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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MICHAEL N. FRASIER, JR.,

APPELLANT

APPELLATE CASE NO 2017-000802

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 5751

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Michael N. Frasier, Jr. petitions the Court for rehearing and respectfully submits that this Court overlooked the fact the evidence relied upon by this Court to support the trial judge's finding that the officer had a reasonable articulable suspicion to justify the extended traffic stop and further detention does not meet the threshold minimum to justify the extended stop. Under a clear error standard of review this Court should conduct its own review of the record and determine that the trial judge's finding that the officer had a reasonable articulable suspicion to justify the extended traffic stop and further detention is not supported by the evidence, especially in light of the fact that the trial judge failed to make any specific findings of

fact to support the ruling. This Court found that the officer's experience, the fact that narcotics officers noticed "something suspicious" about Petitioner at the bus station, the use of the bus system, the driver's unzipped pants, a "little more elevated" nervousness, evasiveness in answering questions about where they were coming from and the driver door opening during the stop support the trial judge's finding. Respectfully, these factors do not rise to the level of reasonable articulable suspicion that illegal activity had occurred or was occurring. The trial judge's general finding is not supported by the record.

Additionally, counsel respectfully submits that this Court and the trial judge overlooked the totality of the circumstances in determining that the consent to search was voluntary. Under a clear error standard of review based on the totality of the circumstances, this Court should conduct its own review of the record and determine that the trial judge's finding that that the consent to search was voluntary is not supported by the record.

Finally, counsel respectfully submits that this Court, in finding that Petitioner's post-*Miranda* warning statement that the jacket containing drugs belonged to him was voluntarily made, overlooked the fact that Petitioner was not warned that his pre-*Miranda* warning statement could not be used against him. Additionally, counsel respectfully submits that this Court shifted the burden of proof in finding that Petitioner provided no testimony he felt coerced or threatened by the fact that, prior to Petitioner making the statement, officers placed his common law wife in handcuffs in the presence of a toddler. The failure to suppress the post-*Miranda* statement constituted an abuse of discretion. Petitioner respectfully seeks rehearing on all three issues presented.

FACTS

On the morning of August 14, 2013, narcotics officers with the North Charleston Police Department saw Petitioner leave the bus station in North Charleston, get into a car and leave. (R. p. 28, lines 9-19). During the pre-trial hearing on Petitioner's motion to suppress Officer Pritchard testified, "It appeared to me that he was clearing the area for threats, i.e., whether it be law enforcement, enemies, something of the sort. He was uncomfortable, it appeared to me." (R. p. 28, line 24 – p. 29, lines 1-2). Based on this purported suspicious behavior, the officers followed the car in which Petitioner was a passenger. Officer Pritchard testified, "Commonly, this happened multiples where we had to get the vehicle stopped leaving certain areas due to the fact that we have no lights. And we've had to – it's easier for us to follow in an unmarked vehicle where we can get a violation. On this particular date, we did follow the vehicle and were able to get a violation on the vehicle, which was a third brake light." (R. p. 30, lines 12-19). After the narcotics officers "got a violation" they contacted a patrol officer to stop the car for the brake light violation. (R. p. 37, lines 1-12).

Officer Hall, the patrol officer who was contacted by the narcotics officers, stopped the car. Cheryl Jones was the driver, Petitioner was a passenger in the front seat and there was a child in the backseat. (R. p. 172, lines 16-21; p. 48, line 23 – p. 49, lines 1-2). Once Officer Hall determined that Ms. Jones had a valid driver's license and neither Jones nor Petitioner had outstanding warrants, the officer decided to write a warning ticket and "try to get consent." (R. p. 64, lines 20-23). Another officer, Officer Deaton, provided backup at the traffic stop. (R. p. 174, lines 10-18). According to Officer Hall, Ms. Jones gave consent to search the car. (R. p. 66, lines 18-19). The officers asked both Ms. Jones and Petitioner to step out of the car.

Officer Hall testified that he asked Petitioner "if he minded if I checked him out or searched him, and he said, 'I do, but', and just kind of put his hands on top of the car." (R. p. 46, lines 23-25). Officer Hall searched Petitioner and found a small bag containing cocaine, a straw and a bus ticket. (R. p. 232, lines 1-3; p. 237, line 11 – p. 238, 239, 240 lines 1-2). At this point Officer Hall arrested Petitioner. (R. p. 47, lines 16-20). Officer Hall and another officer searched the car and found more cocaine in a jacket in the backseat. (R. p. 48, lines 12-22). The officers also found Superior B, a substance used to cut cocaine, in a bag in the backseat. (R. p. 77, lines 13-15).

Prior to *Miranda* warnings, Officer Hall questioned Petitioner about the jacket where the cocaine was found. (R. p. 49, lines 12-19). Officer Hall testified that Petitioner stated that the jacket was his. (R. p. 49, lines 20-21). Eight minutes later, Officer Hall advised Petitioner of his *Miranda* rights. (R. p. 76, lines 7-11). Officer Hall again asked Petitioner about the jacket found in the car. (R. p. 76, lines 15-19) Officer Pritchard, one of the narcotics officers who arrived at the stop later, also asked Petitioner, post *Miranda* warnings, about the cocaine found in the jacket in the car. According to the officer, Petitioner responded, "I'm responsible." (R. p. 159, lines 19-21). Ms. Jones was given a warning ticket for the inoperable third brake light but was not arrested or charged with any drug offense.

ARGUMENTS

1. **The trial judge erred in refusing to suppress evidence obtained when the police unlawfully seized Petitioner, a passenger in a car stopped for having an inoperable third brake light, by exceeding the scope of the initial traffic stop and lacking a reasonable suspicion of criminal activity to support the extension of the stop.**

Prior to trial Petitioner filed a written motion to suppress and moved to suppress all evidence, including a small amount of cocaine, a straw and a bus ticket found on Petitioner's person, cocaine found in the car, cutting agent found in the car, the dash cam video of the traffic stop and statements of the Petitioner, obtained as a result of an illegal seizure in violation of the Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution. (R. pp. 91-125; R. p. 350- 355). The trial judge denied the motion finding that the police had reasonable suspicion of criminal activity to justify the extension of the initial traffic stop. (R. pp. 109-135). The trial judge erred. The State failed to establish that the police officers had reasonable suspicion to prolong the traffic stop. There is no evidence to support the trial judge's finding of reasonable suspicion.

