

SUPREME COURT OF NEW JERSEY  
DOCKET NO. A-60-17 (080159)

STATE OF NEW JERSEY,  
Plaintiff-Respondent,

v.

DWIGHT NELSON,  
Defendant-Appellant.

CRIMINAL ACTION

ON APPEAL FROM THE SUPERIOR  
COURT OF NEW JERSEY,  
APPELLATE DIVISION

Sat Below:

Hon. Jose L. Fuentes, P.J.A.D  
Hon. Greta Gooden Brown, J.A.D.

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**BRIEF OF *AMICUS CURIAE***  
**THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY**

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## SUMMARY OF ARGUMENT

This case presents the first opportunity for this Court to apply its holding in *State v. Dunbar*, 229 N.J. 521 (2017), and reaffirm the strict limits on what the police may do when they stop a driver without reasonable suspicion that contraband will be found.

In *Dunbar*, this Court adopted the federal standard for the constitutionality of a canine sniff of a vehicle, permitting such a sniff when (1) it occurs during the course of a lawful traffic stop and does not prolong the stop, or (2) there is independent reasonable suspicion of a drug offense. Neither of those circumstances apply in this case. Here, an anonymous tip suggested a Black man would be driving a particular car down the New Jersey Turnpike transporting marijuana. At 6:43 p.m., detectives stopped Defendant based on this tip, observed his nervous behavior, and sought and were denied consent to search. Finally, some thirty-eight minutes after the initial stop, they called for and conducted a canine sniff that added an additional thirty-seven minutes to the traffic stop (tickets for which were not finally issued until 2:30 a.m.).

Contrary to the holding of the Superior Court, Appellate Division, the canine sniff was not justified on the basis of a traffic stop (Point I). The Appellate Division mistakenly relied on a legal conclusion by the motion judge that adding thirty-seven

minutes to a traffic stop did not unreasonably prolong it, a conclusion which pre-dated, and contravened, *Dunbar* (Point I, A). Additionally, the panel appeared to read *Dunbar* to allow some delay beyond the time required to complete the stop's purpose, so long as that delay is not, in some undefined sense, "unreasonable." Yet *Dunbar*'s strictures are clear: a canine sniff is unconstitutional if it adds time to what is reasonably necessary to complete a stop for the particular traffic violations. Here, the record indicates that the canine sniff took thirty-seven extra minutes, and nothing suggests this time was reasonably necessary, or even used, to respond to the innocuous violations of following a vehicle too closely and unsafely changing lanes. *Dunbar* plainly prohibits such an addition of time (Point I, B).

The canine sniff was also not justified on the basis of independent reasonable suspicion (Point II). As the Appellate Division correctly found, the anonymous tip did not provide reasonable suspicion. As this Court held in *State v. Rosario*, 229 N.J. 263 (2017), the fact that a tipster properly identifies innocent details, without more, does nothing to corroborate allegations of concealed criminal activity. Specifically, the fact that an anonymous source here correctly predicted that a Black man would be driving a particular car down the New Jersey Turnpike does not provide reasonable suspicion of criminal activity. Any racist neighbor could make such a call; the police must require

more before they stop civilians (Point II, A). Likewise, Defendant's nervous behavior after he was stopped did not provide reasonable suspicion. It is commonplace that people stopped by the police feel anxiety, particularly people of color who have been burdened with our history of racial profiling (Point II, B).

Finally, this case reveals the dangers of allowing police to make pretextual traffic stops when their hunches do not amount to reasonable suspicion (Point III). Pretextual stops are subject to abuse and racial profiling. This Court should not invite such practices by upholding the canine sniff in this case.

