

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1120

Filed: 18 July 2017

New Hanover County, No. 13 CRS 57210

STATE OF NORTH CAROLINA

v.

DARIUS TERRELL HESTER

Appeal by defendant from judgment entered 1 April 2016 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 20 April 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.*

TYSON, Judge.

Darius Terrell Hester (“Defendant”) appeals from his conviction of felonious possession of a stolen firearm following the trial court’s denial of his motion to suppress. Due to Defendant’s failure to object at trial, this issue is properly before us solely upon plain error review. Defendant has failed to carry his burden to show error or plain error in the jury’s verdict or the judgment entered thereon.

I. Background

New Hanover County Sheriff's Deputy Joshua Cranford was familiar with the Rockhill Road area in Wilmington, as he regularly patrolled that area as part of his patrol route. He described the area as having a history of criminal gang and drug activity. Deputy Cranford testified a recent home invasion had occurred in the area and numerous "break-ins" in the past. He had personally made one arrest for home invasion. He was unable to specifically recall making any arrests for breaking and entering or drug activity in the area. Deputy Cranford testified that officers generally share information with each other about areas where criminal activity is afoot and crimes are committed.

New Hanover County Sheriff's Detective Kenneth Murphy had served as a law enforcement officer for seventeen years. He also testified about criminal activity in the Rockhill Road area. Three homicides occurred in the neighborhood between 1999 and 2003. Detective Murphy testified the area was "known for" breaking and entering, drug activity, and drive-by shootings. He was unaware of when the most recent breaking and entering crimes had occurred prior to 16 August 2013.

At around 10:30 a.m. on Friday, 16 August 2013, Deputy Cranford was patrolling the area in his marked patrol car and turned onto Rockhill Road. He was unaware of whether any crimes had been committed in the area that morning or the previous night. After driving approximately one-half mile on Rockhill Road, Deputy Cranford noticed a car was pulled over toward the side of the road, but was partially

parked on the travel lane of the roadway. He initially believed the car might be disabled. As Deputy Cranford's marked patrol car approached the front of the parked vehicle and came within fifty yards of the vehicle, it moved and the driver drove away "in a normal fashion."

When the car pulled away, Deputy Cranford "saw [Defendant] walk away from the vehicle and cross the road in front of [him] and continue up Rockhill Road in the opposite direction." Deputy Cranford did not know whether Defendant had gotten out of the car or had been speaking with anyone inside the car.

Deputy Cranford also testified he believed the car had pulled away and Defendant had crossed the road in reaction to his arrival and presence. He further testified he did not know "if [Defendant] was lost," or whether a drug deal had just occurred. He believed Defendant may have been dropped off on the road in order to break into people's homes.

Deputy Cranford testified he "wanted to get outside and investigate and make sure everything was okay," because of the "area that we were in" and the fact that Defendant walked from the car and the car pulled away as he approached. Deputy Cranford turned his vehicle around, activated his blue lights, and stopped Defendant.

Deputy Cranford exited his patrol car and asked Defendant whether he possessed any drugs or weapons. Defendant responded that he did not. Deputy Cranford asked Defendant for identification. Defendant did not possess a photo

identification, but gave Deputy Cranford his name and date of birth. Defendant was initially polite and cooperative. He asked Deputy Cranford if he had done anything wrong. Deputy Cranford responded that he had not done anything wrong.

Deputy Cranford asked Defendant to remain at the front of his patrol car while he sat inside his patrol car. Deputy Cranford contacted the Sheriff's dispatcher to determine whether Defendant had any outstanding arrest warrants.

Defendant walked from the front of the patrol car to the driver's side and "stood [at] the entrance of the car door," which made Deputy Cranford "uncomfortable." Deputy Cranford instructed Defendant to return to the front of the patrol car. Moments later, Defendant "tried to do the same thing again." At that point, Deputy Cranford exited his patrol car, stood at the front of the car with Defendant, and awaited a response from the Sheriff's dispatcher. The Sheriff's dispatcher informed Deputy Cranford that Defendant had no outstanding warrants, but that he was "known to carry" a concealed weapon based upon a prior charge for carrying a concealed weapon.

Deputy Cranford again asked Defendant whether he possessed a weapon. Defendant lied and responded that he did not. At that point, Deputy Cranford observed a slight bulge under Defendant's shirt. Defendant became confrontational when Deputy Cranford asked him to lift his shirt. Defendant lifted his shirt and pulled a handgun from his waistband. Deputy Cranford testified that Defendant

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pointed the gun at him and pulled the trigger. He heard the hammer click, but the weapon did not discharge.

Deputy Cranford testified he backed up and drew his weapon. He began to fire shots at Defendant, who fled while still carrying his handgun. Deputy Cranford chased Defendant down a dirt path and lost sight of him as Defendant rounded a corner. Deputy Cranford turned the corner and saw Defendant lying on the ground. Defendant had been shot in the shoulder. Defendant told Deputy Cranford he had dropped his gun. Deputy Cranford placed Defendant under arrest.

Deputy Cranford recovered Defendant's handgun in the dirt path about twenty yards away. The recovered gun was found to be loaded with a full clip and it had been reported as stolen from a home in Wilmington in 2013. At trial, Defendant testified he had bought the gun "from off the streets" and that he knew such guns were typically stolen.

Defendant was indicted and tried on the charges of attempted murder and possession of a stolen firearm. Defendant testified he did not point the gun at Deputy Cranford or pull the trigger. He stated he was attempting to hand Deputy Cranford the gun, with the barrel pointed toward the ground.

Defendant testified Deputy Cranford reacted with shock and reached for his weapon. Defendant ran. He stated he was holding the handgun when he ran, but threw it prior to being shot. Defendant was acquitted of the attempted murder

charge. The jury found him to be guilty of possession of a stolen firearm. Defendant appeals.

## II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

## III. Standard of Review and Defendant's Preservation of Error

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)).

Defendant's motion to suppress was heard prior to trial. The trial court denied the motion immediately following the presentation of evidence and arguments of counsel. Defendant concedes defense counsel failed to object when the evidence resulting from the stop, and particularly the stolen handgun, was offered at trial. The admission of the handgun evidence must be reviewed for plain error. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000) (holding a motion *in limine* is insufficient "to preserve for appeal the question of admissibility of evidence if the

defendant did not object to the evidence at the time it was offered at trial”), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

At trial, Defendant failed to object to numerous references to his possession of the stolen handgun, or to object to the tender and admission of the handgun into evidence. During his testimony, Defendant acknowledged he had purchased and possessed the stolen handgun, but denied pointing it at Deputy Cranford or pulling the trigger.

The State argues Defendant elicited the same evidence and testified at trial, and is not entitled to plain error review, because he invited the error. *See* N.C. Gen. Stat. § 15A-1443(c) (2015) (“A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.”). The State cites *State v. Gopal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007), *aff’d per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008) (“Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law.”).

