

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL N. FRASIER,

APPELLANT

APPELLATE CASE NO 2020-001405

REPLY BRIEF OF PETITIONER

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Oct 11 2021

S.C. SUPREME COURT

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES ii

ARGUMENTS IN REPLY.....1

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

<u>Kansas v. Glover</u> , 589 U.S. ___, 140 S.Ct. 1183 (2020).....	3
<u>Robinson v. State</u> , 407 S.C. 169, 754 S.E.2d 862 (2014).....	1
<u>State v. Counts</u> , 413 S.C. 153, 776 S.E.2d 59 (2015).....	5, 8
<u>State v. Forrester</u> , 343 S.C. 637, 541 S.E.2d 837 (2001).....	5, 8, 9
<u>State v. Moore</u> , 415 S.C. 245, 781 S.E.2d 897, <u>cert. denied</u> , 136 S. Ct. 2473, 195 L. Ed. 2d 809 (2016).....	2
<u>State v. Weaver</u> , 374 S.C. 313, 649 S.E.2d 479 (2007).....	5, 8
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	1
<u>United States v. McCoy</u> , 513 F.3d 405 (4th Cir. 2008).....	1
<u>United States v. Robertson</u> , 736 F.3d 677 (4th Cir. 2013)	7
<u>United States v. Sokolow</u> , 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).....	4
<u>United States v. Sprinkle</u> , 106 F.3d 613 (4th Cir. 1997)	4

Other Authorities

Jaclyn L. McAndrew, Who Has More Privacy?: State v. Brown and Its Effect on South Carolina Criminal Defendants, 62 S.C. L.Rev. 671, 694 (2011)	5, 8
---	------

Constitutional Provisions

Fourth Amendment of the United States Constitution	7, 8
S.C. Const. art. I section 10	5, 7, 8, 9

ARGUMENTS IN REPLY

- 1. The Court of Appeals erred in finding that the trial judge properly refused 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.**

In discussing reasonable suspicion Respondent places great emphasis on the experience of the law enforcement officers. (BOR pp. 14, 15, 17, 19). While the Courts must give due weight to an officer's experience, the officer must still be able to point to articulable facts that, in conjunction with his inferences, "reasonably warrant" the prolonged detention. See Robinson v. State, 407 S.C. 169, 182, 754 S.E.2d 862, 868–69 (2014) ("The police officer may make reasonable inferences regarding the criminality of a situation in light of his experience, but he must be able to point to articulable facts that, in conjunction with his inferences, "reasonably warrant" the intrusion. Terry, 392 U.S. at 21, 27, 88 S.Ct. 1868."). In United States v. McCoy, 513 F.3d 405, 415 (4th Cir. 2008), the Fourth Circuit Court of Appeals found that the officer had reasonable suspicion to conduct a Terry stop but noted that, "This is not to say that a wealth of experience will overcome a complete absence of articulable facts, for Terry clearly requires that an officer wishing to briefly detain and frisk a person 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' Terry, 392 U.S. at 21, 88 S.Ct. 1868." The experience of the officers is not a substitute for the necessary reasonable, articulable suspicion of criminal activity to warrant the extension of the traffic stop.

Respondent argues that Petitioner's behavior at the bus station, his level of nervousness, the driver's unzipped pants, and their failure to answer questions amount to reasonable suspicion to extend the traffic stop. (BOR pp. 11-12). With regard to Petitioner's behavior at the bus

station, 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). While purported “furtive actions” can be a factor to be considered for a reasonable suspicion determination, this alone does not suffice.

As to the level of nervousness at the stop, this Court cautioned in 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):

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.

Petitioner’s behavior at the bus stop and nervousness at the traffic stop did not provide the officers with reasonable suspicion.

As to the driver’s unzipped pants, officer Hall testified that, “Just in the past, I’ve come in contact with people who have attempted to hide contraband or narcotics in their pants or crotch area, if you will.” (R. p. 41, lines 15-17). Other than her pants being unzipped because, as she told the officer, she had just gotten out of the shower before coming to the bus station, (R. p. 63, lines 1-12), the officer failed to articulate any other factors that would lead him to believe she was trying to hide contraband. As noted by the trial judge in discussing the driver’s attitude about the unzipped pants, “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 failure to answer questions, when asked about the significance of asking where they were coming from, Officer Hall testified, “Because I knew where they were coming from and I had to ask multiples and did not get a clear answer.” (R. p. 44, lines 5-6). The officer admitted, however, that neither the driver nor Petitioner provided 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 purported evasiveness relied upon by the State, combined with Petitioner’s behavior at the bus station, nervousness during the traffic stop and the driver’s unzipped pants, without more, fail to provide the officers with reasonable suspicion of a serious crime to warrant the extension of the traffic stop.

Respondent’s reliance on Kansas v. Glover, 589 U.S. ____, 140 S.Ct. 1183, 1190 (2020), is misplaced. In Glover the officer ran a license plate check on a truck, learned that Glover was the registered owner of the truck and learned that Glover’s license had been revoked. The officer assumed Glover was the driver and pulled the truck over. The Court wrote, “This case presents the question whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle’s license plate and learning that the registered owner has a revoked driver’s license. We hold that when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable.” Glover, 140 S.Ct. at 1186. The holding is narrow and limited to facts involving the inference that the owner of a vehicle is the driver. Such an inference is not present in this case. The officer in the present case stopped the car after the narcotics officers “got a violation’ in the inoperable third brake light. After the purpose of the initial traffic stop had been completed, the officers lacked reasonable suspicion to extend the traffic stop.