That the Appellate Division so sensibly performed the reasonable suspicion analysis but so plainly confused the application of *Dunbar's* rule against prolongation demonstrates that this Court's clarification is critical. With this case, the Court should reaffirm that police are limited in what they can do when they stop New Jerseyans without reasonable suspicion of a crime, probable cause, or a warrant. When the only authority is a traffic stop, *Dunbar* holds that a canine search is unconstitutional if it adds time to the stop. Thirty-seven minutes is certainly such an addition of time. Accordingly, the canine sniff in this case does not pass constitutional muster, and the decision of the Appellate Division must be reversed.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

*Amicus* adopts the facts and procedural history contained in Defendant-Appellant's Appellate Division brief, incorporated by reference in his supplemental brief to this Court. For the sake of clarity, *amicus* recounts the following facts, as found by the Appellate Division in *State v. Nelson*, No. A-2958-15, 2017 N.J. Super. Unpub. LEXIS 2076 (App. Div. Aug. 15, 2017).

At 6:43 p.m. on October 10, 2014, Defendant, a Black man, was driving his car on the New Jersey Turnpike and going the speed limit. New Jersey State Police (NJSP) pulled him over and, for the next thirty-eight minutes, engaged him in questioning and sought consent to search. *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*3-4, \*12. At 7:21 p.m., Defendant refused consent and the detectives called for a canine unit, which finally arrived and performed a sniff of the vehicle at 7:58 p.m. *Id.* at \*5-6, \*12. After the canine alerted to the possible presence of drugs, NJSP detectives arrested Defendant. They then towed the vehicle, sought and obtained a warrant to search the bags inside, and, after they found marijuana, issued Defendant three motor vehicle citations at 2:30 a.m. *Id.* at \*6, \*11-12.<sup>1</sup> Defendant was charged with possession

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<sup>1</sup> The time of the tickets' issuance is contained in the motion judge's opinion, included in the appendix to Defendant-Appellant's brief to the Appellate Division (Da) at 6a. See also State's Brief to the Appellate Division (Sb) at 6 (citing transcript of suppression motion hearing).



of marijuana with intent to distribute. *Id.* at \*1. The timestamps reflect that “[t]he entire canine sniff-search took approximately thirty-seven minutes.” *Id.* at \*12.

Although the detectives observed two moving violations, they conducted the stop because Defendant matched an anonymous tip received by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). *Id.* at \*3-4.<sup>2</sup> An anonymous source had said a Black man would be driving a specific car down the Turnpike from New York City to Philadelphia and would be transporting a large quantity of marijuana. Based on this information, three NJSP detectives went out in an unmarked vehicle to intercept the car on the Turnpike. Twenty to thirty minutes later, they saw Defendant, whose car and race matched the description, and stopped him. *Id.*

When the detectives pulled Defendant over, he showed signs of nervousness and anxiety and gave conflicting stories. The detectives also saw two large bags in the car and smelled air freshener. *Id.* at \*4-5. At approximately 7:21 p.m., thirty-eight minutes after the initial stop, detectives requested consent to search, which Defendant denied. Accordingly, at 7:27 p.m. the detectives called for a canine unit, which arrived at 7:58 p.m., circled the exterior of the car, and indicated the possible

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<sup>2</sup> The Appellate Division implied that the primary reason for the stop was the anonymous tip, making no mention of the moving violations until it quoted the detective’s reasons for calling the canine unit. *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*3-5.

presence of drugs at the rear door. Based on the canine's indication, the detectives arrested Defendant for possession of an unknown quantity of a controlled dangerous substance. *Id.* at \*12. After a search of the vehicle revealed marijuana, Defendant was issued summonses for three Title 39 violations: following another vehicle too closely, *N.J.S.A. 39:4-89*; unsafely changing lanes, *N.J.S.A. 39:4-88(b)*; and operating a motor vehicle while in possession of narcotics, *N.J.S.A. 39:4-49.1*. *Id.* at \*6.<sup>3</sup>

Reviewing the denial of Defendant's motion to suppress, the Appellate Division noted (as the motion judge found) that the entire canine sniff took thirty-seven minutes, from the time Defendant denied consent to the time the canine unit arrived. *Id.* at \*12. The panel concluded the detectives did not have reasonable suspicion to stop Defendant based on the anonymous tip, but affirmed the denial because it found the canine sniff did not "unreasonably prolong" the legitimate motor vehicle stop. *Id.*

This Court granted Defendant's petition for certification. The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief. *R. 1:13-9*.