Narcotics officers with the North Charleston Police Department ordered a traffic stop of the car in which Petitioner left the bus station as a passenger based on the fact that Petitioner scanned the parking lot as he left the bus station. (R. p. 35, line 6 – p. 36, 37, lines 1-12). The inoperable third brake light violation was a mere pretext for the stop. As the trial judge stated, "We know that they called to have him stopped because they saw his behavior at the bus station. They felt it was suspicious, and that they were just looking for a reason to stop the car so that they could search him and find out if there were illegal drugs in the car." (R. p. 92, lines 12-17). When Officer Hall, the patrol officer called to make the traffic stop, was asked what information he received form the narcotics officers, Officer Hall testified, "I was told that they had – they

were watching the bus station and observed the subject exit the bus station, enter a car. They didn't give me – run through all the particulars. They just believed that something was funny about it and asked if I would conduct a traffic stop on the vehicle." (R. p. 55, lines 1-6). A video of the traffic stop was introduced in evidence and marked as State's Exhibit #6. The video reflects that Officer Hall reached a speed of up to 87 miles per hour in order to catch up with the car. (R. p. 56, lines 7-14).

At 8:07 AM Officer Hall initiated his blue lights while the car was on the Cosgrove Bridge where the driver, Cheryl Jones, could not immediately pull over. (R. p. 56, line 18 – p. 57, line 1; p. 81, lines 10-11). Within forty-nine seconds of the initiation of the blue light Ms. Jones pulled over. (R. p. 58, lines 15-18). When the officer approached the car he noticed that Ms. Jones' zipper was down and her pants were "kind of undone." (R. p. 41, lines 9-12). Jones told the officer that she had just gotten out of the shower before coming to the bus station and she must have forgotten to zip her pants. (R. p. 63, lines 1-12). As noted by the trial judge in discussing Ms. Jones' attitude, "And you can see her attitude to the video. Like, I just got out of the shower, why is it your business that my zipper is down, which I don't know is necessarily unreasonable." (R. p. 96, line 23 – p. 97, line 1).

The officer testified that Petitioner, the passenger, appeared to be nervous. "He was sweating profusely, did not want to really interact with me a whole lot as far as eye contact, something like that." (R. p. 43, lines 3-5). As noted by the trial judge, "Everybody sweats profusely in August in Charleston." (R. p. 82, line 25 – p. 83, line 1). The video of the traffic stop shows an officer wiping his brow. Complaints about the heat and concerns about getting Ms. Jones and the child out of the heat can also be heard on the tape. (R. p. 61, line 6 – p. 62, lines 1-22).

At 8:11 AM Officer Hall ran a driver's license check. (R. p. 81, lines 11-12). The information checks on both Ms. Jones and Petitioner came back clear at 8:13 AM. (R. p. 64, lines 2-19). At this point Officer Hall decided to issue a warning ticket for the inoperable third brake light and to "try and obtain consent to search." (R. p. 64, lines 20-24). The officer testified that while he was writing the warning ticket, the driver's side door opened. (R. p. 73, lines 22-25).

Instead of giving Ms. Jones the warning ticket, Officer Hall asked her to step out of the car. After a few questions Officer Hall stated, "You don't mind if I take a quick look do you?" Jones responded, "No." (See State's Exhibit #6, video of traffic stop). The following questioning of Officer Hall took place during the suppression hearing:

> Q. So doesn't look like you actually gave her the ticket at that point?
>
> A. No.
>
> Q. But you have the ticket written out and ready to give to her, right?
>
> A. Yes, sir.
>
> Q. At that point, you are basically done with the traffic part of it, right? You are still concerned about there may be something in the car.
>
> A. Correct.
>
> Q. But the traffic portion of it, you've written the ticket out. And instead of giving it to her, you get her out and start talking to her about whether you can search the car?
>
> A. Yes, sir.

(R. p. 66, lines 3-17). At this point, the purpose of the initial traffic stop for an inoperable third brake light had ended. According to the officer, Jones then gave consent to search the car. (R. p. 66, lines 18-19). The prosecutor asserted that consent was given at 8:19 AM. (R. p. 81, lines 13-

15). When asked how long a typical traffic stop lasts Officer Hall testified, "Ten minutes, fifteen minutes maybe. I would say ten probably." (R. p. 55, lines 22-25).

Officer Hall did not have a basis to suspect that there were drugs in the car. The officer testified at the pretrial hearing, "Just with the totality of everything, with what I was relayed from the detectives and almost evasiveness – well, not evasiveness, but the length they pulled over, her zipper being undone, just not being very direct with their answers with me, my interested was piqued highly that something was amiss or – I don't know." (R. p. 45, lines 2-7). The officer admitted, however, that neither Jones nor the Petitioner provided false or conflicting statements. (R. p. 59, lines 8-23). Officer Hall agreed that within the first two minutes of the stop Petitioner told the officer he was coming from New York and Jones told the officer she was coming from the bus station. (R. p. 59, lines 8-15).

The prosecutor told the judge, "This traffic stop was extended based on a reasonable articulable suspicion." (R. p. 81, lines 20-21). The prosecutor argued that Petitioner's scanning the parking lot at the bus stop, the fact that the driver's pants were unzipped, Petitioner's nervous behavior and inability to answer questions directly, the driver's delay in stopping and opening the door during the traffic stop amounted to reasonable suspicion to justify the extended traffic stop. (R. p. 85, lines 6-18).

Petitioner, citing State v. Tindall, 388 S.C. 518, 698 S.E.2d 203 (2010), moved to suppress the evidence found on Petitioner's person and the evidence found in the car. (R. p. 91, lines 7-19). Petitioner argued that any purported consent to search was invalid because it was the product of the illegal prolonged detention. (R. p. 93, lines 10-24; p. 101, lines 3-14). Petitioner argued that the officer did not have reasonable suspicion to prolong the traffic stop. (R. p. 97, lines 4-9; p. 100, line 8 – p. 102, lines 1-2).

The trial judge, without discussing what particular factors constituted reasonable articulable suspicion, found that the officer had an objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring. (R. pp. 131-135). The trial judge appears to acknowledge that the determination of whether the State presented evidence of reasonable suspicion to justify the extended traffic stop was a close call stating, "The next, and I've shared this with counsel, the next issue is the stop, which really is at best a 50/50 call based on the facts as they have been presented in the testimony." (R. p. 131, lines 9-12). The judge went on to state, "And I think the parties would agree that the initial purpose of the stop was the taillight[1] being out, that clearly the purpose of that stop had been concluded. And then there was a second extension of the stop." (R. p. 132, lines 13-16). The judge then discussed the narcotics officer's observation of alleged suspicious behavior at the bus stop. (R. p. 132, line 17 – p. 133, lines 1-18). The trial judge acknowledged that the patrol officer was justified in questioning Jones and the Petitioner during the traffic stop. (R. p. 133, lines 19-22). The trial judge acknowledged that nervousness alone is not enough to justify extending a traffic stop. (R. p. 133, line 23 – p. 134, line 1). The judge then stated:

> Now, the officers have articulated many factors. And just in the interest of time, because the jury now has been waiting since 1:30 on us and it's now 2:12. It's not their fault. It took us a little bit longer. And I needed to give you all a reasonable chance to eat as well before we proceeded with the trial. But in the interest of time, I'm just going to cut to the chase on it, which is that the officers articulated what they believed to be the basis of a reasonable and articulable suspicion to extend the stop. And I find that testimony is reasonable and supported by the facts.