Once the trial court denied Defendant’s motion to suppress based upon lack of reasonable suspicion for the stop, Defendant was required to defend against the charges of attempted murder and felonious possession of a stolen firearm. He defended the charges by testifying about the circumstances surrounding his

possession of the stolen handgun. This testimony was subject to cross-examination by the State.

While defending against the attempted murder charge, Defendant testified to explain his actions of surrendering the weapon and stated he did not point or fire his gun at Deputy Cranford. A defendant does not waive an objection to evidence by seeking “to explain, impeach or destroy its value.” *State v. Badgett*, 361 N.C. 234, 246, 644 S.E.2d 206, 213 (citation omitted), *cert. denied*, 552 U.S. 977, 169 L. Ed. 2d 351 (2007). Defendant’s appeal from the denial of his motion to suppress is properly before us on plain error review, and not invited error. *See id.*

“Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). This burden rests upon Defendant. *See id.*

#### IV. Denial of Defendant’s Motion to Suppress

Defendant’s sole argument on appeal asserts the trial court erred by denying his motion to suppress the evidence obtained from the stop. Defendant argues Deputy Cranford did not possess a reasonable suspicion that he was involved in criminal activity when Deputy Cranford initially stopped and questioned him.

##### A. Fourth Amendment Protections



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The United States and North Carolina Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. The protections of the Fourth Amendment apply “to seizures of the person, including brief investigatory detentions.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (citing *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893 (1980)). A “seizure” has occurred under the Fourth Amendment when an officer uses a “show of authority” to stop a citizen. *Florida v. Royer*, 460 U.S. 491, 501-02, 75 L. Ed. 2d 229, 239 (1983). “[T]he crucial test [to determine if a person is seized] is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991) (citation and quotation marks omitted).

Here, Deputy Cranford turned his vehicle around and activated his blue lights after arrival upon the scene. Defendant stopped walking and voluntarily talked with Deputy Cranford. Defendant failed to provide a photo identification to the officer, but provided his name and address. The trial court properly analyzed this encounter as a stop. The State does not contest that Defendant was seized to implicate the Fourth Amendment. A reasonable person would not have felt at liberty to ignore Deputy Cranford’s presence and the use of blue lights on his marked vehicle, and continue to walk away. *See id.*

To survive Fourth Amendment scrutiny, an investigatory stop must be justified by “a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979) (citations omitted). As applied by the Supreme Court of North Carolina: “A court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists” to justify an officer’s investigatory stop. *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012) (citation and quotation marks omitted).

“The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *Watkins*, 337 N.C. at 441-42, 446 S.E.2d at 70 (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)); *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). “The only requirement is a minimal level of objective justification, something more than an ‘unparticularized suspicion or hunch.’” *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, (1989)).

At the conclusion of the suppression hearing, the trial court recited the evidence presented, as detailed above, and stated:

The Court concludes as a matter of law that the Court takes into consideration the officer’s personal observations

at the time that he observed a vehicle and the defendant on Rockhill Road, that it was – that it is a high crime area where several breaking and enterings, drug activity, and drive-by shootings have occurred in the past; and that Deputy Cranford did not have all this information himself as he had not himself made several arrests for breaking and enterings or the activity in that area, that the officers shared this information and that Deputy Cranford would receive updates of information about the area in which he was patrolling on a regular basis when he was on duty.

Therefore, the Court does find that the officer did have reasonable suspicion to believe that a crime was being committed at the time that he stopped the defendant on Rockhill Road. Therefore, the Court is going to deny the motion to suppress the evidence.

B. Intervening Circumstance

Even if this Court were to accept Defendant's argument that Deputy Cranford's initial stop of Defendant was not based upon a reasonable suspicion that Defendant was involved in criminal activity, the trial court's ultimate ruling on Defendant's motion to suppress to allow admission of the stolen handgun is properly upheld.

Viewed in the light most favorable to the State and under plain error review, evidence presented to the trial court at the hearing on Defendant's motion to suppress showed the recovered stolen handgun and all evidence related to the stolen handgun were obtained *after Defendant's commission of a separate crime*: pointing a loaded, stolen gun at Deputy Cranford and pulling the trigger. At the suppression hearing,

the trial court expressly found Defendant pointed the gun at the officer and pulled the trigger.

Evidence discovered as a result of an illegal search or seizure is generally excluded at trial. *See Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963). “[T]he exclusionary rule encompasses both the ‘primary evidence obtained as a direct result of an illegal search or seizure and, relevant here, evidence later discovered and found to be derivative of an illegality,’ the so-called ‘fruit of the poisonous tree.’” *Utah v. Strieff*, \_\_ U.S. \_\_, \_\_, 195 L. Ed. 2d 400, 407 (2016) (quoting *Segura v. United States*, 468 U.S. 796, 804, 82 L. Ed. 2d 599, 608 (1984)). However,

[w]e 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*.

*Wong Sun*, 371 U.S. at 487-88, 9 L. Ed. 2d at 455 (citation and quotation marks omitted) (emphasis supplied). The Supreme Court of the United States has deemed the exclusionary rule “‘applicable only . . . where its deterrence benefits outweigh its substantial social costs.’” *Strieff*, \_\_ U.S. at \_\_, 195 L. Ed. 2d at 407 (quoting *Hudson v. Michigan*, 547 U. S. 586, 591, 165 L. Ed. 2d 56 (2006)).

“Suppression of evidence has always been our last resort, not our first impulse.” *Id.* (ellipsis and citation omitted). Guided by these principles, the Supreme Court of the United States has recognized several exceptions to the exclusionary rule.

First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. *Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.*

*Id.* (internal citations and quotation marks omitted) (emphasis supplied). We address the third exception, and hold the State presented a sufficient intervening event to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun. *See id.*

This Court can conceive only in the most rare instances “where [the] deterrence benefits” of police conduct to suppress a firearm “outweigh[s] its substantial social costs” of preventing a defendant from carrying a concealed, loaded, and stolen firearm, pulling it at an identified law enforcement officer and pulling the trigger. *See Hudson*, 547 U. S. at 591, 165 L. Ed. 2d at 64 (citation and quotation marks omitted).

1. Preservation

We initially address the dissenting opinion's notion that the State's "attenuation doctrine" argument must be dismissed, because the State failed to present that specific argument to the trial court during the hearing on Defendant's motion to suppress.

Defendant argued before the trial court that Deputy Cranford stopped him without reasonable suspicion of criminal activity, and Deputy Cranford's order to Defendant to lift his shirt, which revealed the handgun, constituted an unlawful search. Our review of the transcript of the hearing and record shows the State did not use the words "intervening circumstance" or "attenuation," and argued to the trial court that Deputy Cranford had reasonable suspicion to stop Defendant. The trial court denied Defendant's motion to dismiss on the basis that Deputy Cranford possessed reasonable suspicion to stop Defendant.