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<sup>3</sup> The Title 39 citations were ultimately dismissed. Sb 2.

## ARGUMENT

### I. THE CANINE SNIFF WAS NOT JUSTIFIED ON THE BASIS OF A TRAFFIC STOP, BECAUSE THE SNIFF ADDED THIRTY-SEVEN MINUTES TO THE STOP.

The motion judge made the factual finding that the canine sniff “*extended the length of time* of the initial motor vehicle stop and expanded the scope of the search beyond the limits of a motor vehicle stop[.]” Da 12a (emphasis added).<sup>4</sup> The Appellate Division likewise noted that “[t]he entire canine sniff-search took approximately thirty-seven minutes.” Yet the Appellate Division concluded, “Under these circumstances, the motion judge found the canine search did not unreasonably prolong the Title 39 enforcement stop. Mindful of the Court’s holding in *Dunbar*, we agree.” *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*12.

This conclusion is mistaken for two principal reasons: first, because the motion judge’s legal conclusion, on which the Appellate Division relied, that a thirty-seven minute extension is not unreasonable pre-dates *Dunbar*; and second, because *Dunbar* mandates that any prolongation renders the canine search unconstitutional, regardless of whether the Appellate Division feels that the amount

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<sup>4</sup> This brief uses the following abbreviations:

“Da” refers to the appendix to Defendant-Appellant’s brief to the Appellate Division.

“Db” refers to Defendant-Appellant’s supplemental brief to this Court.

“Sb” refers to the State’s brief to the Appellate Division.

of time is in some (undefined) sense not "unreasonable."

**A. This Court Decided *Dunbar* After the Motion Judge's Opinion, Such That the Latter's Legal Conclusions Have No Bearing on the Question of Prolongation.**

Defendant was pulled over by New Jersey State Police in October 2014, and the motion judge decided the suppression issue in October 2015. Between that time and the Appellate Division's August 2017 opinion, this Court decided *State v. Dunbar*, which modified the standard by which the constitutionality of canine sniffs is measured. 229 N.J. 521 (2017). To *amicus'* knowledge, the present case is the first time this Court will consider the application of that standard to another set of facts.

In *Dunbar*, the Court explicitly adopted the federal standard pronounced in *Rodriguez v. United States*, 135 S.Ct. 1609 (2015). Accordingly, under current law an officer may conduct a canine sniff of a vehicle under two sets of circumstances: (1) during the course of an otherwise lawful traffic stop so long as the sniff does not "prolong[] a traffic stop beyond the time required to complete the stop's mission" or (2) "if an officer has articulable reasonable suspicion independent from the reason for the traffic stop that a suspect possesses narcotics," in which case "the officer may continue a detention to administer a canine sniff." *Dunbar*, 229 N.J. at 540 (citing *Rodriguez*, 135 S.Ct. at 1616).

The second set of circumstances was permissible before *Dunbar* and was relied upon by the motion judge in this case. See *id.* at

539; Da 11a (opinion of motion judge noting that "New Jersey courts have approved of such [sniff] searches, but only when reasonable and articulable suspicion exists."). As properly found by the Appellate Division and discussed in Point II, there was no independent reasonable suspicion to justify the sniff in this case.

The Appellate Division devoted the majority of its opinion to a careful examination of the absence of reasonable suspicion, but in its final two pages, without any legal analysis, nevertheless upheld the sniff under *Dunbar*. Its reasoning consisted only of the following: The panel recited the motion judge's finding as to the propriety of the traffic stop and *Dunbar's* allowance of a canine sniff during such a stop. *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*11. It then recalled the timestamps of the stop, calculating that the canine sniff took thirty-seven minutes. Without any explanation and based only on these recitations, the panel announced that "we agree" with the motion judge's legal conclusion that the sniff "did not unreasonably prolong the Title 39 enforcement stop." *Id.* at \*12. In so doing, the Appellate Division confused the two sets of circumstances permitted by *Dunbar*, transposing the motion judge's pre-*Dunbar* finding regarding reasonable suspicion onto *Dunbar's* rule against prolongation. Such a conclusion completely perverts, and in fact would negate, this Court's ruling in *Dunbar*.