(R. p. 134, lines 14-24). The trial judge found that the purported delay in stopping, however, was reasonable and did not contribute to reasonable suspicion. (R. p. 134, line 25 – p. 135, lines 1-17). The trial judge's finding that the officer had a reasonable articulable suspicion to justify

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[1] The third brake light was out, not the taillight.

the extended traffic stop and detention is not supported by the record and constitutes clear error requiring reversal.

During trial Petitioner renewed his objection to the admission of the dash cam video. (R. p. 168, lines 5-9). Petitioner also renewed the objection to the admission of the small amount of cocaine found on Petitioner's person. (R. p. 231, lines 23-24). Additionally, Petitioner renewed his objection to the bus ticket and the straw found on Petitioner's person. (R. p. 237, line 14 – p. 238, 239, 240, lines 1-10). Petitioner renewed his objection to the admission of the cocaine found in the car. (R. p. 232, line 15; p. 263, lines 22-25; p. 266, lines 1-18). Petitioner also renewed his objection to the admission of the Superior B cutting agent. (R. p. 236, lines 21-23). Petitioner renewed his objections to a post *Miranda* statement attributed to Petitioner. (R. p. 156, line 23 – p. 157, lines 1-6; p. 158, lines 16-18, p. 159, line 6, p. 240, lines 19-20). All evidence subject to the suppression motion was admitted over objection. The objections were again renewed at the close of the State's case and after the jury reached a verdict. (R. p. 278, lines 16-20; p. 346, lines 5-6).

"In Fourth Amendment cases, the trial court's factual rulings are reviewed under the 'clear error' standard." State v. Provet, 391 S.C. 494, 498, 706 S.E.2d 513, 515 (citing State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000)). "Under the clear error standard, an appellate court will not reverse a trial court's findings of fact simply because it would have decided the case differently." *Id.* (internal quotations omitted) (citing State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct.App.2005)). "Therefore, we will affirm if there is any evidence to support the trial court's rulings." Id. (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002)).

The Fourth Amendment to the Constitution of the United States grants citizens the right to be secure against unreasonable search and seizure. (U.S. Const. amend. IV). Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but where probable cause exists to believe that a traffic violation has occurred, such a seizure is reasonable per se. See Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). In carrying out a routine traffic stop, a law enforcement officer may request a driver's license and vehicle registration, run a computer check, and issue a citation. See United States v. Sullivan, 138 F.3d 126, 131 (4th Cir.1998). However, "[a]ny further *detention* for questioning is beyond the scope of the stop and therefore illegal unless the officer has a reasonable suspicion of a serious crime." *Id.* (emphasis added); see Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."). The initial pretextual traffic stop for the inoperable third brake light is not being challenged. The prolonged detention by Officer Hall after he wrote the warning ticket, however, required additional reasonable suspicion.

In State v. Moore, 415 S.C. 245, 252, 781 S.E.2d 897, 900–01, cert. denied, 136 S. Ct. 2473, 195 L. Ed. 2d 809 (2016) the South Carolina Supreme Court wrote:

> "Violation of motor vehicle codes provides an officer reasonable suspicion to initiate a traffic stop." Id. (citing Pennsylvania v. Mimms, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977)). "A traffic stop supported by reasonable suspicion of a traffic violation remains valid until the purpose of the traffic stop has been completed." *Id.* (citing Arizona v. Johnson, 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009)); see Rodriguez v. United States, ——U.S. ——, 135 S.Ct. 1609, 1616, 191 L.Ed.2d 492 (2015) (holding that even a *de minimis* extension of a traffic stop is unconstitutional absent reasonable suspicion). However, "[o]nce the underlying basis for the initial traffic stop has concluded, it does not automatically follow that any further detention for questioning is unconstitutional." Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. " '[T]he officer may detain the driver for questioning unrelated to the initial stop if

> he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring.' " *Id.* (quoting United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir.1998)).

Officer Hall's continued detention of Petitioner and Jones **after** checks on both of them came back clear and the officer wrote the warning ticket, exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment. At the time Officer Hall returned to the car the purpose of the traffic stop had been accomplished except for the issuance of the warning. Instead of issuing a warning the officer continued to question Petitioner and Jones and asked both to step out of the car. The officer still had Petitioner's license and there was another officer present on the scene. (R. p. 65, lines 9-12). A reasonable person in Petitioner's position would not have felt free to terminate the encounter. Officer Hall admitted that he never told them that they were free to leave. (R. p. 66, lines 20-25).

The prosecutor admitted that the traffic stop had been extended beyond the scope of the initial traffic stop for an inoperable third brake light but argued that the officer had an objectively reasonable and articulable suspicion illegal activity had occurred or was occurring. The prosecutor told the judge, "This traffic stop was extended based on a reasonable articulable suspicion." (R. p. 81, lines 20-21). Officer Hall, however, did not have an objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring, rendering the prolonged detention unconstitutional.

In State v. Provet, 391 S.C. 494, 500–01, 706 S.E.2d 513, 516 (Ct. App. 2011), this Court wrote:

> Lengthening the detention for further questioning beyond that related to the initial stop is acceptable in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a consensual encounter. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848 (citing United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir.1998)). Reasonable suspicion requires a particularized and objective basis that

> would lead one to suspect another of criminal activity. State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct.App.2001) (citing United States v. Cortez, 449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). In determining whether reasonable suspicion exists, the trial court must consider the totality of the circumstances. State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct.App.2007). Generally stated, reasonable suspicion is a standard that requires more than a "hunch" but less than probable cause. *Id.* 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." United States v. Foreman, 369 F.3d 776, 781 (4th Cir.2004). Therefore, courts must "consider the totality of the circumstances" and "give due weight to common sense judgments reached by officers in light of their experience and training." United States v. Perkins, 363 F.3d 317, 321 (4th Cir.2004). "Reasonableness is measured in objective terms by examining the totality of the circumstances. As a result, the nature of the reasonableness inquiry is highly fact-specific." State v. Tindall, 388 S.C. 518, 527, 698 S.E.2d 203, 208 (2010).

"[I]n evaluating whether an officer possesses reasonable suspicion, this Court must "consider 'the totality of the circumstances—the whole picture.' " Sokolow, 490 U.S. at 8, 109 S.Ct. 1581 (quoting United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). State v. Moore, 415 S.C. 245, 253, 781 S.E.2d 897, 901, cert. denied, 136 S. Ct. 2473, 195 L. Ed. 2d 809 (2016).