We are bound by precedents to conclude this issue is properly before us. It is well-settled in North Carolina that "[t]he question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable. The crucial inquiry for this Court *is admissibility and whether the ultimate ruling was supported by the evidence.*" *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (quoting *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987)) (emphasis supplied).

“[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned.” *State v. Dewalt*, 190 N.C. App. 158, 165, 660 S.E.2d 111, 116 (quoting *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)), *disc. review denied*, 362 N.C. 684, 670 S.E.2d 906 (2008).

The burden on appeal rests upon Defendant to show the trial court’s ruling is incorrect. *See State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988). The occurrence of an intervening event, which purges the taint of an illegal stop, becomes an issue only if the court finds the underlying illegality.

The intervening event does not present an arguable issue until the trial court determines the defendant sustained his burden of persuasion on the illegality of the police conduct. While the State could have requested the trial court’s consideration of the attenuation issue as an alternative basis to admit the handgun, the State’s failure to raise the attenuation issue at the hearing does not compel nor permit this Court to summarily exclude the possibility that the trial court’s ruling was correct under this or some other doctrine or rationale. *See Bone*, 354 N.C. at 8, 550 S.E.2d at 486; *Blackwell*, 246 N.C. at 644, 99 S.E.2d at 869.

The dissenting opinion notes the well-established trot that “the law does not permit parties to swap horses between courts in order to get a better mount.” *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). However, those cases and all others cited only apply to

instances where the party, whether Plaintiff, Defendant, or the State, is carrying the burden on appeal to show error in the lower court's ruling on appeal, and relies upon a theory not presented before the lower court.

That circumstance is not before us here. We review the trial court's ultimate ruling for error, prejudice, and, in this case, *solely* for plain error. This Court is free to and may uphold the trial court's "ultimate ruling" based upon a theory not presented below or even argued here. *See Bone*, 354 N.C. at 8, 550 S.E.2d at 486.

Our precedents clearly allow the party seeking to *uphold* the trial court's presumed-to-be-correct and "ultimate ruling" to, in fact, choose and run *any* horse to race on appeal to sustain the legally correct conclusion of the order appealed from. *See id.*; *Austin*, 320 N.C. at 290, 357 S.E.2d at 650; *Blackwell*, 246 N.C. at 644, 99 S.E.2d at 869.

The dissenting opinion relies upon this Court's decision in *State v. Gentile*, 237 N.C. App. 304, 766 S.E.2d 349 (2014). *Gentile* is easily distinguishable from the circumstances presented here. In *Gentile*, the State sought to overturn the trial court's ruling, which granted the defendant's motion to suppress. This Court did not allow the State, *who bore the burden on appeal* to show error in the trial court's presumably correct ruling, to "swap horses" on appeal. *Id.* at 310, 766 S.E.2d at 353-54. For the same reason, this Court routinely dismisses arguments advanced by



defendants in criminal cases when the defendants attempt to mount and ride a stronger or better, and possibly prevailing steed not run before the trial court.

Rule 10 of our Rules of Appellate Procedure governs the preservation of issues during trial proceedings. N.C. R. App. P. 10. Our conclusion that the trial court did not commit plain error to allow into evidence the stolen and loaded handgun does not change, even if we were to presume the State failed to preserve the attenuation issue for our review. Alternatively, we rule to invoke Rule 2 in this case to suspend the dissent's alleged requirements of Rule 10 to allow us to consider the State's attenuation argument.

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2.

This matter involves “exceptional circumstances [and] significant issues of importance in the public interest,” the firing of a stolen and loaded weapon upon a police officer by a private citizen illegally carrying a weapon. Defendant was not prejudiced by the State's failure to make the attenuation argument below. The State presented evidence at the suppression hearing that Defendant fired upon the officer, which Defendant had the opportunity to rebut.

The trial court specifically found that Defendant attempted to fire at the officer when it rendered its ruling on Defendant's motion to suppress. Further, we note Defendant argues denial of his suppression motion on appeal, under plain error review, even though he failed to properly preserve his objection when the evidence was introduced and commented on multiple times at trial. Even if the State failed to properly preserve the attenuation argument in the trial court for our review, the circumstances in this case alternatively compel us to invoke Rule 2 and also review the merits of the State's arguments to uphold the trial court's ultimate ruling in its order. This issue is properly before us.

## 2. Commission of a Crime

To determine whether an intervening event is sufficient to break "the causal chain between the unlawful stop and the discovery of the [evidence]," the Supreme Court of the United States has delineated the following three factors: (1) "the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search;" (2) "*the presence of intervening circumstances*;" and (3) "the purpose and flagrancy of the official misconduct." *Strieff*, \_\_ U.S. at \_\_, 195 L. Ed. 2d at 408 (emphasis supplied). "In evaluating these factors, we assume without deciding . . . that [the officer] lacked reasonable suspicion to initially stop [the defendant]." *Id.*

Here, the evidence presented in the light most favorable to the State at the suppression hearing showed after Deputy Cranford was warned Defendant might be carrying a concealed weapon, noticed a bulge in Defendant's waist, and asked Defendant to lift his shirt, Defendant responded by: (1) raising his shirt; (2) pulling a loaded and stolen handgun from his waistband; (3) pointing the gun at Deputy Cranford; and (4) pulling the trigger.

Deputy Cranford testified the handgun failed to discharge when Defendant pulled the trigger. Deputy Cranford's testimony that Defendant committed the independent criminal act in the presence of the officer breaks the causal chain between the presumably unconstitutional stop and the discovery of the evidence.

The facts of this case are directly on point with the United States Court of Appeals for the Fourth Circuit's decision in *State v. Sprinkle*, 106 F.3d 613 (4th Cir. 1997). In *Sprinkle*, the officers conducted an investigatory stop of the defendant without reasonable suspicion of criminal activity. *Id.* at 618-19. While an officer was performing a pat-down of the defendant, the defendant began to run with the officer in pursuit. *Id.* at 616. The defendant pulled a handgun from the front of his pants and continued to run with his gun still drawn and fired one shot toward the officer. *Id.*

The Court explained: "If a suspect's response to an illegal stop 'is itself a new, distinct crime, then the police constitutionally may arrest the [suspect] for that

crime.” *Id.* at 619 (quoting *United States v. Bailey*, 691 F.2d 1009, 1017 (11th Cir. 1982)). “Because the arrest for the new, distinct crime is lawful, evidence seized in a search incident to that lawful arrest is admissible.” *Id.* (citing *Bailey* at 1018).

Our federal courts have explained the reasons for holding that a new and distinct crime, following an arguably illegal stop or search of the defendant, is a sufficient intervening event to provide an independent basis for an arrest and/or the admissibility of evidence uncovered during a search incident to that arrest.