The motion judge's approval of the thirty-seven minute prolongation is inapposite not only because it predates *Dunbar*, but because it applies the wrong standard. Da 11a-12a (citing requirement of reasonable and articulable suspicion under *State v. Elders*, 386 N.J. Super. 208, 228 (App. Div. 2006), *aff'd in part, rev'd in part*, 192 N.J. 224 (2007)). The motion judge noted that "[f]ederal decisions have upheld detentions of forty-five, fifty, sixty and even seventy-five minutes where, for example, the delay was necessitated by efforts to obtain a narcotics dog." Da 11a (quoting *State v. Baum*, 393 N.J. Super 275, 288 (App. Div. 2007), *aff'd as modified*, 199 N.J. 407 (2009)); see also Sb 15 (identical quotation). But *Elders*, *Baum*, and the federal cases *Baum* references all predate *Dunbar*. Indeed, this Court acknowledged, "To the extent that *Elders* and *Baum* can be read to suggest a different standard, we disapprove of that reading." *Dunbar*, 229 N.J. at 539.<sup>5</sup>

The motion judge appears to have found as a factual matter that the stop was prolonged by the canine search, *i.e.*, that the stop would not have continued for those thirty-seven minutes but for the canine search. Da 12a. Yet deciding the case pre-*Dunbar*, the judge held that such a delay was nevertheless neither

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<sup>5</sup> Before the Appellate Division, the State conceded that the canine sniff resulted in a "delay of approximately thirty-seven minutes" but, relying on *Baum*, asserted that this delay "was not excessive." Sb 14-15. For the reasons discussed, that is not the inquiry *Dunbar* requires.

unreasonable nor impermissible. Obviously, *Dunbar* now makes clear that it is.

This Court, like the Appellate Division, owes no deference to the motion judge's legal conclusion that the stop was not unreasonably prolonged. *State v. Gamble*, 218 N.J. 412, 425 (2014). The Appellate Division was well aware of its standard of review and that it was bound by *Dunbar's* holding. *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*7, \*12. That the panel adopted the motion judge's legal conclusion anyway reveals the urgent need for this Court to clarify *Dunbar's* import.

**B. Absent Reasonable Suspicion, *Dunbar* Prohibits a Canine Sniff That Adds Time to a Traffic Stop.**

The Appellate Division's reliance on the motion judge's pre-*Dunbar* analysis missed the finer points of that judge's factual findings. Perhaps the Appellate Division was confused about the language of the motion judge's ultimate (and erroneous) legal conclusion that the extension of time was not unreasonable, such that the panel overlooked the judge's finding that the canine sniff in fact did extend the stop. Compare *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*12 (relying on the motion judge's conclusion that "the canine search did not unreasonably prolong the Title 39 enforcement stop"), with *Da 12a* (finding that the canine sniff "extended the length of time of the initial motor vehicle stop and expanded the scope of the search beyond the limits of a motor

vehicle stop"). This extension of time - the finding of which is entitled to deference, *State v. Gonzales*, 227 N.J. 77, 101 (2016) - is precisely what *Dunbar* now prohibits as a matter of law, where there is no independent reasonable suspicion of criminal activity.

Indeed, in adopting the federal standard for canine sniffs, this Court was careful to cabin *Dunbar's* new permission with express temporal limitations. In the absence of reasonable suspicion, the prohibition on prolonging the detention means "an officer *may not add time* to the stop." *Dunbar*, 229 N.J. at 540 (emphasis added). In relying on the motion judge's conclusion, the Appellate Division mistakenly relaxed this prohibition by, in effect, allowing some "reasonable" delay. Compare *id.* ("may not add time"), with *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*12 (did not "unreasonably prolong").

