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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2017-000802

THE STATE,

Respondent,

vs.

MICHAEL N. FRASIER, JR.,

Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING

On July 29, 2020, this Court issued a published opinion in which it unanimously affirmed Appellant Michael N. Frasier, Jr.'s conviction for trafficking in cocaine. State v. Frasier, Op. No. 5751 (S.C. Ct. App. filed July 29, 2020). In affirming Frasier's conviction, this Court properly followed the applicable standard of review and correctly concluded the trial judge's ruling regarding the propriety of the extension of the stop was supported by the evidence presented. Likewise, this Court correctly found the trial judge's ruling finding Frasier voluntarily consented to the search of his person was supported by the evidence presented. Finally, this Court again properly followed the applicable standard of review and correctly found the trial judge's conclusion regarding the voluntary nature of Frasier's post-warning statements was supported by the evidence presented.

Even though this Court accurately applied the pertinent standards of review to each of the issues raised and correctly examined the evidence and testimony contained in the record before

concluding the trial judge's rulings were properly supported by it, Frasier has now submitted a lengthy Petition for Rehearing challenging this Court's rulings on all three appellate issues raised. Through that petition, Frasier has largely repeated the arguments contained in his appellate brief in a strikingly-similar manner to the manner in which they were originally presented while adding only a brief amount of additional analysis that essentially just reiterates those previously-raised—and rejected—arguments. On August 18, 2020, this Court requested the State file a return to Frasier's petition.

Looking to Frasier's contentions in his Petition for Rehearing as to the issue regarding the propriety of the extension of the stop, they can best be summarized as a simple claim the factors found by the trial judge to support reasonable suspicion did not actually do so. In making that claim, Frasier in essence seeks to elevate the low bar of the reasonable suspicion standard to something much more demanding than it actually is in an effort to have the officer's actions deemed unconstitutional. See Kansas v. Glover, __ U.S. __, 140 S. Ct. 1183, 1190 (2020) (rejecting an interpretation of what is required to satisfy the reasonable suspicion standard because the rejected interpretation "would considerably narrow the daylight between the showing required for probable cause and the 'less stringent' showing required for reasonable suspicion"); Kaley v. United States, 571 U.S. 320, 338 (2014) (recognizing even the higher probable cause standard "is not a high bar"). Likewise, Frasier seems to urge the application of a totality-of-the-circumstances analysis that would incorrectly involve consideration of each individual factor alone to determine whether it alone supports reasonable suspicion and that would preclude a factor from being considered towards the reasonable suspicion determination if it could potentially be explained as innocent behavior when improperly considered in an isolated and out-of-context manner. See United States v. Arvizu, 534 U.S. 266, 273 (2002) (instructing

courts are precluded from conducting a "divide-and-conquer analysis" when considering the totality of the circumstances). However, as this Court recognized, the appropriate analysis involves an examination of all the circumstances viewed together as a whole while reasonable suspicion can exist even when each of the factors alone might appear to be innocent or might not have been sufficient to establish reasonable suspicion by itself. Id.; see United States v. Sokolow, 490 U.S. 1, 10 (1989) (instructing innocent behavior will frequently provide the basis for a showing of both probable cause and reasonable suspicion). When the correct analysis is applied to the factors present in Frasier's case, the officer—just as the trial judge correctly found—possessed sufficient information to satisfy the low bar of the reasonable suspicion standard and, therefore, acted in a constitutionally reasonable manner when he extended the stop. Cf. Terry v. Ohio, 392 U.S. 1, 28 (1968) (holding an officer's actions, which were based on the officer observing Terry and his confederate simply walk by and look in a store window several times, in effectuating a detention and frisk search were constitutionally reasonable because they were not "the product of a volatile or inventive imagination" or "undertaken simply as an act of harassment" and, instead, were reasonably tempered). Therefore, this Court—which applied the correct standard of review and conducted the appropriate totality-of-the-circumstances analysis—properly affirmed the trial judge's ruling finding the extension of the stop was supported by reasonable suspicion. Accordingly, for those reasons coupled with the reasons already more thoroughly articulated in the State's appellate brief and during oral argument, this Court should decline to grant rehearing in Frasier's case.