The factors argued by the State in support of reasonable suspicion were: 1.) the purported vague suspicious activity observed by the narcotics officers at the bus station and generally relayed to Officer Hall; 2.) a lane change and forty-nine second delay in stopping to get across the bridge; 3.) the fact that the driver's zipper was undone; 4.) Petitioner's nervous behavior and delay in directly answering questions about where they were coming from; and 5.) the driver door opening during the traffic stop. The judge correctly found that the lane change and purported delay in stopping was reasonable. (R. p. 134, line 25 – p.135, lines 1-17). The judge incorrectly found that other non-specified factors provided Officer Hall with objectively reasonable and articulable suspicion that illegal activity had occurred or was occurring. (R. p.

134, lines 14-24). Viewing the factors above as a whole and considering the totality of the circumstances the record does not support the trial judge's finding of reasonable suspicion. There is no evidence of reasonable suspicion in the present case.

In Moore the South Carolina Supreme Court found that the large amount of money found on Moore, Moore's unusual itinerary and Moore's nervousness supported the trial court's finding of reasonable suspicion. In regard to nervousness, the Court in Moore cautioned writing:

> Moore exhibited excessive nervousness in the judgment of the officer, which lends support to a finding of reasonable suspicion to prolong the traffic stop. We nevertheless comment on law enforcement's reliance on the seemingly omnipresent factor of nervousness. General nervousness will almost invariably be present in a traffic stop. At the suppression hearing, Deputy Owens gave a lengthy list of factors in support of reasonable suspicion, including many that were merely different manifestations of the element of nervousness. While nervous behavior is a pertinent factor in determining reasonable suspicion, we, like many appellate courts, have become weary with the many creative ways law enforcement attempts to parlay the single element of nervousness into a myriad of factors supporting reasonable suspicion. Here, law enforcement's penchant for turning nervousness into a laundry list of factors was not necessary. The trial court properly focused not on the factor of nervousness, but rather upon the facts noted above which support a finding of reasonable suspicion that Moore was likely engaged in criminal activity.

State v. Moore, 415 S.C. 245, 254–55, 781 S.E.2d 897, 902, cert. denied, 136 S. Ct. 2473, 195 L. Ed. 2d 809 (2016)(footnote #3 omitted). Nervousness alone is not sufficient and is simply one factor to be considered. In the present case there is no other evidence supporting a finding of reasonable suspicion. The purported vague suspicious activity observed by the narcotics officers at the bus station and generally relayed to Officer Hall, the fact that the driver's zipper was undone and the driver door opening during the traffic stop combined with Petitioner's nervous behavior does not support a finding of reasonable suspicion to justify the prolonged detention.

In Provet the South Carolina Court of Appeals affirmed the finding of reasonable suspicion by the trial court and wrote:

> In the case at hand, the trial court found reasonable suspicion existed to support Owens' further detention of Provet based on Owens ascertaining (1) Provet was nervous as displayed by extreme shaking of the hands and accelerated breathing, (2) third-party vehicle registration is very common in drug trafficking, (3) Provet's admission to visiting one girlfriend while driving a different girlfriend's vehicle, (4) Provet's claim he was coming from the Holiday Inn even though the traffic violation occurred prior to that hotel's exit, (5) Provet's presence in Greenville for two days without any luggage, (6) the presence of numerous fast food bags, a cell phone, and some receipts in Provet's vehicle, and (7) the presence of several air fresheners in the vehicle that produced a strong odor.

State v. Provet, 391 S.C. 494, 504–05, 706 S.E.2d 513, 518–19 (Ct. App. 2011), aff'd, 405 S.C. 101, 747 S.E.2d 453 (2013)(footnotes #3, #4 omitted). Unlike in Moore, Petitioner in the present case did not have a large amount of money or an unusual itinerary. Unlike in Provet, there was no evidence in the present case that Petitioner had extreme shaking of the hands or accelerated breathing. The vehicle in the present case was not registered to a third party. Petitioner did not provide false statements to Officer Hall. There was no testimony in the present case about fast food bags, or cell phones or several air fresheners.

In State v. Tindall, 388 S.C. 518, 523, 698 S.E.2d 203, 206 (2010)(footnotes #4, #5 omitted), the South Carolina Supreme Court wrote:

> The question therefore becomes whether the officer reasonably suspected a serious crime at the point at which he chose not to conclude the traffic stop, despite his stated intention to issue a warning ticket, instead opting to continue his questioning. *See Sullivan,* 138 F.3d at 131. At that point, the officer had ascertained the following information: (1) Tindall was driving to Durham to meet his brother; (2) Tindall was driving a rental car rented the previous day by another individual which was to be returned to Atlanta on the day of the stop; (3) Tindall did a "felony stretch" on exiting the vehicle; and (4) Tindall seemed nervous. We find these facts did not provide the officer with a "reasonable suspicion" that a serious crime was afoot. Consequently, the continued detention was illegal and the drugs discovered during the search of the vehicle must be suppressed.

In Tindall the South Carolina Supreme Court found that the officer lacked reasonable suspicion despite the third party rental and felony stretch. In the present case there was no third party

rental and no felony stretch. There was no evidence to support reasonable suspicion in the present case.

Any purported consent by either Jones or Petitioner was invalid because it was the result of the illegal detention. In State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005), the South Carolina Court of Appeals wrote:

> Undoubtedly, a law enforcement officer may request permission to search at any time. However, when an officer asks for consent to search *after* an unconstitutional detention, the consent procured is per se invalid unless it is both voluntary and not an exploitation of the unlawful detention. State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991); State v. Williams, 351 S.C. 591, 571 S.E.2d 703 (Ct.App.2002); see Wong Sun v. United States, 371 U.S. 471, 487–88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' ") (citation omitted); Brown v. State, 188 Ga.App. 184, 372 S.E.2d 514, 516 (1988) ("[I]n order to eliminate any taint from an [illegal] seizure or arrest, there must be proof both that the consent was voluntary and that it was not the product of the illegal detention.").
>
> Proof of a voluntary consent alone is not sufficient. Williams, 351 S.C. at 604, 571 S.E.2d at 710; Brown, 372 S.E.2d at 516. The relevant factors include the temporal proximity of the illegal seizure and consent, intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.*

Any purported consent given by Jones or Petitioner was the product of the illegal detention and the taint of the unreasonable stop was not sufficiently attenuated. In State v. Williams, 351 S.C. 591, 604–05, 571 S.E.2d 703, 710–11 (Ct. App. 2002) the South Carolina Court of Appeals wrote:

> In the instant case, we need not determine whether Williams' consent was voluntary, because the record clearly reflects it was obtained through Blajszczak's exploitation of the unlawful detention. Blajszczak's testimony before the trial court revealed that a minimal amount of time passed between the seizure and ensuing consent, there were no intervening or attenuating circumstances, and, as we have already decided, Blajszczak's actions in detaining Barbour and Williams

had no legal basis. Although the trial court failed to reach the issue of consent, the record unquestionably supports finding Williams' consent invalid.