The appropriate question in this case is not whether thirty-seven minutes was an *unreasonable* prolongation, nor even whether thirty-seven minutes - or properly, the approximately seventy-five minutes from Defendant's initial stop to his arrest - was too long for a traffic stop for these moving violations. Instead, *Dunbar* asks whether the canine sniff prolonged the stop at all: In other words, did "the canine sniff extend[] the traffic stop beyond the time reasonably required to complete the traffic stop's purpose[?]" *Dunbar*, 229 N.J. at 536. "The critical question, then, is not whether the dog sniff occurs before or after the officer



issues a ticket . . . but whether conducting the sniff prolongs – i.e., adds time to – the stop.’” *Id.* (quoting *Rodriguez*, 135 S.Ct. at 1616) (alteration in original).<sup>6</sup>

Thus the only examination of reasonable timing goes to the length of time required to complete the traffic stop’s purpose. *Id.*; see also *Rodriguez*, 135 S.Ct. at 1614 (holding that the allowable time “ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.”). While the case law is careful not to set a precise limit on the reasonable length of a traffic stop, it is evident that a moving violation investigation, without more, should not be time-intensive; it includes relatively simple tasks such as checking the driver’s license, registration, and proof of insurance.<sup>7</sup> *Dunbar*, 229 N.J. at 533 (citing *Rodriguez*, 135 S.Ct. at 1615). As the U.S. Supreme Court explained, “‘If an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably

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<sup>6</sup> In *Rodriguez*, the canine sniff appeared to extend the stop by seven or eight minutes; the U.S. Supreme Court remanded so the Eighth Circuit could determine whether such a prolongation was justified by independent reasonable suspicion, 135 S.Ct. at 1614, 1616, not whether it was a reasonable delay. In *Dunbar*, the timing of the canine sniff was unclear, so this Court remanded to determine whether the sniff prolonged the traffic stop and, if so, whether that was justified by independent reasonable suspicion. 229 N.J. at 540, 541.

<sup>7</sup> In so noting, *amicus* does not minimize the indignity and compounding emotional burden, especially for people of color, of being routinely stopped for minor, often pretextual traffic violations.

required to complete the stop's mission. . . . [A] traffic stop prolonged beyond that point is unlawful.'" *Id.* at 536 (quoting *Rodriguez*, 135 S.Ct. at 1616); see also *State v. Dickey*, 152 N.J. 468, 477 (1998) (instructing that "common sense and ordinary human experience must govern over rigid criteria" when evaluating reasonableness of an investigative detention).

Nothing in the record suggests, and the State has not claimed, that the additional thirty-seven minutes before Defendant's arrest were required - or in fact used - to investigate or take action in response to the innocuous traffic violations of following another vehicle too closely and unsafely changing lanes.<sup>8</sup> Indeed, it is unclear whether the detectives meant to investigate those two traffic violations at all. But even if they had performed tasks tied to such infractions and written up the tickets on the spot, rather than hours later after the vehicle was towed, the record does not explain why they reasonably should not have completed this during the more than half hour between when Defendant was stopped (soon after 6:43 p.m.) and when he denied consent to search (at 7:21 p.m.). Regardless, the motion judge made the factual determination that the canine sniff did extend the time (by thirty-seven extra minutes) beyond that which the detectives were possibly

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<sup>8</sup> The third traffic violation, operating a motor vehicle while in possession of narcotics, obviously post-dated the discovery of the narcotics.

engaged in motor vehicle-related tasks. Da 12a. *Dunbar* squarely prohibits this addition.