Next, looking to Frasier's rehearing contentions as to the issue regarding the propriety of the search of his person, they do not substantively deviate from the arguments already raised in Frasier's appellate brief. Instead, in arguing against this Court's affirmance of the trial judge's

ruling on the search issue, Frasier simply repeats the arguments from his brief in a nearly-verbatim fashion, quotes a portion of this Court's opinion addressing the matter, and includes the following statement after the quotation: "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." Based on the fact Frasier's rehearing arguments on the search issue have not substantively changed from the arguments previously raised to this Court, the State does not have any new responses to them. Therefore, the State relies upon the arguments previously raised in its appellate brief and during oral argument before this Court. Moreover, since this Court's ruling on appeal fully comports with the relevant law, this Court correctly found the trial judge did not err by concluding Frasier consented to the search based on the evidence and testimony presented. See State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 856 (2003) ("A trial judge's conclusions on issues of fact regarding voluntariness will not be disturbed on appeal unless so manifestly erroneous as to be an abuse of discretion."); cf. United States v. Vongxay, 594 F.3d 1111, 1120 (9th Cir. 2010) (affirming the district court judge's finding Vongxay impliedly consented to a search of his person where an officer asked Vongxay for permission to search him and Vongxay responded by raising his hands to his head so as to enable a search); Chism v. State, 312 Ark. 559, 569, 853 S.W.2d 255, 261 (Ark. 1993) (finding Chism's act of assuming a search position constituted "overwhelming evidence of [Chism]'s consent to search"). Accordingly, for the identified reasons, this Court should again decline to grant rehearing in Frasier's case.

Finally, looking to Frasier's rehearing contentions as to the issue regarding the admissibility of his statements, they again have not been changed in a substantive way from the arguments already raised in Frasier's appellate brief. Once again, Frasier simply repeats the

arguments from his brief in a virtually-identical fashion, includes a single reference to a case not previously cited, quotes a portion of this Court's opinion addressing the admissibility of the post-warning statements, and includes a few additional lines of arguments. Through those extra lines, Frasier alleges rehearing is warranted because: (1) this Court purportedly overlooked the fact he was not warned his pre-warning statement could not be used against him prior to giving his post-warning statements; and (2) this Court supposedly shifted the burden of proof to him by finding he did not provide testimony to support a conclusion he felt coerced or threatened by his common-law wife being handcuffed in the presence of a toddler. To the extent Frasier's rehearing arguments repeat ones already raised, the State once again relies upon the arguments previously raised in its appellate brief and during oral argument before this Court as support for the conclusion the trial judge's ruling regarding the admissibility of the post-warning statements was a correct one. See State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (recognizing a trial judge's ruling regarding the voluntariness of a statement will be affirmed on appeal if supported by *any* evidence). Meanwhile, to the extent Frasier contends this Court erred by overlooking the fact he was not expressly warned his pre-warning statement could not be used against him prior to making his post-warning statements, the absence of such a warning in no way required Frasier's post-warning statements to be deemed involuntary. See Oregon v. Elstad, 470 U.S. 298, 314 (1985) ("[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to