(1) “a contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct[.]” *Bailey*, 691 F.2d at 1017-18; (2) the exclusionary rule does not extend so far as to require suppression when the discovery of the evidence can be traced to the separate offense, *see, e.g., Waupekenay*, 973 F.2d at 1538; and (3) to hold otherwise would encourage persons to resist the police and create potentially violent and dangerous confrontations. *Id.* Challenges to even unconstitutional police searches must be made in the courts, not on the street.

*United States v. Crump*, 62 F. Supp. 2d 560, 568 (D. Conn. 1999).

Like in *Sprinkle*, when Defendant “drew and fired his gun at [Deputy Cranford], he committed a new crime that was distinct from any crime he might have been suspected of at the time of the initial stop.” *Sprinkle*, 106 F.3d at 619. Deputy Cranford had probable cause to arrest Defendant “because the new crime purged the taint of the prior illegal stop[,] [a]nd the gun, which was in plain view at the scene of the new crime, could be legitimately seized.” *Id.* at 619-20.

Although Defendant’s commission of a separate and distinct criminal offense is alone sufficient as an “intervening circumstance” to purge the taint of the presumed illegal stop, we note the third factor set forth in *Strieff* also favors attenuation. “The exclusionary rule exists to deter police misconduct. The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.” *Strieff*, \_\_ U.S. at \_\_, 195 L. Ed. 2d at 409.

Here, Deputy Cranford explained that he and other officers knew Rockhill Road to be a high crime area; while patrolling the area he turned onto Rockhill Road and saw a vehicle parked partially onto the roadway; the vehicle drove away as Deputy Cranford approached; Defendant “walk[ed] away from the vehicle;” Deputy Cranford believed the car drove off and Defendant started to walk away in reaction to his presence; and he decided to investigate “to make sure everything was okay” due to the “area we were in.”

Like in *Strieff*, there was no indication that the stop of Defendant “was part of any systemic or recurrent police misconduct.” *Id.* at \_\_, 195 L. Ed. 2d 410. Even if the initial stop was unjustified and unsupported by reasonable suspicion, it does not “rise to a purposeful or flagrant violation of [Defendant’s] Fourth Amendment rights.” *Id.* at \_\_, 195 L. Ed. 2d at 410. The trial court’s ultimate conclusion to allow admission of the recovered, stolen, and loaded weapon was proper, and more so under plain error

review, where Defendant failed to object to the admission of, or testimony concerning, the handgun. Defendant has failed to carry his burden to exclude this evidence under plain error review or the reverse the jury's conviction.

#### V. Conclusion

The evidence of the stolen handgun was admissible because the presumably unlawful stop was sufficiently attenuated by Defendant's intervening commission of a separate and distinct criminal offense of concealing and pointing a stolen and loaded gun at Deputy Cranford and pulling the trigger. These events "broke the causal chain between the [presumed] unconstitutional stop and the discovery of evidence." *Id.*

This issue is properly before us on plain error review of the trial court's "ultimate ruling" and conclusion to deny Defendant's motion to suppress. *See Bone*, 354 N.C. at 8, 550 S.E.2d at 486 (stating this Court determines "admissibility and whether the *ultimate ruling* was supported by the evidence" (emphasis supplied)). Furthermore, as was true in *Strieff*, "there is no evidence that [the] stop reflected flagrantly unlawful police misconduct." *Id.*

The trial court properly denied Defendant's motion to suppress. Defendant has failed in his burden to show error, much less plain error, in the trial court's ultimate ruling to allow the testimony concerning and the weapon itself to be admitted. *It is so ordered.*

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NO PLAIN ERROR.

Judge DILLON concurs with separate opinion.

Chief Judge McGEE dissents with separate opinion.





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DILLON, Judge, concurring.

I concur but write separately to address the dissent's issue with the State's failure to preserve its appellate argument.

Defendant was convicted of possessing a firearm which was discovered during a stop. At the suppression hearing below, the State's *sole* argument was that the stop itself was lawful, and, therefore, the firearm was admissible.

During the suppression hearing, the State also offered evidence, which the trial court found credible, that during the stop Defendant pulled the concealed firearm, pointed it at the officer and pulled the trigger. I agree with the majority that this intervening event makes the gun admissible. Though the State failed to make this "winning" argument at the suppression hearing, the trial court denied Defendant's motion.

The dissent is based, in large part, on a view that the State, as the appellee, should be prohibited just like Defendant, as the appellant, from making any legal argument on appeal that it failed to make at the suppression hearing. Indeed, it is axiomatic that an appellant cannot "swap horses" by making a new argument on appeal that was not made before the trial court in order to get a "better mount." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

Rule 10 of our appellate rules allows an appellee to propose "alternative bas[e]s in law for supporting the judgment" in addition to the basis relied upon by the trial

court. However, Rule 10 states that such alternative bases that the appellee desires to raise on appeal must have been “properly preserved[.]” N.C. R. App. P. 10(c).

So based on Rule 10 one could argue that the State, as the appellee, should be limited, just like Defendant-appellant, to the arguments it made at the suppression hearing. Had the State lost, the State (as the *appellant*) would be allowed on appeal to make *only* the losing argument that it made before the trial court. And, therefore, the State should not be allowed to make the winning argument in this case simply because it won at the trial court based on a losing argument. That is, the State did not “properly preserve” (as required by Rule 10) the winning argument. *See Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989) (“Because a contention not made in the court below may not be raised for the first time on appeal, the . . . contention [by the party seeking to raise that issue on appeal] was no *properly* presented to the Court of Appeals for review[.]”)

However, one could argue that an appellate court may consider *any* basis which supports the trial court’s correct result, even if the basis was not relied upon by the trial court or argued by the parties. This view is based on Supreme Court’s jurisprudence suggesting that our role as an appellate court is simply to determine whether the trial court *got it right* based on its findings, even if the reasoning may be faulty. *See, e.g., State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d at 482, 486 (2001) (“The crucial inquiry for this Court is admissibility and whether the ultimate ruling was

supported by the evidence.”) And here, the State *did present* evidence, which the trial court *did find* credible, to support the winning argument, namely the trial court found that Defendant attempted to shoot the officer. Based on this argument, we should simply affirm the order of the trial court.

But presuming that Rule 10 does prevent the State from arguing (and our Court from considering) the “winning” argument, I concur with the majority’s invocation of Rule 2 to consider the winning argument. I believe that this matter involves “exceptional circumstance [and] significant issues of importance in the public interest” and in my discretion, I conclude that the invocation of Rule 2 is necessary “to prevent injustice.” *State v. Campbell*, 2017 N.C. LEXIS 400, \*6-7 (June 9, 2017). It is a matter of public interest that private citizens illegally carrying concealed weapons not be excused from assaulting an officer simply because the officer may have erred in determining that reasonable suspicion existed to justify a stop, where the officer was not otherwise assaultive in his behavior. I note that Defendant is not prejudiced by the State’s failure to make the winning argument at the suppression hearing. Indeed, the State put on evidence at the suppression hearing that Defendant assaulted the officer during the stop, and Defendant had the opportunity to rebut the State’s evidence regarding Defendant’s assaultive behavior. And there is no winning argument which Defendant’s counsel could have made to

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*DILLON, J., concurring*

justify the exclusion of the firearm where it was found that Defendant used it to assault the officer.