**II. THE CANINE SNIFF WAS NOT JUSTIFIED ON THE BASIS OF INDEPENDENT REASONABLE SUSPICION.**

At the time of the motion judge's examination, and at present, a canine sniff may extend the reasonable length of a traffic stop if it is independently supported by reasonable and articulable suspicion. *Dunbar*, 229 N.J. at 540. Yet in the instant case, neither the anonymous tip nor Defendant's behavior after the detectives stopped him furnished this level of suspicion. *Amicus* agrees with the Appellate Division's treatment of this issue and therefore addresses only the most salient aspects here.<sup>9</sup>

**A. The Anonymous Tip Did Not Provide Reasonable Suspicion, Because Police Confirmed Merely Innocent Details.**

The Appellate Division correctly relied on *State v. Rosario* to conclude that the detectives had no reasonable suspicion to detain Defendant on the basis of the anonymous tip. Here as in *Rosario*, the "facially 'innocent details' [received from the ATF] standing alone do[] not show that the ATF had knowledge of concealed criminal activity." *Nelson*, 2017 N.J. Super. Unpub.

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<sup>9</sup> It is worth noting that, because there was no reasonable suspicion, it was likewise impermissible under *Carty* for the detectives to have sought consent to search. 170 N.J. 632, 635 (2002).

LEXIS 2076, at \*9-10 (analogizing to *Rosario*, 229 N.J. 263, 275 (2017)).

As an initial matter, anonymous tips, without more, are insufficient to justify a stop. See *State v. Rodriguez*, 172 N.J. 117, 127 (2002) (cautioning “[a]n anonymous tip, standing alone, is rarely sufficient to establish a reasonable articulable suspicion of criminal activity.”); *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (holding an anonymous tip “provided no predictive information” to allow police to corroborate criminal activity or investigate the reliability of an informant). Moreover, even when the tip does properly predict certain events, that corroboration does not necessarily extend to corroboration of criminal activity. As this Court noted in *Rosario*, “The fact that the tip accurately identified the defendant and her vehicle is of no moment because a tipster’s knowledge of such innocent identifying details alone ‘does not show that the tipster has knowledge of concealed criminal activity.’” *Rosario*, 229 N.J. at 275 (quoting *J.L.*, 529 U.S. at 272); *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*9 (quoting same).

Here, as in *Rosario*, “we have no corroborated criminal activity.” 229 N.J. at 276. The fact that officers did later find marijuana<sup>10</sup> cannot “be used, post hoc, to establish the reasonable

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<sup>10</sup> Of course, Defendant did have marijuana; as in other search and seizure cases, the issue would not be before the Court otherwise.

and articulable suspicion required at the outset," *id.* at 277, in this case to justify a canine sniff. See also *State v. Walker*, 213 N.J. 281, 291 (2013) ("There is no indication either directly from the source or in the details provided in the tip that specifies the informant's basis of knowledge. Nowhere did the informant indicate where he obtained the information or whether it was obtained in a reliable manner.").<sup>11</sup>

An NJSP detective testified in this case that the anonymous tip provided a description, *inter alia*, about "who was driving." When asked to clarify, he revealed that the description consisted only of information of a "black male driving at the time. But other than that, nothing." *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*3. Put simply, driving while Black does not provide reasonable suspicion of criminal activity, even if law enforcement has historically acted as though it does. See, e.g., David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 *Minn. L. Rev.* 265 (1999); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit*

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But the fact that in some cases officers' actions, unsupported by reasonable suspicion or probable cause, do result in the discovery of criminal activity does not *post hoc* justify those actions, nor suggest that in the circumstances that do not come before the Court these actions are so fruitful.

<sup>11</sup> It is worth noting that, because there was no reasonable suspicion, it was likewise impermissible under *Carty* for the detectives to have sought consent to search. 170 N.J. 632, 635 (2002).

*Association Test*, 8 *Ohio St. J. Crim. L.* 187, 207 (2010) (finding that study participants implicitly associated Blackness with guilt).

Professor Carbado has examined this contradiction between law and practice, noting that “[f]ew people publicly would take the position that it is legitimate for police officers to target black and brown motorists for traffic stops . . . [yet] every few months a new report is released revealing just how pervasive racial profiling really is.” Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 *Mich. L. Rev.* 946, 1031 (2002); see also *State v. Carty*, 170 N.J. 632, 645 (2002) (following the history of NJSP’s racial profiling on the New Jersey Turnpike).