waive or invoke his rights."); see also Missouri v. Seibert, 542 U.S. 600, 617 (2004) (plurality opinion) (holding the use of a deliberate "question first and warn later" tactic precludes the admission of a subsequent post-warning statement unless the facts support a conclusion the warnings given could have been effective); Seibert, 542 U.S. at 622 (Kennedy, J., concurring) ("The admissibility of postwarning statements should continue to be governed by the principles of Elstad unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made."). Furthermore, to the extent Frasier contends this Court—despite expressly recognizing the State had the burden of establishing the voluntariness of the statements—shifted the burden of proof by noting no testimony was presented establishing Frasier felt threatened or coerced, Frasier's assertion in that regard ignores the fact an absence of conflicting or disputed evidence regarding the voluntariness of a statement can legitimately be considered by a court analyzing an issue regarding the voluntariness of the statement, and such consideration in no way shifts the burden of proof away from the State. Cf. State v. McCray, 332 S.C. 536, 549, 506 S.E.2d 301, 307 (1998) (affirming the trial judge's voluntariness determination regarding McCray's statement due—in part—to the fact "[t]here is no evidence [McCray] was coerced into making a statement"); State v. Breeze, 379 S.C. 538, 545, 665 S.E.2d 247, 251 (Ct. App. 2008) ("Conversely, Breeze did not contradict [the officer]'s testimony with respect to the issue of whether the statement was voluntary. . . . Faced with [the officer]'s undisputed testimony the trial court concluded the State had showed that Breeze voluntarily made the statement. Based on [the officer]'s testimony, we cannot conclude the trial court's ruling is unsupported by any

evidence."). Accordingly, for all the reasons advanced so far, this Court should once again decline to grant rehearing in Frasier's case.

Furthermore, even if this Court's conclusion regarding the admissibility of Frasier's post-warning statements was somehow erroneous, any error resulting from the admission of the statements in Frasier's case—which would not have been transformed into a "whodunit"-style mystery if the statements had been excluded due to the fact Frasier, who was the only male occupant of the vehicle at the time of the stop, was caught with cocaine on his person packaged in the exact same type of green baggie in which the cocaine recovered from the men's jacket was packaged—would have been harmless beyond a reasonable doubt in light of the insignificance and immateriality of those statements when they are considered in conjunction with the other overwhelming evidence of Frasier's guilt presented during trial. Cf. State v. Easler, 327 S.C. 121, 129, 489 S.E.2d 617, 621-622 (1997) ("[A]ny error in the failure to suppress his statements was harmless beyond a reasonable doubt. . . . The overwhelming evidence of Easler's guilt renders any Miranda violation harmless."), overruled on other grounds by State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018); State v. White, 410 S.C. 56, 60, 762 S.E.2d 726, 728 (Ct. App. 2014) (finding any error in the trial judge's failure to suppress White's statement placing White at the scene of a murder as the product of impermissible "question first and warn later" questioning was harmless beyond a reasonable doubt because, "notwithstanding White's statement, cell phone evidence clearly placed [the victim] and White together at the time and place of the murder" and further finding any error to be harmless in light of the witness testimony linking White to the murder). Significantly, the fact any possible error regarding the admission of Frasier's post-warning statements would have been completely harmless under the

circumstances involved further demonstrates there is no legitimate need for rehearing in Frasier's case.

In light of all the foregoing reasons coupled with the arguments raised in both the State's appellate brief and during oral argument before this Court, this Court correctly affirmed all the appropriate and factually-supported rulings made by the trial judge during Frasier's trial. Therefore, no legitimate grounds exist warranting a grant of rehearing in Frasier's case. Frasier's Petition for Rehearing should be denied.

Respectfully submitted,

ALAN WILSON
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By: ______________________
Mark R. Farthing
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September 2, 2020

STATE OF SOUTH CAROLINA
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THE STATE,

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Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify I have served the within Return to Appellant's Petition for Rehearing on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 2nd day of September, 2020.

MARK R. FARTHING
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From:	Mark Farthing
To:	"khudgins@sccid.sc.gov"
Cc:	"cstock@sccid.sc.gov"
Subject:	State v. Michael N. Frasier, Jr. -- Return to Petition for Rehearing
Date:	Wednesday, September 2, 2020 6:10:00 PM
Attachments:	Frasier.Return to Pet for Rehearing (02370611xD2C78).pdf

Ms. Hudgins,

Please see the attached Return to Appellant's Petition for Rehearing in the State v. Michael N. Frasier, Jr. appeal. I will be filing it with the Court of Appeals shortly via the electronic filing system. If you would like physical copies, have any questions, or need anything else, please just let me know. Thanks.

Sincerely,
Mark

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SC Court of Appeals

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