Therefore, I concur.

McGEE, Chief Judge, dissenting.

Defendant asks this Court to reverse the trial court's denial of his motion to suppress. Defendant argues Deputy Cranford did not have reasonable suspicion to stop him when the deputy observed him walking on the side of the road in Wilmington, North Carolina. Rather than address the sole issue presented by Defendant in this appeal, the majority and the concurrence choose to reach, and ultimately credit, a novel legal theory of admissibility advanced by the State that was never raised or considered in the trial court.

If the State's argument had been preserved, I would agree with the majority – with some reservations, outlined below – that Deputy Cranford's stop of Defendant was sufficiently attenuated from the discovery of the firearm under the Supreme Court of the United States' holding in *Utah v. Strieff*, \_\_\_ U.S. \_\_\_, 195 L. Ed. 2d 400 (2016). However, the State failed to preserve its attenuation argument, and I respectfully dissent from the majority's decision to reach and credit that argument.

The rule the majority crafts is inconsistent with normal rules of preservation. This Court regularly refuses to consider arguments presented by a criminal defendant for the first time on appeal, reasoning that the argument has been waived by the defendant's failure to first make the argument to the trial court. There is no reason why this rule should operate differently for the State and, consistent with binding precedent, I would hold the State's failure to raise its attenuation argument

in the trial court warrants dismissal of that argument here. Deputy Cranford's stop of Defendant was unconstitutional, and I would therefore reverse the trial court's denial of Defendant's motion to suppress and vacate his conviction.

I. Reasonable Suspicion to Stop Defendant

I first address whether there was a sufficient basis for Deputy Cranford to stop Defendant. The majority does not consider whether Deputy Cranford's conduct was unconstitutional, and instead proceeded directly to a discussion of whether the unconstitutional stop, if it existed, was attenuated from the discovery of the evidence the Defendant moved to suppress. However, consideration of the constitutionality of the stop is useful, since a determination that the stop was lawful would conclude our inquiry in this case. Also, even if the stop was unlawful, being able to identify precisely what conduct of Deputy Cranford was unjustified is valuable in the *Strieff* attenuation analysis.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. *See* U.S. CONST. AMEND. IV. The United States Supreme Court has held that “[a]n investigatory stop is permissible under the Fourth Amendment if supported by reasonable suspicion.” *Ornelas v. United States*, 517 U.S. 690, 693, 134 L. Ed. 2d 911, 917 (1996) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)). Reasonable suspicion is “a particularized and objective

basis for suspecting the particular person stopped” has violated the law. *Navarette v. California*, 572 U.S. \_\_\_, \_\_\_, 188 L. Ed. 2d 680, 686 (2014).

As this Court has held,

the legal evaluation of a police officer’s reasonable suspicion determination must be grounded in a pragmatic approach. Reasonable suspicion is a nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Our nation’s highest court has acknowledged that the concept of reasonable suspicion is somewhat abstract and has deliberately avoided reducing it to a neat set of legal rules. As such, common sense and ordinary human experience must govern over rigid criteria.

*State v. Mangum*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 795 S.E.2d 106, 118 (2016) (citations, quotation marks, and brackets omitted). In order to meet the reasonable suspicion threshold, “[t]he officer, of course, must be able to articulate something more than an inchoate and unparticularized suspicion or hunch.” *State v. Knudsen*, 229 N.C. App. 271, 284, 747 S.E.2d 641, 650 (2013) (quotation omitted). “An officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts.” *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012). As a reviewing court, we “must consider the totality of the circumstances — the whole picture.” *Id.*

In the present case, Deputy Cranford observed Defendant standing on the side of the road in an area known for high crime. Defendant was talking to an unknown

person in a vehicle. Deputy Cranford testified that the vehicle was parked “partially in the road” with its brake lights engaged. Shortly after Deputy Cranford arrived in his police cruiser and stopped about twenty-five to fifty yards from the vehicle, the vehicle drove away at a normal speed and in a normal fashion. Deputy Cranford believed the driver of the vehicle “recognized [him] as a deputy” and drove off in an effort to avoid him. Deputy Cranford did not check the license plate of the vehicle, did not follow the vehicle, and did not know if the driver or any occupants of the vehicle were involved in any criminal activity. After the vehicle left, Defendant walked down the road with a cellphone in his hands.

Deputy Cranford testified he did not know if Defendant had exited the vehicle, that nothing about Defendant’s appearance drew his attention, and that he did not know who Defendant was or what Defendant was doing. Deputy Cranford deemed the vehicle driving away as “suspicious” and testified it was his belief that Defendant’s walking away “was in reaction to [Deputy Cranford’s] presence as well[.]” On cross-examination, Deputy Cranford admitted that “no matter what [Defendant] did walking away from [the vehicle], [he] thought that was suspicious.” Accordingly, Deputy Cranford drove past Defendant, turned around, and activated his blue lights to effectuate a stop. Deputy Cranford characterized Defendant as being “polite and cooperative” when he was first stopped. At the suppression hearing, the following exchange occurred between Deputy Cranford and the prosecutor:



[Prosecutor:] So what were your particularized concerns? Why did you stop to talk to [Defendant]?

[Deputy Cranford:] Due to the area that we were in and the reason when I got close the car pulled off. I saw [Defendant] walking away. I didn't know if he had gotten out of the [vehicle], if a -- if he was lost, if a drug deal had just happened, or what was going on. So I wanted to get out and investigate and make sure everything was okay.

As the concurrence and I recognize, the totality of the circumstances of this case does not rise to the minimal level of objective justification required for a reasonable articulable suspicion under the Fourth Amendment. Deputy Cranford observed Defendant talking to someone in a vehicle that was haphazardly parked on the side of the road in a high crime area. According to Deputy Cranford's own testimony, he did not recognize Defendant, did not know if Defendant had been in the "suspicious" vehicle, and nothing about Defendant's actions or appearance drew Deputy Cranford's attention. The vehicle drove away at a normal speed and in a normal fashion, and Defendant merely walked down the road. Nevertheless, Deputy Cranford thought it "suspicious" that Defendant had spoken to someone in a vehicle. Rather than following the vehicle, Deputy Cranford chose to activate his blue lights and effectuate a stop of Defendant.