In other words, the simple fact that an anonymous tipster correctly predicted that a Black man would be driving a particular car down the Turnpike says nothing about whether the tipster was correct about his alleged criminal activity. Anyone seeing a Black man driving could make such an anonymous call; officers must have something more to corroborate criminal activity before they can perform a stop based on that. An opposite rule would invite racial profiling, and encourage civilians to help accomplish it.

**B. Defendant’s Behavior After He Was Stopped Did Not Provide Reasonable Suspicion, Because It Is Normal to Be Nervous When Stopped by the Police.**

Even if the detectives were justified in stopping Defendant for moving violations, what they observed upon approaching the car

likewise did not constitute reasonable suspicion that the Defendant was transporting drugs. Of particular note, the detective claimed that there was a strong smell of air freshener; *amicus* submits that the odor of air freshener is common in many well-cleaned cars, as well as increasingly when drivers perform ride-share services such as Lyft, Uber, etc. Additionally, the detective's identification of the absence of "any kind of personal belongings, even just a knapsack" combined with the presence of "two large bags in the rear cargo" is not only contradictory, it is also inherently not criminal; Defendant's personal belongings could in fact have been in the two bags. See *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*5 (enumerating factors which detectives claimed justified their call for a canine).

But perhaps most concerning is the detective's claim that Defendant's behavior provided grounds for reasonable suspicion: namely, that "he was extremely nervous. He was shaking, trembling, [and] he started to sweat." *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*4 (quoting detective's testimony).

Feeling nervous when stopped by the state police is not only not criminally suspicious, it is reasonable and commonplace. This Court has explicitly held that "under the New Jersey Constitution, the appearance of nervousness is not sufficient grounds for the reasonable and articulable suspicion necessary to extend the scope of a detention beyond the reason for the original stop." *Carty*,

170 N.J. at 648; see also *State v. Lund*, 119 N.J. 35, 47 (1990) (noting that nervous or evasive behavior is not uncommon when people are stopped by police and does not, without more, indicate criminal activity). Indeed, it is particularly unsurprising that a Black man would show extreme nervousness when encountering law enforcement in light of the history of discriminatory policing of communities of color. See ACLU of New Jersey, *Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey* (Dec. 2015), [https://www.aclu-nj.org/files/7214/5070/6701/2015\\_12\\_21\\_aclunj\\_select\\_enf.pdf](https://www.aclu-nj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf) (examining data for four New Jersey cities); see also Olivia Rizzo, *Another N.J. Public Official Goes Off on a Cop at a Traffic Stop, Calls Chief a 'Skinhead,' NJ Advance Media* (May 17, 2018), [http://www.nj.com/essex/index.ssf/2018/05/south\\_orange\\_school\\_board\\_member\\_gets\\_into\\_alterca.html](http://www.nj.com/essex/index.ssf/2018/05/south_orange_school_board_member_gets_into_alterca.html) (describing fear of a Black school board member during traffic stop, who says "I'm scared of cops because you guys hurt black people."). *Amicus* calls this Court's attention to Defendant's supplemental brief, which notes that a Black man's nervousness

as he was detained and questioned by three state troopers is not indicative of anything other than his membership in a group that has for centuries, since the inception of law enforcement agencies in this nation, been aware of the potential danger posed to black lives by law enforcement officers.

[Db 3 n.1.]



Defendant's behavior and the detectives' observations do not provide the reasonable suspicion required to conduct a canine sniff outside the temporal limits of a traffic stop. At best, they may result in a police hunch, but this Court has clarified that an officer's hunch is not constitutionally sufficient. See *infra*, Point III; *Elders*, 192 N.J. at 236, 250 (finding officer's request for consent based on facially conflicting statements and nervousness insufficient under *Carty* and concluding officer's belief amounted merely to a hunch, not reasonable suspicion).