In the present case, as in Williams, the record clearly reflects that consent was obtained through Officer Hall's exploitation of the unlawful detention. A minimal amount of time passed between the seizure and purported consent and there were no intervening circumstances. Any consent was invalid. The trial judge erred in refusing to suppress the fruits of the illegal seizure.

This Court does not need to reweigh the facts or substitute its de novo judgment in order to find that the State failed to prove reasonable suspicion because the record does not support the trial judge's finding of reasonable suspicion. The officer did not have reasonable suspicion to justify the prolonged traffic stop. The prolonged detention constituted an unconstitutional seizure under both the Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution. Any evidence obtained as a result of the unlawful seizure is fruit of the poisonous tree. Suppression of the evidence is the remedy. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The trial judge erred in refusing to suppress the evidence.

In affirming the conviction this Court wrote:

> Because we must evaluate the trial court's findings for clear error, we reluctantly conclude evidence supported the trial court's finding the officer had reasonable suspicion to extend the stop. See Moore, 415 S.C. at 251, 781 S.E.2d at 900 ("The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." (quoting Pichardo, 367 S.C. at 96, 623 S.E.2d at 846)); Wilson, 345 S.C. at 6, 545 S.E.2d at 829 ("This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court]'s ruling is supported by any evidence."). Here, Officer Hall testified that he had four years of experience in narcotics, had four years of patrol experience, and had conducted at least 1,000 traffic stops. He stated that at the time he initiated the stop, he knew Frasier had come from the bus station and narcotics officers had noticed something suspicious about him. Officer Hall testified that in his experience, people commonly used the bus system to bring narcotics into the community. He explained that when he first approached Jones's vehicle, her pants

> were fully unzipped and in his experience, people sometimes hid narcotics in their crotch area. Additionally, Officer Hall averred Frasier's level of nervousness was "a little more elevated" than what he normally saw during a traffic stop. Further, he stated Jones and Frasier evaded his questions about where they were coming from. Finally, he stated Jones's opening the driver's side door struck him as "a little odd" because it was an uncommon occurrence during traffic stops. Officer Hall stated that based on these observations, his "interest was piqued highly that something was amiss."

State v. Frasier, No. 2017-000802, 2020 WL 4342682, at *6 (S.C. Ct. App. July 29, 2020). Under a clear error standard of review this Court must review the record and determine if the trial judge's ruling is supported by the evidence. This review requires this Court to critically examine the factors offered in support of the finding of reasonable articulable suspicion, without reweighing the facts or substituting its de novo judgment. Pursuant to this clear error standard of review, however, this Court does not have to accept any explanation offered. Instead, this Court must determine if the facts offered support the ruling. In order to support a finding of reasonable articulable suspicion the facts should eliminate a substantial portion of innocent travelers and the officer must articulate why a particular behavior is suspicious or logically demonstrate that the behavior is likely to be determinative of illegal activity. See United States v. Williams, 808 F.3d 238, 251 (4th Cir. 2015).

Reviewing the record under a clear error standard of review, the trial judge's finding that the officer had a reasonable articulable suspicion to justify the extended traffic stop is not supported by the evidence, especially in light of the fact that the trial judge failed to make any specific findings of fact to support the ruling. The trial judge simply stated:

> Now, the officers have articulated many factors. And just in the interest of time, because the jury now has been waiting since 1:30 on us and it's now 2:12. It's not their fault. It took us a little bit longer. And I needed to give you all a reasonable chance to eat as well before we proceeded with the trial. But in the interest of time, I'm just going to cut to the chase on it, which is that the officers articulated what they believed to be the basis of a reasonable and articulable suspicion to

> extend the stop. And I find that testimony is reasonable and supported by the facts.

(R. p. 134, lines 14-24). This Court found the following factors supported the trial judge's finding that the officer had a reasonable articulable suspicion to justify the extended traffic stop: 1.) the officer's experience; 2.) the fact that narcotics officers noticed "something suspicious" about Petitioner at the bus station; 3.) the use of the bus system; 4.) the driver's unzipped pants; 5.) a "little more elevated" nervousness; 6.) evasiveness in answering questions about where they were coming from; and 7.) the driver door opening during the stop. These factors, taken together, do not support reasonable articulable suspicion that illegal activity had occurred or was occurring. The trial judge's general finding is not supported by the record.

The present case is easily distinguished from State v. Alston, 422 S.C. 270, 811 S.E.2d 747, (2018), where the South Carolina Supreme Court found that there was evidence in the record to support the trial judge's determination the officer had reasonable suspicion of criminal activity to extend the scope of the stop beyond its initial purpose. There is no such evidence in the present case. In United States v. Williams, 808 F.3d 238, 251 (4th Cir. 2015), cited in the Alston opinion, the Fourth Circuit Court of Appeals wrote:

> As explained above, each of the factors relied on in the Superseding Opinion—standing alone—fails to support any reasonable, articulable suspicion of criminal activity. That analysis does not end our inquiry, however, because, as we have recognized, "reasonable suspicion may exist even if each fact standing alone is susceptible to an innocent explanation." *See* McCoy, 513 F.3d at 413–14. Under the applicable standard, the facts, "in their totality," should "eliminate a substantial portion of innocent travelers." Id. at 413. Furthermore, an officer must "either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance." *See* Foster, 634 F.3d at 248.

As to the first factor considered by this Court, while the Courts must give due weight to an officer's experience, the officer must still articulate why a certain behavior is indicative of illegal

activity. See United States v. Williams id. The second factor, the fact that narcotics officers noticed "something suspicious" about Petitioner at the bus station is a factor the Court can consider, but without more does not rise to the level of reasonable suspicion. As to the third factor, use of the bus system, reasonable suspicion should not be based on the use of the bus system because this factor fails to eliminate a substantial portion of innocent travelers who use the bus system. See United States v. Williams id. As to the fourth factor, the driver's unzipped pants, the trial judge stated, "And you can see her attitude to the video. Like, I just got out of the shower, why is it your business that my zipper is down, which I don't know is necessarily unreasonable." (R. p. 96, line 23 – p. 97, line 1). As to the fifth factor, a "little more elevated" nervousness, "General nervousness will almost invariably be present in a traffic stop." Moore, 415 S.C. at 254-255, 781 S.E.2d at 902.