Deputy Cranford had, at most, an inchoate and unparticularized hunch that criminal activity was afoot. Therefore, Defendant's actions did not give rise to the minimal level of objective justification required by the Fourth Amendment. *See, e.g., Knudsen*, 229 N.C. App. at 285, 747 S.E.2d at 651.

## II. Merits of the Majority's Attenuation Analysis

As the majority correctly notes, evidence discovered as a result of an illegal search or seizure is generally excluded at trial. *See Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963). Despite this general principle, there are several exceptions to the exclusionary rule, including the one at issue here: the attenuation doctrine. *See generally Utah v. Strieff*, \_\_\_ U.S. \_\_\_, \_\_\_, 195 L. Ed. 2d 400, 407 (2016). Whether an intervening event is sufficient to “break the causal chain between the unlawful stop and the discovery of” the evidence and is therefore “attenuated[.]” rests on three factors as noted by the majority: (1) “the temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search;” (2) “the presence of intervening circumstances;” and (3) “the purpose and flagrancy of the official misconduct.” *Strieff*, \_\_\_ U.S. at \_\_\_, 195 L. Ed. 2d at 408. Had the State preserved its attenuation argument notwithstanding its failure to raise it at trial, which I will discuss later, I would generally agree with the majority that the facts of this case favor attenuation. However, I have the following reservations with the majority’s application of *Strieff*’s three factors.

### (A) Temporal Proximity Between the Stop and the Discovery of Evidence

The first step of *Strieff* analyzes the “temporal proximity between the unconstitutional conduct and the discovery of evidence to determine how closely the

discovery of evidence followed the unconstitutional search.” *Id.* The majority does not analyze this factor at all, but rather proceeds directly to the second factor in the analysis. I believe that an analysis of whether an illegal stop is sufficiently attenuated from the discovery of some evidence is properly conducted by considering all three factors the Supreme Court of the United States identified as bearing on whether attenuation is present.

The discovery of the firearm in the present case occurred in extremely close proximity in time to the unconstitutional stop. After being seized, Deputy Cranford spoke for some time with Defendant, contacted dispatch, searched for outstanding warrants, and then again spoke with Defendant. All of these actions were part of the unconstitutional stop, and were undertaken while the stop was ongoing. Therefore, the discovery of the firearm, which occurred when Defendant pulled the firearm from his waistband and attempted to discharge it, occurred seconds after the unconstitutional stop. I would find that this factor favors attenuation.

(B) Intervening Circumstances

The second factor to consider in an attenuation analysis is whether there were sufficient intervening circumstances between the unconstitutional conduct and the discovery of the evidence. *Strieff*, \_\_\_ U.S. at \_\_\_, 195 L. Ed. 2d at 408. Like the majority, I believe that Deputy Cranford’s observation of a new criminal act perpetrated by Defendant during the course of the stop serves as an intervening

circumstance that strongly favors attenuation. At the suppression hearing, as the majority notes, Deputy Cranford testified that during the stop he asked Defendant to lift up his shirt and Defendant responded by raising his shirt, pulling a firearm from his waistband, pointing the gun at Deputy Cranford, and pulling the trigger. According to Deputy Cranford’s testimony, the gun did not go off when the trigger was pulled.<sup>1</sup>

Deputy Cranford’s testimony that Defendant had committed the criminal act of attempted first-degree murder breaks the causal chain between the unconstitutional stop and the discovery of the evidence, and is entirely unconnected from the stop. However, I would not go so far as to say, as the majority does, that the “commission of a separate and distinct criminal offense is *alone* sufficient . . . to purge the taint of the . . . illegal stop[.]” (emphasis added). In the present case, it is sufficient to hold that the intervening criminal act perpetrated by Defendant strongly favors attenuation and, along with the third factor (discussed below), would attenuate Deputy Cranford’s unconstitutional stop from the discovery of the firearm. I would leave a broader holding — that the commission of a separate and distinct criminal offense will *always* be decisive — to an appropriate future case.

(C) The Purpose and Flagrancy of the Official Misconduct

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<sup>1</sup> The jury apparently did not credit Deputy Cranford’s testimony on this point, finding Defendant not guilty of attempted first-degree murder. However, in reviewing a trial court’s ruling on a motion to suppress, we examine the evidence in the light most favorable to the State. *See State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010).

The final *Strieff* factor inquires into the purpose and flagrancy of the police misconduct. As the majority recognizes, “[t]he exclusionary rule exists to deter police conduct. The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence – that is, when it is purposeful or flagrant.” *Strieff*, \_\_\_ U.S. at \_\_\_, 95 L. Ed. 2d at 409. Like the majority, I would find that the third factor favors attenuation.

As the Supreme Court of the United States has held, there must be something more than a lack of reasonable suspicion in order for a finding of flagrancy to be appropriate. *See Strieff*, \_\_\_ U.S. at \_\_\_, 195 L. Ed. 2d at 410 (“For [a] violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure.”). While Deputy Cranford’s conduct in stopping Defendant was without reasonable suspicion, his errors and unconstitutional conduct do not rise to a “purposeful or flagrant violation of [Defendant’s] Fourth Amendment rights,” nor is there any indication on this record that the stop “was part of any systemic or recurrent police misconduct.” *Id.*

### III. Preservation of Attenuation Argument

Had the State raised and argued to the trial court its theory that Deputy Cranford’s stop of Defendant was sufficiently attenuated from the discovery of the firearm, my disagreement with the majority would end here. However, the State failed to argue its attenuation argument in the trial court, and this Court should not

address it in the first instance. At trial, Defendant moved to suppress the evidence found in the search, arguing that Deputy Cranford's stop violated his rights under the Fourth Amendment to the United States Constitution. At the hearing on Defendant's motion, the State presented evidence from Deputy Cranford and his superior officer. Thereafter, the State defended the constitutionality of the stop solely on the grounds that Deputy Cranford possessed reasonable suspicion to stop Defendant. The trial court ruled exclusively on that basis, and found that Deputy Cranford possessed reasonable suspicion to stop Defendant. The attenuation doctrine was never raised by the State and, as the majority concedes, the words "attenuation" and "intervening circumstance" were never spoken at the suppression hearing.

As the majority notes, the question for this Court when reviewing a trial court's ruling on a motion to suppress "is whether the ruling of the trial court was correct and not whether the reason given therefor [was] sound or tenable. The crucial inquiry for this Court is admissibility *and whether the ultimate ruling was supported by the evidence.*" *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (emphasis added). The majority reads the second clause, italicized above, from *Bone's* holding. When considering the admissibility of the evidence, we must consider whether the "ultimate ruling" of the trial court was supported by the evidence. The "ultimate ruling" of the trial court in the present case was that the motion to suppress should be denied

because Deputy Cranford had reasonable suspicion to stop Defendant. As discussed above, this ruling was incorrect.

We should not suggest that the trial court’s “ultimate ruling” denying Defendant’s motion to suppress – because Deputy Cranford had reasonable suspicion to stop Defendant – also contained an unwritten, but implied, alternative ruling that, if Deputy Cranford’s stop was unconstitutional, the unconstitutional stop was sufficiently attenuated from the discovery of the evidence so as to be admissible. The trial court never ruled on whether the unconstitutional stop was sufficiently attenuated from the discovery of the evidence, because attenuation was never raised by the State.

The majority suggests that the “occurrence of an intervening event” only “becomes an issue” if the trial court “finds the underlying illegality,” and that an “intervening event” is not an “arguable issue” until the defendant “sustain[s] his burden of persuasion on the illegality of the police conduct.” I disagree. The legality of Deputy Cranford’s stop of Defendant and the admissibility of the firearm found on Defendant *was* at issue. In fact, it was the *only* issue being litigated in Defendant’s motion to suppress. The State argued, uninterrupted and at length, in opposition to Defendant’s motion to suppress. Nothing limited the State from arguing an alternative position, such as attenuation, the position it now raises in this Court in the first instance. Litigants make alternative arguments in support of legal positions

in our trial courts on a daily basis, and waive the arguments they fail to make. If the majority were correct, the State would only raise its “intervening event” theory<sup>2</sup> after the trial court had determined that the stop was not supported by reasonable suspicion. But at that point, it would have been too late – the trial court would have already ruled on and granted Defendant’s motion to suppress.

The State had ample opportunity and compelling reason to raise its attenuation argument as an alternative to its argument that the stop was supported by a reasonable suspicion. Although *Strieff* had not yet been decided by the Supreme Court of the United States, *Strieff* did not change governing law; it only supplemented existing law by applying the factors set out in *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416 (1975). The attenuation doctrine is firmly rooted in North Carolina law, and has been considered and applied in North Carolina Supreme Court cases decades old. See, e.g., *State v. Allen*, 332 N.C. 123, 127-28, 418 S.E.2d 225, 228-29 (1992); *State v. Freeman*, 307 N.C. 357, 359-60, 298 S.E.2d 331, 332-33 (1983). If the State had wished to argue an alternative position, it was required to do so in the trial court in the first instance. The State clearly knows how to make such an alternative argument, as they did so in their brief to this Court in this case.

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<sup>2</sup> I note that an “intervening event,” or intervening circumstance, is only one of the three factors used to determine if the discovery of some evidence is sufficiently attenuated from unconstitutional conduct. See *Strieff*, \_\_\_ U.S. at \_\_\_, 195 L. Ed. 2d at 408. For ease of reading, I employ the nomenclature employed by the majority.



This Court confronted a similar situation in *State v. Gentile*, 237 N.C. App. 304, 766 S.E.2d 349 (2014). In *Gentile*, the trial court granted the defendant's motion to suppress evidence found in a search of his home, holding that when the officers noticed the smell of marijuana emanating from the residence, they "were not in a place in which they had a right to be." *Gentile*, 237 N.C. App. at 308, 766 S.E.2d at 352. On appeal, this Court agreed with the trial court that the officers were in a place they had "no legal right to be" when they smelled the marijuana, which was the basis for the search. *Id.* at 310, 766 S.E.2d at 353. After so holding, the trial court turned to the State's belated argument that

even if the detectives' entry onto constitutionally protected areas of defendant's property was unlawful, the trial court erred by granting the motion to suppress because it failed to examine the remaining portions of the search warrant affidavit to determine if the warrant was still supported by probable cause, absent the odor of marijuana.

*Id.* Confronted with this argument, this Court held that the State had "failed to preserve this issue on appeal" because "the State never argued before the trial court that the motion to suppress should be denied because even if the detectives had no legal right to be on the driveway when they smelled the marijuana, the remaining portions of the search warrant were nevertheless sufficient to establish probable cause." *Id.* at 310, 766 S.E.2d at 353-54. Accordingly, this Court dismissed the State's alternative argument as unpreserved. *Id.*

The circumstances of the present case are no different from the ones confronted by this Court in *Gentile*. In the present case, as in *Gentile*, the State failed to argue to the trial court its alternative theory as to why Defendant's motion to suppress should be denied. Since "the State never argued before the trial court that the motion to suppress should be denied because" the discovery of the evidence was sufficiently attenuated from Deputy Cranford's unconstitutional conduct, the State "failed to preserve this issue on appeal." *Id.* at 310, 766 S.E.2d at 353. This Court is bound by *Gentile's* reasoning. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

The majority suggests that *Gentile* is "easily distinguishable" from the present case because in *Gentile* "the State sought to overturn the trial court's ruling, which granted the defendant's motion to suppress," while in this case the State seeks to defend the trial court's denial of Defendant's motion to suppress. Respectfully, I disagree with the majority's attempt to distinguish *Gentile*, and note it creates a needlessly complicated and unfair rule of preservation. Under the majority's theory, in *Gentile*, all the State would have had to do to be able to "swap horses" would have been to convince the trial court that their incorrect theory – the police were in a place in which they had a lawful right to be when they smelled the marijuana – was in fact correct. In that circumstance, the State would have been free to "swap" that theory for any other theory on appeal – including the one we refused to consider because it was not properly preserved – while the defendant would have been relegated to those

theories it preserved by arguing them to the trial court. In other words, whether a litigant is bound by the arguments it makes in the trial court depends only upon whether the arguments were accepted by the trial court, regardless of whether the trial court was correct. If the State loses a motion to suppress – i.e. a defendant’s motion to suppress is granted – then the State is forever wedded to whatever theory it presented at trial. If, however, the defendant’s motion to suppress is denied – on an incorrect or otherwise untenable theory – the State may thereafter argue any legal theory it wishes in order to preserve its favorable ruling. This is, in my view, an untenable theory of preservation.

This Court has held, time and again, that when a “defendant presents a *different theory* [on appeal] to support his motion to dismiss than that he presented at trial, this assignment of error is waived.” *State v. Euceda-Valle*, 182 N.C. App. 268, 272, 641 S.E.2d 858, 862 (2007) (emphasis added) (citation omitted); *see also State v. Chapman*, \_\_\_ N.C. App. \_\_\_, 781 S.E.2d 320, 330 (2016) (“Because [the defendant] *has failed to properly preserve the specific argument* she now seeks to make on appeal regarding the basis upon which her motion to dismiss should have been granted, we decline to reach the merits of her argument.” (emphasis added) (citations omitted)). It appears arbitrary to declare some arguments preserved and others unpreserved, not by whether those arguments were raised at trial, but rather simply

by virtue of who obtained a favorable ruling by the trial court, regardless of whether that ruling was correct.