**III. ALTHOUGH THE LAW MAY ALLOW POLICE TO MAKE PRETEXTUAL STOPS TO SATISFY THEIR SUBJECTIVE HUNCHES, THIS COURT SHOULD NOT INVITE THAT PRACTICE FURTHER.**

This case highlights concerns regarding the use of pretextual stops. It shows how police might use traffic violations as *post hoc* justifications to excuse the absence of reasonable suspicion or probable cause - or, even if the officers do not mean to, how courts might allow such excuses anyway.<sup>12</sup> This Court should clarify its holding in *Dunbar* to ensure it is not misread as an invitation for such pretexts.

While the law may prevent courts from querying the subjective intent behind a pretextual stop, *State v. O'Neal*, 190 N.J. 601, 614 (2007); *Whren v. United States*, 517 U.S. 806, 813-15 (1996),

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<sup>12</sup> As noted *supra*, it is unclear whether the detectives actually claimed the traffic violations as their justification for the stop.

it is no secret that police around the country, and here in New Jersey, make lawful traffic stops in order to investigate their hunches about criminal activity instead. See, e.g., Ken Armstrong, *How the Supreme Court Made It Legal for Cops to Pull You Over for Just About Anything: Even Hanging Air Freshener*, *The Marshall Project* (Aug. 3, 2015), <https://www.themarshallproject.org/2015/08/03/how-the-supreme-court-made-it-legal-for-cops-to-pull-you-over-for-just-about-anything>; Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 *Tul. L.Rev.* 1409, 1465 (2000). The traffic code is so extensive that even the most common or innocuous violations may be used to justify a stop, for example, as in this case, for following another car too closely. *Nelson*, 2017 N.J. Super. Unpub. LEXIS 2076, at \*6. As one scholar noted,

Every day, millions of cars are stopped for one of the myriad of regulations governing our use of public streets. As soon as you get into your car, even before you turn the ignition key, you have subjected yourself to intense police scrutiny. So dense is the modern web of motor vehicle regulations that every motorist is likely to get caught in it every time he drives to the grocery store.

[Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 *J. Crim. L. & Criminology* 829, 874 (2001).]

As this Court is well aware, the risks of using traffic stops as a pretext are abundant, including as an invitation for racial

profiling. See, e.g., *Carty*, 170 N.J. at 645-46 (reviewing Attorney General's *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* and acknowledging "widespread abuse of our existing law" when "motor vehicle[s] are] stopped for even the most minor traffic violation"). Indeed, the Court noted that the rule announced in *Carty* "also serves the prophylactic purpose of preventing the police from turning a routine traffic stop into a fishing expedition for criminal activity unrelated to the stop." *Id.* at 647.

The Appellate Division in this case found that detectives did not have reasonable suspicion to detain Defendant, but the court was satisfied that the Title 39 violations cured any constitutional infirmity. There can be no question that these violations were an afterthought: only two of them could possibly have been observed initially, and all three were not recorded until after a search was performed pursuant to a warrant over six and a half hours after the arrest. Moreover, it is not clear that the detectives ever meant to perform a traffic stop function, or otherwise complete the "mission" that *Rodriguez*, and *Dunbar* in turn, contemplate. Perhaps the anonymous tip provided them with a hunch, but the law is clear that a detention "cannot - we emphasize cannot - be justified merely by" a hunch. *State v. Davis*, 104 N.J. 490, 505 (1986) (emphasis in original). Allowing officers to act on these

hunches, and any underlying biases, under the guise of a traffic stop does little more than flout this Court's clear command.

If this Court upholds a thirty-seven minute prolongation of a traffic stop without reasonable suspicion, it will transform *Dunbar* into a perverse incentive and risk emboldening officers to conduct pretextual traffic stops as a cover for constitutionally infirm hunches, in the hopes that a canine sniff will eventually provide probable cause to arrest. This case provides an opportunity instead for the Court to reiterate *Dunbar's* clear directive: absent reasonable suspicion, a canine sniff may not add time to a traffic stop.

**CONCLUSION**

For the foregoing reasons, this Court should reverse the decision of the Appellate Division.

Respectfully submitted,



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