As to the sixth factor, purported evasiveness, Officer Hall testified at the pretrial hearing, "Just with the totality of everything, with what I was relayed from the detectives and almost evasiveness – well, not evasiveness, but the length they pulled over, her zipper being undone, just not being very direct with their answers with me, my interested was piqued highly that something was amiss or – I don't know." (R. p. 45, lines 2-7). The officer admitted, however, that neither Jones nor the Petitioner provided false or conflicting statements. (R. p. 59, lines 8-23). Officer Hall agreed that within the first two minutes of the stop Petitioner told the officer he was coming from New York and Jones told the officer she was coming from the bus station. (R. p. 59, lines 8-15). At that point in time, the officer had no reason to believe that this was not true.

As to the seventh and final factor considered by this Court, the driver door opening during the stop, while the officer testified this was unusual, he failed to articulate how this behavior was indicative of illegal behavior. In the opinion this Court wrote:

> Although we acknowledge that several of these factors would likely be insufficient standing alone to support a finding of reasonable suspicion, they must be viewed under the totality of the circumstances. See Moore, 415 S.C. at 253, 781 S.E.2d at 901 (acknowledging "many of the factors offered by the State seem innocent when viewed in isolation," but finding there was "evidence to support the trial court's finding of reasonable suspicion to prolong the traffic stop given the totality of the surrounding circumstances"); Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (recognizing that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"). Officer Hall's testimony linked the foregoing observations to the knowledge he gained from his experience in law enforcement to explain why Jones's and Frasier's behaviors caused him concern. Therefore, in view of the totality of the circumstances, we find Officer Hall's testimony supports the trial court's finding that the decision to further detain Jones and Frasier was based on reasonable articulable suspicion.

State v. Frasier, No. 2017-000802, 2020 WL 4342682, at *7 (S.C. Ct. App. July 29, 2020). The seven factors considered by this Court, as discussed above, do not support the finding that the officer had a reasonable articulable suspicion of criminal activity to support the extended traffic stop.

2. The trial judge erred in refusing to suppress a bus ticket, a straw and a small bag of cocaine found on Petitioner's person as a result of a nonconsensual search conducted without probable cause.

Without conceding that any purported consent to search was the result of an unlawful detention and therefore invalid, as argued in issue one, Petitioner additionally and alternatively argued that Officer Hall's search of Petitioner was not consensual. Prior to trial Petitioner filed

a written motion to suppress and moved to suppress a small amount of cocaine, a straw and a bus ticket found on Petitioner's person by Officer Hall as a violation of the Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution. (R. p. 94, line 4 – p. 95, 196, lines 1-16 ; p. 104, 105, 106, 107, lines 1-7; R. p. 356). The trial judge found the search to be consensual. (R. p. 128, line 5 – p. 129, 130, 131 lines 1-8). The trial judge erred. At trial Petitioner renewed the objection to the admission of the small amount of cocaine found on Petitioner's person. (R. p. 231, lines 23-24). Additionally, Petitioner renewed his objection to the bus ticket and the straw found on Petitioner's person. (R. p. 237, line 14 – p. 238, 239, 240, lines 1-10). The renewed objections were overruled. (R. p. 239, lines 14-15).

During the pre-trial motion to suppress Officer Hall testified that he asked Petitioner "if he minded if I checked him out or searched him, and he said, 'I do, but', and just kind of put his hands on top of the car." (R. p. 46, lines 23-25). The interaction between Officer Hall and Petitioner can be seen on the video that was introduced in evidence as State's Exhibit #6. Officer Hall searched Petitioner and found a small bag containing cocaine, a straw and a bus ticket. (R. p. 232, lines 1-3; p. 237, line 11 – p. 238, 239, 240 lines 1-2). Officer Hall admitted that his request to search was more of a statement. (R. p. 70, lines 2-5). Counsel for Petitioner questioned Officer Hall:

> Q. That seems to me like this is consent military style. You told him, you don't mind if I search you real quick, it's like you are going to do it anyway. And maybe that's what he's thinking, yeah, I mind, but what choice do I have. Right? You don't think you had maybe some duty to ask him follow-up question or at least get a yes from him?
>
> A. Yes, in hindsight, I could have worded it better or made the question a little bit more clear towards him.

(R. p. 72, lines 1-8). Officer Hall admitted that he and the other officer on scene were armed with a pistol, a stun gun, pepper spray and a baton. (R. p. 68, lines 3-19). Officer Hall admitted that Petitioner asked, "My pockets too?" (R. p. 72, lines 14-19).

Counsel for Petitioner argued:

> If anything, he's revoked his consent at that point. Even if he did consent in the beginning, once they start going in his pockets, he's protesting that and revoking any consent that I don't think he gave in the first place. I think it's a submission to authority and not a voluntary consent. The case I cite to is State v. Harris. In that case, the police wanted to search a guy's car, and said, we want to search your car, and the guy said, that's cool. And the court ruled that's not a voluntary consent. He said, that's cool.

(R. p. 104, line 21 – p. 105, lines 1-5). The State admitted that the voluntariness of the consent to search was a close call telling the trial judge, "He then asked for consent to search, pulls the defendant out, and asks for his consent to search. Now, I have a duty to the Court. That is a close call on the consent to search his person where the cocaine is found." (R. p. 86, lines 4-7). The State agreed that the search of Petitioner's person was not a Terry frisk. (R. p. 86, line 9 – p. 87, lines 1-12).

During argument during the pre-trial suppression hearing the trial judge noted, "Now, I will conceded the video, I've watched it, and his behavior is sort of contradictory. He says, I really don't want to, but then his body language contradicts his words. Because then he immediately turns around and puts his hands on the roof of the car and basically submits to his person being searched. He said, I really don't want to, but. It's kind of what his body says." (R. p. 94, lines 11-17). A begrudging submission is not consent. The search of Petitioner's person was unlawful as nonconsensual.

In State v. Harris, 277 S.C. 274, 276, 286 S.E.2d 137, 138 (1982), the case cited by counsel for Petitioner, the South Carolina Supreme Court, finding the search nonconsensual, wrote:

> Consent is recognized as an exception to the general rule that searches conducted without a warrant are unreasonable. State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). However, the State bears the burden of proving the voluntariness of a consent to search from the totality of the surrounding circumstances. State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977). Also, the determination of voluntariness of consent is a question of fact for the trial judge. State v. Bailey, S.C., 274 S.E.2d 913 (1981). The trial judge determined that in view of the surrounding circumstances, "That's cool" did not constitute a consent to search. We agree. "That's cool" as a response to a declaration that the police officer wanted to search the vehicle at the complex was not a voluntary consent.