In United States v. Sprinkle, 106 F.3d 613, 618–19 (4th Cir. 1997), the Fourth Circuit Court of Appeals held that the officers lacked a reasonable, articulable suspicion to justify the investigatory stop. In Sprinkle the Court wrote:

The government says that five facts, taken together, provided Officers Riccio and Connolly the basis for a reasonable suspicion of criminal activity: (1) Officer Riccio knew that Poindexter had a criminal record and had recently been released from prison after serving time for narcotics violations, (2) the subjects were spotted in a neighborhood known by the officers for high (narcotics) crime, (3) when Sprinkle entered the Cougar, he and Poindexter huddled toward the center console with their hands close together, (4) as Officer Riccio walked past the car, Poindexter put his head down and his hand up to his face as if to avoid recognition, and (5) Poindexter drove away as soon as the officers walked by the car. The government is right that in the end we must evaluate the combined strength of these factors, *see United States v. Sokolow*, 490 U.S. 1, 8–10, 109 S.Ct. 1581, 1586–87, 104 L.Ed.2d 1 (1989), but we will discuss them one by one as we put them into the mix.

Sprinkle, 106 F.3d at 617. The Fourth Circuit disagreed with the Government’s position writing, “Our conclusion is that the five factors cited by the government gain little, if any, strength when put together. Together, they did not give the officers the necessary reasonable, articulable suspicion of criminal activity.” Sprinkle, 106 F.3d at 618. The factors relied on by the officers in the present case provide less than the factors the Fourth Circuit found insufficient in Sprinkle.

Respondent asserts in footnote #8 of the brief that, “Under such circumstances, Frasier’s appellate references to our state constitution are far too conclusory to validly raise any issues related to it for review by this Court.” (BOR, p. 11). In the written motion to suppress submitted to the trial judge Petitioner cited Article I, §10 of the South Carolina Constitution. (R. p. 352). In the brief Petitioner asserts that the extended traffic stop without reasonable suspicion violated both the Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution as an unconstitutional seizure. (R. p. 4).

The South Carolina Constitution provides, “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.” S.C. Const. art. I, § 10. The South Carolina Constitution affords a higher level of privacy protection than the Fourth Amendment. As noted by this Court in State v. Counts, 413 S.C. 153, 167–70, 776 S.E.2d 59, 67–68 (2015):

As previously stated, the South Carolina Constitution provides citizens an express right to privacy. S.C. Const. art. I, § 10. But, other than the use of the word “unreasonable” to modify this right, there are no parameters concerning the right or a definition of what constitutes “unreasonable invasions of privacy.” As a result, legal scholars interpreting the legislative history of this constitutional provision have concluded that “the drafters were depending upon the state judiciary to construct a precise meaning of this phrase.” Jaclyn L. McAndrew, *Who Has More Privacy?: State v. Brown and Its Effect on South Carolina Criminal Defendants*, 62 S.C. L.Rev. 671, 694 (2011).

Counts involved the “knock and talk” investigative technique and addressed higher level of privacy protection found in the South Carolina Constitution and discussed in State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) and State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007).

In State v. Weaver, 374 S.C. 313, 321–22, 649 S.E.2d 479, 483 (2007), this Court wrote:

In addition to language that mirrors the Fourth Amendment, S.C. Const. art. 1 § 10 contains an express protection of the right to privacy: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated....” State v. Forrester, *supra* (emphasis added). By articulating a specific prohibition against “unreasonable invasions of privacy,” the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution. *Id.* Accordingly, the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment. *Id.*

The factors relied upon by the State to justify the extension of the traffic stop do not provide reasonable suspicion under the Fourth Amendment of the United States Constitution. The extended traffic stop was an unreasonable invasion of privacy and violated Petitioner's express rights under the South Carolina Constitution. This Court should reverse the conviction.

2. The Court of Appeals erred in finding that the trial judge did not err 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, 96, 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.

Petitioner did not consent to be searched. 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). This was a begrudging submission to a command not a voluntary consent to a request. See United States v. Robertson, 736 F.3d 677, 679–80 (4th Cir. 2013). The non-consensual nature of the encounter is further supported by Petitioner's question, "My pockets too?" (R. p. 72, lines 14-19). Petitioner's words reflect that he did not consent to the search and his action of placing his hands on top of the police car did not make the search consensual.

Respondent asserts in footnote #13 of the brief that, "Under such circumstances, Frasier's conclusory reference to Article I, Section 10 without supporting argument cannot be and is not sufficient to legitimately present any issues concerning our state constitution to this Court for review." Petitioner cited to the State Constitution both at trial and in the brief. (R. p. 107, lines 3-7; p. 356; BOP p. 23). The non-consensual search of Petitioner's person violated both the

Fourth Amendment of the United States Constitution and Article I, §10 of the South Carolina Constitution.

As discussed above with regard to the unlawfully extended traffic stop, the South Carolina Constitution provides, “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.” S.C. Const. art. I, § 10. The South Carolina Constitution affords a higher level of privacy protection than the Fourth Amendment. As noted by this Court in State v. Counts, 413 S.C. 153, 167–70, 776 S.E.2d 59, 67–68 (2015):

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The non-consensual search of Petitioner’s pockets following the traffic stop violates the Fourth Amendment of the United States Constitution. The search was an unreasonable invasion of privacy and violated Petitioner’s express rights under Article I, §10 of the South Carolina Constitution. This Court should reverse the conviction.

CONCLUSION

Based on the above arguments this Court should reverse the trafficking conviction.


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This 11th day of October, 2021.