbreath, the defendant was parked in a private residence's driveway of a person whom he did not know at 1:00 a.m. with the engine running. Id. at 233-234, 387 S.E.2d at 256. When approached by law enforcement, the defendant became angry and aggressive towards the officers and also refused to produce *any* identification. The resident of the home informed law enforcement that she did not know who the defendant was, and the officer then observed a package of cocaine in the defendant's hand. Id.

The Court in Culbreath noted that the correct standard for prolonging a detention of an individual is reasonable suspicion and not probable cause. Id. at 235, 387 S.E.2d at 257. However, the Court found in Culbreath that no seizure had occurred until after the officers saw the cocaine in the defendant's hand and forced him out of the vehicle. Id. at 236, 387 S.E.2d 257.

The Culbreath case lends no support whatsoever to the Court's ruling in this case. Appellant was never angry or aggressive with Reese, she did not refuse any of his requests including showing him her I.D., and there was never any observation of anything illegal in plain view. She also was traveling down a public interstate unlike Culbreath who was parked in a stranger's private driveway.

Because there was no reasonable suspicion to continue to detain Appellant, Reese would only be justified in continuing to detain and question Appellant if she consented. Pichardo 367 S.C. at 99, 623 S.E.2d at 848. After Reese completed his computer check on Appellant, he decided to issue warning tickets for her. R. 13, l. 17 – 14, l. 4; R. 84, l. 16 – 85, l. 6. Once Reese finished writing the warning tickets and explaining them to Appellant the initial purpose of the stop was complete. Therefore, Appellant should have been free to leave. However, instead of letting Appellant go, Reese withheld the warning tickets and asked for consent to search her car. By withholding the warning tickets from Appellant and requesting her permission to search, he additionally and unreasonably prolonged the traffic stop which resulted in an illegal seizure of Appellant. Because Appellant had already been seized by Reese for the alleged traffic violations she was already in a more coercive situation and less likely to feel free to decline Reese's request for consent.

Further, the fact that Reese physically withheld the warning tickets he issued Appellant before asking for consent demonstrates that a reasonable person in Appellant's shoes would not have felt free to leave under the circumstances. By withholding the tickets and asking Appellant for consent to search, he seized Appellant anew. Appellant's "consent" to search was involuntary because she was illegally seized and a reasonable person in her circumstances would not have felt free to decline the request.

The Court erred in finding that Reese had reasonable suspicion that Appellant was engaged in illegal activity and that Appellant's consent to search was voluntary. Therefore, the Court erred in denying Appellant's motion to suppress and Appellant's convictions and sentence should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial. See State v. Pichardo, 367 S.C. 84, 99, 623 S.E.2d 840, 848 (Ct. App. 2005).

C. The Court erred in denying Appellant's motion to suppress because the officers exceeded the scope of consent when they removed the back seat from the vehicle to access a hidden compartment which went beyond what a reasonable person would have understood the search to entail.

An individual who consents to a search by law enforcement is free to limit the scope of the search in any manner he sees fit. State v. Forrester, 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001). If a police officer is relying on the individual's consent as the basis for the search the officer "must not exceed the scope of consent granted or the search becomes unreasonable." Id. Even if law enforcement obtains a general and unqualified consent from an individual, the police still do not have "carte blanche to do whatever they please." Forrester, 343 S.C. at 648-49, 541 S.E.2d at 843 citing Wayne R. LaFare, Search and Seizure: A Treatise On The Fourth Amendment § 8.1(c), at 612 (3d ed. 1996).

Courts must evaluate the scope of consent under an objective and reasonableness standard, i.e. what a reasonable person in the circumstances would have understood the scope of

consent to be. State v. Mattison, 352 S.C. 577, 585-86, 575 S.E.2d 852, 856 (Ct.App. 2003) citing Florida v. Jimeno, 500 U.S. 248, 251, (1991). Neither the individual's nor the officer's subjective belief as to the scope of consent is dispositive as to what is "objectively reasonable." Wayne R. LaFave, Search and Seizure: A Treatise On The Fourth Amendment § 8.1 (c) (5th ed. 2012).

In this case, the search performed by Reese and Harrison far exceeded what an objectively reasonable person would have believed the scope to be. After spending several minutes rummaging through Appellant's and her three-year-old daughter's belongings the officers had found nothing illegal. State's Ex. 9 at 13:00 – 19:00. Reese physically removed Appellant's and her daughter's luggage from the vehicle and put it on the ground next to the interstate. State's Ex. 9 at 16:35. After getting down on the ground and shining his flashlight underneath the car, Harrison went in to the back seat of the vehicle and removed Appellant's daughter's car seat and set it on the side of the interstate as well. State's Ex. 9 at 20:25. Reese physically removed the back seat from the car and threw it on the ground. State's Ex. 9 at 24:45. Although Harrison claimed he did not end up using it, he retrieved his crow bar which he referred to as his "master key" that he specifically keeps on hand because he "[has] to break into a lot of these containers." R. 39, ll. 16 – 21.