As argued during the suppression hearing, Petitioner's statement, after being asked if he minded if the Officer searched him, that "he did mind, but . . ." is a stronger demonstration of non-consent than the "that's cool" statement found in Harris to be nonconsensual. (R. p. 106, line 19 – p. 107, lines 1-2).

In United States v. Robertson, 736 F.3d 677, 679–80 (4th Cir. 2013), the Fourth Circuit discussed the difference between "a voluntary consent to a request versus a begrudging submission to a command" finding that when Robertson walked toward the officer and raised his hands, after being silent in response to the request to search, he was merely submitting to a search rather than voluntarily consenting to the search. The Fourth Circuit wrote:

> The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. Searches without probable cause are presumptively unreasonable, but if an individual consents to a search, probable cause is unnecessary. See Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). We review for clear error a district court's determination that a search is consensual under the Fourth Amendment. See United States v. Wilson, 895 F.2d 168, 170 (4th Cir.1990). We apply a subjective test to analyze whether consent was given, looking to the totality of the circumstances. Wilson, 895 F.2d at 171–72. The government has the burden of

> proving consent. See United States v. Mendenhall, 446 U.S. 544, 557, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Relevant factors include the officer's conduct, the number of officers present, the time of the encounter, and characteristics of the individual who was searched, such as age and education. Lattimore, 87 F.3d at 650. Whether the individual searched was informed of his right to decline the search is a "highly relevant" factor. Wilson, 895 F.2d at 172.

Robertson, 736 F.3d at 679–80.

In the present case, Petitioner's statement, after being asked if he minded if the Officer searched him, that "he did mind, but . . ." was a stronger demonstration of non-consent than Robertson's silence. Petitioner's action of placing his hands on the car demonstrated that he was merely submitting to the search, as in Robertson, rather than voluntarily consenting to the search. Viewing the relevant factors of proving consent, as discussed in Robertson, Petitioner was stopped on the side of the road and was not free to leave. He was surrounded by two armed uniformed officers and was not informed of his right to decline the search. Like the search in Robertson, the search in the present case was nonconsensual. The evidence found on Petitioner's person pursuant to the unlawful search must be suppressed.

In affirming this Court wrote:

> We find evidence supports the trial court's finding that Frasier consented to the search of his person. *See Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 ("This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial [court']s ruling is supported by any evidence."). Here, Frasier can be seen and heard in the video stating, "I do, but" when the officer asked if he minded if he "checked" him and then he turned around and placed his hands on top of the vehicle. When the officer began to search his pockets, Frasier stated, "my pockets too?" but did not tell the officers to stop or otherwise revoke his consent. Additionally, Officer Hall testified that even though Frasier said he "mind[ed]," he then turned around and placed his hands on the vehicle, which Officer Hall perceived as permission. Further, he stated Frasier never said "stop" or "stop doing that." Finally, the record contains no evidence officers used or threatened the use of force to coerce Frasier to consent. The trial court found that according to the video, notwithstanding Frasier's statements, "his body language [wa]s clearly consensual" and he "very clearly, by his behavior, in a noncoerced way, turn[ed] and put[ ] his hands on the vehicle and consent[ed]" to the search. The trial court stated it could not speculate as to Frasier's inner

> thoughts but found he did not revoke his consent by stating "even my pockets too?" because this was not an unequivocal act or statement revoking consent. We find Frasier's conduct depicted in the video as well as Officer Hall's testimony support a conclusion that, by Frasier's words and conduct, he voluntarily consented to the search and did not effectively withdraw that consent at any point during the search. Accordingly, we find the trial court did not err by concluding Frasier consented to the search, and we affirm its denial of his motion to suppress.

State v. Frasier, No. 2017-000802, 2020 WL 4342682, at *7 (S.C. Ct. App. July 29, 2020). Viewing the totality of the circumstances, as discussed above, the record does not support the trial judge's finding that the consent to search was voluntary.

3. The trial judge erred in refusing to suppress Petitioner's statements to police when the statements were involuntary and in violation of the rule established in Missouri v. Seibert, 542 U.S. 600 (2004).

Without conceding the argument presented in issue one that statements made as a result of the unlawful prolonged detention should have been suppressed, Petitioner additionally and alternatively argued that the statements were involuntary and in violation of Missouri v. Seibert, 542 U.S. 600 (2004). Prior to *Miranda* warnings, but after Petitioner was placed in custody, Officer Hall questioned Petitioner about the jacket where the cocaine was found. (R. p. 49, lines 12-19). Officer Hall testified that Petitioner stated that the jacket was his. (R. p. 49, lines 20-21). Eight minutes later, Officer Hall advised Petitioner of his *Miranda* rights. (R. p. 76, lines 7-11). Officer Hall again asked Petitioner about the jacket found in the car. (R. p. 76, lines 15-19). According to Officer Hall Petitioner again stated that the jacket was his. (R. p. 241, lines 6-8). Officer Pritchard, one of the narcotics officers who arrived at the stop later, also asked Petitioner, post *Miranda* warnings, about the cocaine found in the jacket in the car. According to the officer, Petitioner responded, "I'm responsible." (R. p. 159, lines 19-21).

Prior to trial Petitioner filed a written motion to suppress and moved to suppress statements attributed to Petitioner as both involuntary and in violation of Missouri v. Seibert, 542 U.S. 600 (2004). (R. pp. 107 – 114, R. p. 358). During the suppression hearing Officer Hall testified that he should have mirandized Petitioner when he placed him under arrest for the powder substance found on his person. (R. p. 47, line 16 – p. 48, lines 1-11). The judge suppressed pre *Miranda* statements provided to Officer Hall but admitted the post *Miranda* statements provided to Officer Hall and Officer Pritchard. (R. p. 125, line 18 – p. 126, 127, 128, lines 1-4). The trial judge erred. At trial Petitioner renewed his objections to the post *Miranda* statements attributed to Petitioner. (R. p. 156, line 23 – p. 157, lines 1-6; p. 158, lines 16-18, p. 159, line 6, p. 240, lines 19-20).