Ironically, in the present case the majority would agree that the State could not raise its attenuation argument in this Court, if only the trial court had gotten the law *right*. If the trial court had correctly determined Officer Cranford's stop of Defendant violated the Fourth Amendment, Defendant would be able to defend that ruling under any theory he wished on appeal, while the State would be confined to that theory raised in the trial court. Since the State inexplicably did not raise the attenuation doctrine in the trial court, it would be barred from doing so in this Court in the first instance.

The North Carolina Rules of Appellate Procedure were designed to further "fundamental fairness and the predictable operation of the courts[.]" *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007). On appeal to this Court, Defendant focused the arguments in his principal brief exclusively on whether Deputy Cranford had reasonable suspicion to seize him under the Fourth Amendment. Defendant did so for good reason: the State's argument urging the trial court to deny his motion to suppress, and the trial court's ultimate ruling on that motion to suppress, were exclusively focused on whether reasonable suspicion existed for the stop. After Defendant filed his brief in this Court, though, the ground shifted beneath his feet; the State filed a brief waiving any argument that the stop was supported by

reasonable suspicion and moved forward exclusively on the theory that the presence or absence of reasonable suspicion did not matter because the stop was attenuated from the discovery of the evidence.

Upon receiving the State's brief, Defendant was forced to litigate that new issue, never before considered or passed upon within the context of the present case, in a reply brief. To avoid being blindsided, should a defendant now make arguments on appeal, and then proceed to preemptively research and brief any alternative bases the State may conceivably argue to defend the trial court's ruling? Perhaps not, lest a defendant give the State any ideas about new theories of admissibility. Preservation and the appellate rules are designed to prevent this circumstance.

Our Supreme Court has held that "the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934); *see also State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." (citation omitted)). The majority suggests this rule only applies "to instances where the party. . . carrying the burden on appeal to show error in the lower court's ruling on appeal, and relies upon a theory not presented before the lower court." But the Supreme Court in *Weil* did not equivocate: it held that a *party* – not just an appellant,

but a *party* – may not “swap horses” between courts to gain a better mount on appeal. *Weil*, 207 N.C. at 10, 175 S.E. at 838. Applying this rule to both appellants and appellees is sensible, as it ensures fairness and requires litigants to present legal arguments they believe to be meritorious to the trial court before presenting them to an appellate court.

In faithfully following our Supreme Court’s precedent, along with that precedent’s necessary implications, our Supreme Court’s holdings in *Wiel* and *Sharpe* decide this case in Defendant’s favor. It is undisputed that the State never argued its attenuation theory in the trial court. The State proceeded only on the theory that Deputy Cranford’s stop of Defendant was permissible because reasonable suspicion was present, and in denying Defendant’s motion to suppress the trial court only ruled on that basis. This precludes the State from raising its attenuation argument on appeal in the first instance.

This Court regularly dismisses arguments first advanced by defendants on appeal in criminal cases, reasoning that those arguments have been waived due to the defendants’ failure to raise them in the trial court. *See, e.g., State v. Mastor*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 777 S.E.2d 516, 521 (2015) (dismissing a defendant’s argument where the defendant did not “raise or argue” the objection in the trial court, reasoning that the defendant “failed to preserve [the] issue for appellate review”). That rule

should operate no differently for the State.<sup>3</sup> Attenuation is a theory of admissibility wholly independent from whether reasonable suspicion existed for a stop. I would hold that if the State wishes to argue alternative legal theories of admissibility, the onus is on the State to make those arguments to the trial court. Because Deputy Cranford's stop of Defendant was unconstitutional and the State failed to preserve its attenuation argument, I would reverse the trial court's denial of Defendant's motion to suppress and vacate his conviction. I dissent from the majority's decision to reach the State's belated attenuation argument.

Invocation of N.C.R. App. P. Rule 2

I also dissent from the majority's decision to "rule to invoke Rule 2 [of the North Carolina Rules of Appellate Procedure] in this case[.]" The majority concludes that, even if the State's argument regarding attenuation was not preserved, this case is a proper one for this Court to dispense with the rules of appellate procedure by invoking N.C.R. App. P. 2. I disagree. As our Supreme Court has repeatedly stated: "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (citation omitted). "This

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<sup>3</sup> Though not dispositive, the United States Court of Appeals for the Tenth Circuit has similarly held that attenuation arguments not raised in the trial court are waived on appeal. See *United States v. Hernandez*, 847 F.3d 1257, 1261-62 (10th Cir. 2017) (holding the government waived its attenuation argument by not making that argument to the district court).

assessment – whether a particular case is one of the rare ‘instances’ appropriate for Rule 2 review – must necessarily be made in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected.” *State v. Campbell*, \_\_\_ N.C. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2017 N.C. LEXIS 400, at \*7 (2017) (citations omitted).

The present case does not implicate “significant issues of importance in the public interest.” Defendant in this case was convicted of a single offense, possession of a stolen firearm, which is punishable as a class H felony. *See* N.C. Gen. Stat. § 14-71.1 (2015). I do not see the merit in the majority’s apparent assertion that *any* shooting or attempted shooting of a police officer – the only fact the majority propounds as a reason for invoking Rule 2 – is a *de facto* reason to dispense with the rules of appellate procedure. Such a rule would absolve the State of its need to follow normal preservation rules in any case that allegedly involved the shooting (or, as here, an alleged attempted shooting) of an officer, and would come close to the creation of an “automatic right to review via Rule 2” for police shooting cases, a type of rule our Supreme Court very recently rejected. *See Campbell*, \_\_\_ N.C. at \_\_\_, \_\_\_ S.E.2d at \_\_\_, 2017 N.C. LEXIS 400, at \*7 (“In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.”).



The present case, in my view, also fails to implicate any manifest injustice. Rather, the State would only be forced to proceed on appeal on those legal theories that it raised in the trial court.

#### IV. Conclusion

Due to a lack of reasonable suspicion, Deputy Cranford's stop of Defendant violated Defendant's right to be free from unreasonable searches and seizures under the Fourth Amendment. The State does not contest this fact, and on appeal only defends the stop by arguing that the discovery of the evidence was sufficiently attenuated from Deputy Cranford's unconstitutional conduct. Had attenuation been raised and preserved by the State in the trial court, I agree with the majority that the discovery of the firearm would have been sufficiently attenuated from Deputy Cranford's unconstitutional stop of Defendant.

But the State failed to raise its attenuation argument before the trial court, and cannot raise it here for the first time. I dissent from the majority's and the concurrence's decision to address the State's belated attenuation argument. The preservation rule the majority crafts is untenable, and by faithfully applying precedent from this Court and our Supreme Court, I would dismiss the State's belated argument, reverse the trial court's denial of Defendant's motion to suppress, and vacate Defendant's conviction. I further dissent from the majority's and the concurrence's alternative decision to invoke N.C.R. App. P. 2.

STATE V. HESTER

*McGEE, C.J., dissenting*