In Florida v. Jimeno, 500 U.S. 248, (1991), the Supreme Court only held that it was objectively reasonable that the scope of a general and unqualified consent extended to a paper bag on the floorboard of a car. The Jimeno Court also noted that "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk." Id. at 251-252.

Relying on Jimeno, the Court of Appeals of New York held that an officer exceeded the scope of a general consent to search when he pulled up carpeting in the vehicle and used a crowbar to pry open a part of the gas tank. People v. Gomez, 838 N.E.2d 1271 (2005). In so holding, the Gomez Court held that “a general consent to search alone cannot justify a search that impairs the structural integrity of a vehicle or that results in the vehicle being returned in a materially different manner than it was found.” Id. 838 N.E.2d at 1273. The Court ruled: “A reasonable person would not have understood the officer’s request to search to include prying open a hole in the floorboard and gas tank with a crowbar.” Id. The Gomez Court reached this conclusion even though the defendant in that case did not place any limitations on the officers’ search, nor did the defendant object to the search while it was performed. Id.

The search performed in Jimeno is a far cry from the search performed in this case. Here, the officers went well beyond what a reasonable person would have thought the scope of the search would entail when they removed the child’s seat from the rear of the car and also removed the back seat of the car. Even after the officers did this, they still retrieved a crow bar fully planning on using it to pry open the closed container underneath the vehicle. R. 40, ll. 1 – 11.

Harrison stated that when he attempted to pry the container open, he found that he did not actually need the crowbar. R. 40, ll. 1 – 11. However, this is immaterial to the objectively reasonable standard because by the time Reese and Harrison had gotten to where the lid to the container was visible, they had already exceeded the scope of consent under an objectively reasonable standard. Further, opening the container after they found it was also beyond the objectively reasonable scope of the consent in this case. Harrison stated at the motion to suppress that there was a trunk lock with a hook welded onto the lid of the closed container. R. 40, ll. 1 – 11.

This case was not simply a paper bag on the floorboard of the front passenger seat. Rather this was, a container that had been installed by removing the fuel tank of the vehicle and welding the aftermarket compartment to the underside frame of the vehicle and then reinstalling the fuel tank below it with elongated bolts. R. 139, l. 11 – 141, l. 5. Further, there was a trunk lock welded to the lid of the container which was accessible only by removing the rear seat. R. 40, ll. 1 – 11. An objectively reasonable person would not have believed that even an unqualified consent to search a vehicle would extend this far.

The Court erred in finding that the search of the closed container welded under the rear seat of the vehicle was not beyond the scope of consent under the objectively reasonableness standard. Therefore, the Court erred in denying Appellant's motion to suppress and Appellant's convictions and sentence should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial. See Florida v. Jimeno, 500 U.S. 248, (1991); State v. Forrester, 343 S.C. 637, 648, 541 S.E.2d 837, 843 (2001).

The Court erred in denying Appellant's motion for a directed verdict since there was no substantial circumstantial evidence presented that Appellant knew there were drugs in the vehicle.

Standard of Review

In determining whether a trial judge erred in denying a defendant's motion for a directed verdict, the appellate courts must view the evidence in the light most favorable to the state. State v. Hudson, 277 S.C. 200, 201, 284 S.E.2d 773, 774 (1981). A trial judge should not be concerned with the weight of the evidence presented but only whether evidence exists. Id. "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. State v. Hepburn, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013).

Relevant Facts

At the close of the state's case Appellant moved for a directed verdict. R. 181, ll. 6 – 12. Defense counsel argued that there was insufficient direct and circumstantial evidence that Appellant knew the car contained heroin. R. 181, ll. 6 – 12.

Defense counsel cited to State v. Miles, 421 S.C. 154, 805 S.E.2d 204 (Ct.App. 2017) which held that in a drug trafficking case the state must prove that the defendant "knew the item was a controlled substance." Id. at 165, 805 S.E.2d 211. Counsel distinguished Appellant's case from Miles, where the Court found denial of a directed verdict was proper, because in Miles the

defendant attempted to flee and throw away the box that contained the controlled substance and he also admitted to knowing the box contained drugs. R. 181, l. 13 – 182, l. 2.

Counsel argued that the evidence against Appellant only amounted to a mere suspicion because the drugs were hidden beneath the car in a specially welded container, there was no evidence that Appellant ever handled the drugs in any way, no witness testified that Appellant was present when the drugs were put into the compartment, and there were no statements made by Appellant that she knew there were drugs in the car. R. 182, ll. 3 – 22.

The trial judge denied Appellant's motion for a directed verdict ruling that "she claimed she owned the car." R. 183, l. 20 – 184, l. 4.

Discussion

South Carolina' defines trafficking heroin as:

Any person who *knowingly* sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of: . . . heroin . . . is guilty of a felony which is known as "trafficking in illegal drugs."

S.C. Code Ann. § 44-53-370(e)(3)(c) (1976) (emphasis added). Therefore, an essential element the state must prove is knowledge. "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." Hernandez, 382 S.C. at 624, 677 S.E.2d at 605.

In this case there was no direct evidence whatsoever that Appellant had knowledge of the drugs in the car. There were no witnesses who testified to seeing Appellant putting the drugs in

the car and she flatly denied there were any drugs in the car when asked by Reese. State's Ex. 9 at 7:00.

There also was not "substantial circumstantial evidence" of knowledge in this case. The Court relied on the fact that Appellant claimed ownership of the car, having purchased it the day before. R. 183, ll. 21 – 23. This may be circumstantial evidence that rises to a mere suspicion that Appellant knew of the drugs, but it certainly does not meet the "substantial circumstantial evidence" standard demanded of our courts. In fact, Harrison testified that in order to have installed the hidden compartment a person would have had to remove the fuel tank from underneath the car, presumably requiring the car to be lifted off the ground, and then the person would have had to weld the compartment to the underside of the car's frame and then reinstall the fuel tank using extended screws and bolts to hold it in. R. 139, l. 11 – 141, l. 5. There was no evidence in the record that Appellant possessed the specialized skills required to perform such a task. In fact, Appellant told Reese that she was a cook at Applebee's. State's Ex. 9 at 4:00 – 5:00. There was no evidence presented that Appellant had any knowledge there was even a hidden compartment added to the vehicle that she purchased and there was certainly not sufficient evidence that she knew the hidden compartment contained contraband.

The Court erred in denying Appellant's motion for a directed verdict because there was no direct evidence that Appellant had knowledge of the drugs in the car and there was not substantial circumstantial evidence of knowledge either. Therefore, this Court should direct a verdict of acquittal in favor of Appellant. See State v. Miles, 421 S.C. 154, 805 S.E.2d 204 (Ct.App. 2017); S.C. Code Ann. § 44-53-370(e)(3)(c) (1976).

The Court erred in refusing to charge the jury the *State v. Logan* circumstantial evidence instruction when the state relied exclusively on circumstantial evidence to attempt to prove the element of knowledge of the drugs since the Supreme Court held this instruction should be given when requested by a defendant.

Standard of Review

When determining whether a trial court erred in its jury instruction, appellate courts should consider the charge given “as a whole and in light of the evidence and issues presented at trial.” State v. Logan, 405 S.C. 83, 90–91, 747 S.E.2d 444, 448 (2013) citing State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011). If the jury charge adequately covers the law and is substantially correct, then it does not require reversal. Logan 405 S.C. at 90-91, 747 SE.2d at 448.

Relevant Facts

At Appellant’s jury trial, the state did not present any direct evidence to prove the element of knowledge. The state relied solely on circumstantial evidence as to this particular element of the charged offense.

Defense counsel requested the specific circumstantial evidence charge derived from State v. Logan. R. 143, l. 11 – 144, l. 2; R. 230. The judge refused to charge the requested instruction but marked Appellant’s proposed charge as Court’s Exhibit 1. R. 144, ll. 3 – 9; R. 230.

Discussion

In State v. Logan, our Supreme Court clarified the rule regarding jury instructions on circumstantial evidence. The circumstantial evidence jury instruction had been the subject of some modifications and the Logan Court sought to clarify the proper instruction to be given. See

State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2005); State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997); State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955).

The Supreme Court of South Carolina held in Logan that a trial judge should give the following jury charge on circumstantial evidence, in addition to a proper reasonable doubt instruction, when the defendant requests it:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, *however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt.* If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

State v. Logan, 405 S.C. at 99, 747 S.E.2d at 452 (emphasis added).

The Logan Court further clarified that a trial judge may still issue the circumstantial evidence charge approved of in Grippon and Cherry but that the trial judge cannot rely exclusively on that charge when a defendant objects to it. Logan at 100, 747 S.E.2d at 453. The Logan Court went on to state “[t]hus, we modify Grippon and Cherry to allow the additional language provided above if requested by a defendant.” Id.

Defense counsel requested the exact jury instruction that was laid out in Logan. R. 143, l. 11 – 144, l. 2; R. 230. The Court refused to charge the requested instruction. Instead, the Court gave the following instruction to the jury on circumstantial evidence:

There are two types of evidence which are generally presented during a trial: direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of the chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

R. 211, ll. 1 – 24.

Pursuant to State v. Logan, refusal to grant Appellant's request for the approved circumstantial evidence charge was error. State v. Logan, 405 S.C. at 99, 747 S.E.2d at 452. The Supreme Court plainly held in Logan that this instruction should be given when requested by a defendant and the Court's failure to do so was improper. Id. Furthermore, the error was not harmless beyond a reasonable doubt because the state relied exclusively on circumstantial evidence to prove the element of knowledge. Without *any* direct evidence to prove the element of knowledge, the Court's error in its failure to charge the Logan instruction on circumstantial evidence was not harmless. Therefore, Appellant's conviction should be reversed and this case remanded for a new trial. See State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013).

CONCLUSION

By reason of the foregoing argument, this Court should issue an order of acquittal on both charges pursuant to argument 2. In the alternative Appellant's convictions should be reversed, and this case be remanded to the Greenville County Court of General Sessions for a new trial pursuant to arguments 1 and 3.

s/Adam Ruffin

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of March, 2020.

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."

March 26, 2020

s/Adam Ruffin

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