In State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841–42 (2010), the South Carolina Supreme Court wrote:

> In Seibert, the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering *Miranda* warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are:
>
> 1) the completeness and detail of the question and answers in the first round of interrogation;
>
> 2) the timing and setting of the first questioning and the second;
>
> 3) the continuity of police personnel; and
>
> 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

In State v. Hill, 425 S.C. 374, 384–85, 822 S.E.2d 344, 350 (Ct. App. 2018), this Court wrote:

> Navy made clear Seibert did not rest on whether the police deliberately used the "question first" tactic. Navy, 386 S.C. at 304, 688 S.E.2d at 842. Here, there is no direct evidence the Investigators set out to skirt *Miranda*, and it would be naïve to think we would find some. Seibert, 542 U.S. at 616 n. 6, 124 S.Ct. 2601 (noting evidence of intent will rarely surface, "so the focus is on facts apart from intent that show the question-first practice at work"). However, this is not a situation like Oregon v. Elstad, 470 U.S. 298, 301, 312-13, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), where a defendant's unwarned inculpatory statement—uttered in response to an arresting officer's offhand comment that he "felt" the defendant was involved in a burglary—did not render later *Miranda* warnings given to the defendant at the station ineffective. Here, we do not have a *Miranda* mistake made in the heat of arrest but a calculated investigatory interview structured by veteran homicide investigators who at times pitched Hill doubletalk. Justice Kennedy's concurrence in Seibert ventured such a *Miranda* breach could be cured if there was a substantial break in the time and environment of the first and second interviews, or if the defendant was advised his first confession could not be used against him. Seibert, 542 U.S. at 622, 124 S.Ct. 2601. Neither occurred here.

In the present case Officer Hall, after Petitioner was arrested for the powder substance found on his person and after Officer Hall found the cocaine in a jacket in the backseat but before *Miranda* warnings, asked Petitioner about ownership of the jacket. The judge suppressed Petitioner's initial answer that the jacket belonged to him. Eight minutes later Officer Hall mirandized Petitioner and again asked him about ownership of the jacket. The trial judge admitted Petitioner's second answers to both Officers Hall and Pritchard that the jacket belonged to him. While the questioning in regard to ownership of the jacket was not lengthy, the second post-*Miranda* questioning was within eight minutes of the first pre-*Miranda* questioning, Officer Hall conducted both interrogations and treated the second round of questioning as a continuation of the first. Petitioner was not warned that his first statement could be used against him. During the suppression hearing the following questioning of Officer Hall took place:

Q. And after he's read his Miranda, you begin questioning him again, right –

A. Yes, sir.

> Q. –about the jacket. And you really don't – you don't kind of start off fresh like, okay, whose jacket is it, right? You say, you are telling me the jacket is yours. That's the first thing you say after Miranda; is that right?
>
> A. That sounds correct.
>
> Q. Basically, referring back to that statement that he made eight minutes ago?
>
> A. I believe so, yes.

(R. p. 76, lines 12-22). The "question first, give *Miranda* warnings later" tactic used by Officer Hall is precisely what the Courts found to be a violation in Seibert and Navy. The statements made by Petitioner after the second round of questioning should have been suppressed. The trial judge's failure to suppress the statements was not harmless. Petitioner admitted ownership of a jacket containing over 100 grams of cocaine.

Petitioner correctly distinguished State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016). (R. p. 110, line 19 – p. 111, lines 1-8). In Medley the second round of statements were not the result of a second interrogation, as in the present case, but rather initiated by the defendant. Petitioner Frasier did not initiate the second round of statements. The statements were taken in violation of the rule announced in Seibert and discussed in Navy.

Petitioner also challenged admission of his statement claiming ownership of the jacket as involuntary because it was made after a veiled threat to arrest Ms. Jones. Petitioner argued:

> The next argument, which is voluntariness, the second before he claims the jacket, Officer Hall says, put her in cuffs. And puts Jones in cuffs. She's got a little toddler with her. He's already in cuffs. So he says, put her in cuffs. Asks whose jacket it is. Mr. Frasier claims the jacket, seeing her in cuffs. Officer Hall tells him, she's just being detained. She's not under arrest. Implication being, I can let her go if you tell me the right thing. And that's when he claimed the jacket.

(R. p. 112, line 20 – p. 113, lines 1-4). Petitioner cited State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992), to support the argument that the statement was inadmissible as involuntary. (R. p. 113, lines 23 – p. 114, lines 1-17).

In Corns the South Carolina Court of Appeals reversed the trial court's admission of confession which was the result of veiled threats against the defendant's family. The Court wrote:

> A reading of the record as a whole with special consideration of the testimony of the officers who witnessed the oral statements leads us to the conclusion that, at the very least, the officers coerced Corns's confession on the marijuana by means of veiled threats against his family. When a defendant waives his *Miranda* rights and gives a statement, the burden is on the State to prove his rights were voluntarily waived by a preponderance of the evidence. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989). The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused. Id. 382 S.E.2d at 914. A confession may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). We find that the testimony of the officers conceding they informed Corns his wife could be arrested, that she could be "involved in the marijuana," and that their children could be taken from them amounted to an exertion of improper influence rendering Corns's statement involuntary. Accordingly, we find the trial judge erred as a matter of law in allowing Corns's oral statements into evidence.

State v. Corns, 310 S.C. 546, 552, 426 S.E.2d 324, 327 (Ct. App. 1992). Viewing the totality of the circumstances in the present case, the State failed to prove, by a preponderance of the evidence, that Petitioner voluntarily waived his *Miranda* rights. The statements should have been suppressed.

In affirming the conviction this Court wrote:

> We find Officer Hall's testimony and the contents of the video support the trial court's finding that, based on the totality of the circumstances, Frasier's postwarning statement, in which he admitted to owning the jacket, was voluntary notwithstanding Officer Hall's pre-warning questioning. *See* Rochester, 301 S.C. at 200, 391 S.E.2d at 247 ("On appeal, the conclusion of the trial [court] on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion.").

State v. Frasier, No. 2017-000802, 2020 WL 4342682, at *8 (S.C. Ct. App. July 29, 2020). This Court additionally wrote:

> Further, we find evidence supports the trial court's rejection of Frasier's argument he claimed ownership of the jacket because he felt threatened officers would arrest Jones. Although the burden was upon the State to prove voluntariness, Frasier provided no testimony he felt coerced or threatened by the fact officers had placed Jones in handcuffs. The video recording shows Officer Hall made no express threat to arrest Jones if Frasier did not confess. Therefore, the trial court did not err by refusing to exclude the statement on this basis.

State v. Frasier, No. 2017-000802, 2020 WL 4342682, at *9 (S.C. Ct. App. July 29, 2020).

Counsel respectfully submits that this Court, in finding that Petitioner's post- *Miranda* warning statement that the jacket containing drugs belonged to him was voluntarily made, overlooked the fact that Petitioner was not warned that his pre-*Miranda* warning statement could not be used against him. Additionally, counsel respectfully submits that this Court shifted the burden of proof in finding that Petitioner provided no testimony he felt coerced or threatened by the fact that prior to the statement officers placed his common law wife in handcuffs in the presence of a toddler. The failure to suppress the post-*Miranda* statement constituted an abuse of discretion.

Based on the above arguments counsel respectfully seeks rehearing.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 13th day of August, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL N. FRASIER, JR.,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Michael N. Frasier, #215880, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 13th day of August, 2020.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT