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VIA ELECTRONIC FILING
Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: State v. Azmar Carter (Sup. Ct. Dkt. 081493)
App. Div. Docket No. 3305-16T3

Honorable Chief Justice and Associate Justices:

Please accept this letter brief in lieu of a more formal submission from *amicus curiae* the American Civil Liberties Union of New Jersey (ACLU-NJ) in support of Defendant's Petition for Certification.

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SUMMARY OF ARGUMENT

The Court should grant certification to prevent an extreme reworking of common understanding of search and seizure law that would profoundly influence police behavior for the worse. Though the decision below was unpublished, the panel's radical misapplication of established constitutional principles threatens to give police officers broad latitude to seize New Jerseyans without suspicion. The court below made two significant errors that require correction through certification.

First, the Appellate Division erred in attributing, without citation, the burden of proof to the defendant rather than to the State. Officers had no warrant to seize or search Carter. As such, the seizure was presumptively unreasonable and the State bears the burden of demonstrating that such action was lawful under an established exception to the warrant requirement (or to show that no seizure occurred).

Second, there is no constitutional distinction between being "informed" to stop and being ordered to stop. The record clearly shows that the officers issued a command to Carter. When officers restrain the freedom of movement of an individual by issuing such an order, they have seized that individual within the meaning of the Fourth Amendment and Article I, Paragraph 7 of the New Jersey State Constitution. A contrary result, as dictated by the Appellate

Division's opinion, creates unworkable and dangerous incentives for people interacting with police.

STATEMENT OF FACTS

On April 7, 2015, Sergeant Stefanelli, and Detectives Johnson, Mooney and Greenfield of the Orange Police Department were driving in an unmarked police car on Scotland Road. (1T:4-17 to 6-6)[1]. At approximately 1:50 p.m., they observed Defendant Azmar Carter standing alone on the sidewalk. (1T:6-20 to 7:19). Officer Johnson knew Carter from prior street encounters and from a prior CDS arrest. (1T:7-5 to 10). The four officers watched Carter for five to ten minutes from their vehicle, during which time they did not observe Carter engaging in any illegal activity. (1T:8-8 to 11; 1T:19-22 to 20-10). Officer Johnson then testified that the officers drove up to Carter and that upon seeing the police car, Carter began walking away at a normal speed. (1T:10-3 to 11-8).

The officers exited the vehicle, identified themselves as police officers and ordered Carter to stop (1T:11-12 to 12-3; 1T:12-23 to 13-3; State v. Carter, 2018 N.J. Super. Unpub. LEXIS 1536, Slip Op. at 3). Carter complied with the officers' command and then exclaimed, "I saw you guys and thought you wanted me to leave" before throwing a small bag of marijuana on the ground.

[1] 1T refers to the transcript dated August 4, 2016.
2T refers to the transcript dated August 29, 2016.
DBr refers to Defendant's Appellate Division letter brief.

(1T:13-2 to 25). Officers arrested Carter for possession of marijuana and seized his backpack. (1T:14-1 to 24). Back at the police station, the police conducted an inventory search of the bag and recovered more marijuana, a handgun, and Xanax pills. (1T:15-17 to 16-3; 1T:17-5 to 13).

PROCEDURAL HISTORY

The defendant moved to suppress the marijuana and the contents of the backpack as the products of an unlawful seizure. The trial court denied the defendant's motion, finding that the officers' "simple stop and inquiry" was constitutional as Carter "did, in fact, stop and speak to [the officers.]" (2T:9-19 to 23). The trial court further held that the inventory search of the backpack revealed lawfully seized evidence. (2T:12-8 to 10).

Defendant appealed the trial court's decision, asserting that the court erred in finding that police lawfully stopped him. Defendant contended that the officers lacked a lawful basis to conduct an investigatory stop because the officers did not possess any suspicion that he was engaged in criminal activity. The marijuana was involuntarily abandoned as a product of the unlawful stop. DBr at 5.

The Appellate Division affirmed the trial court's denial of Defendant's motion to suppress evidence. Carter, Slip Op. at 2. The court held that because the officers did not deny Carter the

right to move freely, no investigatory detention took place.[2] Rather, in the eyes of the panel, the officers merely conducted a field inquiry when they approached Carter on the street and "informed him to stop". Id. at 8. Under the constitutional concept of a field inquiry, the Appellate Division asserted, a defendant has the burden of proof to show that he possessed an objectively reasonable belief that he was not free to ignore the officers' order to stop. Id. at 8-9. The court found that the Defendant failed to meet that burden given the "insufficient evidence in the record". Id. at 9.

ARGUMENT

I. THE APPELLATE DIVISION APPLIED THE INCORRECT LEGAL STANDARD, ERRONEOUSLY ATTRIBUTING THE STATE'S BURDEN TO THE DEFENDANT.

Under the Fourth Amendment and Article I, paragraph 7 of the State Constitution, a warrantless search is presumptively invalid unless it comes within one of the specific exceptions to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (internal citations omitted); State v. Alston, 88 N.J. 211, 230 (1981). The State has the burden of proving that a search falls within one of those exceptions. State v. Maryland, 167 N.J. 471,

[2] The court also held that Defendant failed to contest the legality of the stop before the trial court and therefore plain error analysis applied. Carter, Slip Op. at 6. Amicus contends that this conclusion is mistaken as a matter of both law and fact and relies on the argument contained in Defendant's Petition for Certification at pages 2-3 to support that position.

489 (2001) (holding that on a motion to suppress evidence from a warrantless search, the state has the burden of proving the validity of the search); State v. Wilson, 178 N.J. 7, 12 (2003) (holding that the State, as the party seeking to validate the warrantless search must prove that it falls within one of the exceptions). Where the State conducts a warrantless search, it bears the responsibility of proving by a preponderance of the evidence that an exception to the warrant requirement applies. Id. at 13; State v. Elders, 192 N.J. 224, 246 (2007).

The Appellate Division held that the defendant bore the burden of proving that he did not feel free to leave, asserting, "[the] defendant has the burden of showing he had an objectively reasonable belief that he was not free to ignore Detective Johnson's request to stop." Carter, Slip Op. at 9. There is no support for such a framework. It is axiomatic that warrantless searches are presumptively invalid and that the State bears the burden of proving that it falls within one of the few, narrowly circumscribed exceptions. State v. Frankel, 179 N.J. 586, 598 (2004); see also State v. Patino, 83 N.J. 1, 7 (1980); State v. Ercolano, 79 N.J. 25, 41-42 (1979).

It is true that unlike investigative detentions, field inquiries do not constitute searches entitled to constitutional protections. Still, New Jersey courts examining distinctions between those two sorts of encounters – other than the Appellate

Division in this case – have *never* shifted the burden of establishing that the encounter was a field inquiry to defendants. See, e.g., State v. Rosario, 229 N.J. 263, 273 (2017) (examining intrusiveness of encounter without placing burden on defendant to prove that a reasonable person would not feel free to leave); State v. Rodriguez, 172 N.J. 117, 126 (2002) (same); State v. Davis, 104 N.J. 490, 497-49 (1986) (same); State v. Adubato, 420 N.J. Super. 167 (App. Div. 2011) (same); State v. Daniels, 393 N.J. Super. 476, 484-85 (App. Div. 2007) (same); State v. Sirianni, 347 N.J. Super. 382, 387 (App. Div. 2002) (same); State ex rel. J.G., 320 N.J. Super. 21 (App. Div. 1999) (same).

Insofar as the standard of proof in a motion to suppress evidence is a preponderance of the evidence, State v. Whittington, 142 N.J. Super. 45, 51-52 (App. Div. 1976), it could be argued that the allocation of the burden of proof is of little moment. But when the misapplication of the burden is examined in concert with the court's inappropriate deference to officers' subjective intent rather than the objective behavior (Point IIA, infra), the error is magnified.

II. THE OFFICERS UNLAWFULLY SEIZED CARTER WHEN THEY APPROACHED HIM ON THE STREET AND ORDERED HIM TO STOP. A CONTRARY HOLDING CREATES DANGEROUS INCENTIVES TO FLEE.

When four police officers exited their vehicle, approached Carter, identified themselves as police officers, and ordered him to stop, the officers unequivocally subjected Carter to an

investigatory stop. A stop occurs when "by means of physical force or a show of authority, [the suspect's] freedom of movement is restrained" and if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave". United States v. Mendenhall, 446 U.S. 544, 553-54 (1980); See also Davis, 104 N.J. at 498; Rodriguez, 172 N.J. at 126. An officer does not violate the Fourth Amendment when she approaches an individual "on the street or in another public place" and poses questions so long as that individual remains free to walk away. Davis, 104 N.J. at 497 (citations omitted); Rodriguez, 172 N.J. at 126 (citations omitted). The interaction is merely a field inquiry as long as the individual may disregard the officer's questions and terminate the encounter. Maryland, 167 N.J. at 483 (quoting Florida v. Royer, 460 U.S. 491, 497-98 (1983)). However, once an officer restricts an individual's "right to move" that interaction becomes an investigatory stop, to which Fourth Amendment protections adhere. See Rodriguez, 172 N.J. at 126 (quoting State v. Sheffield, 62 N.J. 441, 447 (1973)).

A court considering a motion to suppress must examine the totality of the circumstances to determine "whether the police conduct would have communicated to a reasonable person that the person was not free [to leave]" State v. Tucker, 136 N.J. 158, 166 (1994) (quoting Florida v. Bostick, 501 U.S. 429, 439 (1991)). Whether an investigatory stop occurs is measured from the

perspective of the citizen. Maryland, 167 N.J. at 483 (citing Tucker, 136 N.J. at 165-66). An encounter is no longer merely a field inquiry when the attendant circumstances convey to an objectively reasonable person that she is not free to leave. Id. The words, tone, or deeds of law enforcement may convey that message to the objectively reasonable person. See, e.g., State v. Crawley, 187 N.J. 440, 444 (2006) (finding that officers saying "Police. Stop. I need to speak with you" was sufficient to constitute a stop); State v. Williams, 410 N.J. Super. 549, 554-555 (App. Div. 2009) (undisputed that officers subjected defendant to an investigatory stop when they ordered him to stop); Rodriguez, 172 N.J. at 128 (when defendant was isolated from traveling partner and asked questions in a police-dominated atmosphere he would not feel free to leave); Davis, 104 N.J. at 498 (officers blocking an individual's path conveyed the message that he was not free to go).

The tone of the interaction between the officers and Carter was hostile and intimidating. The four officers watched Carter for as long as ten minutes from their patrol car before exiting the vehicle to stop Carter. (1T:8-8 to 11). When Carter began to walk away from his initial position, all of the officers got out of their vehicle to pursue him. (1T:11 at 2-14). As the four officers approached Carter, standing alone on the sidewalk, they ordered him to stop. (1T:11-12 to 12-3; 1T:12-23 to 13-3; Carter, Slip Op.

at 3). A reasonable individual in this situation would no longer have felt free to walk away from the officers. In fact, as the officers approached, Carter exclaimed "I saw you guys and thought you wanted me to leave". (1T: 13 at 15-16). Carter was reasonably afraid at this point that any additional effort to leave would be viewed by the officers as attempted flight, which could have put him at risk of not only criminal charges, see Crawley, 187 N.J. at 460 (flight from an illegal investigatory stop constitutes obstruction), but also physical harm. See Eli Rosenberg and Keith McMillan, The Washington Post, "Police in East Pittsburgh fatally shoot 17-year-old Antwon Rose as he flees traffic stop" June 20, 2018, https://www.washingtonpost.com/news/post-nation/wp/2018/06/20/police-in-east-pittsburgh-fatally-shoot-17-year-old-boy-fleeing-traffic-stop/?utm_term=.f1276f169a91. A reasonable person in Carter's position was unable to terminate the encounter and go about his business and thus was undeniably seized within the meaning of the Fourth Amendment and Article I, Paragraph 7.[3]

It is not dispositive that the prosecutor asked Officer Johnson if he had "*informed* [Carter] to stop or no?" (1T:11-25,

[3] Amicus adds that as a Black man, Carter would be more than reasonable in his belief that he was not free to leave and that he risked arrest or physical harm if he had walked away. The argument that the Court should consider the perspective of a reasonable person of color in determining whether an encounter is a field inquiry or an investigative detention is set forth in greater detail in the ACLU-NJ's amicus brief in State v. Roundtree, Owens, Peace, and Peace, A-0178-16 (079961).

emphasis added) instead of asking whether the officer had *ordered* Carter to stop. Whether a seizure occurred depends on whether an objectively reasonable individual would feel free to walk away. There is no constitutional distinction between an officer "informing" a citizen to stop and an officer "ordering" a citizen to stop. If officers restrain a citizen's freedom of movement they have seized that individual. Four officers approached an isolated Carter and ordered him to stop. The totality of the circumstances here would convey to an objectively reasonable person that her freedom had been restrained and that she was not free to leave.

This is exactly the incentive system that New Jersey's constitutional jurisprudence seeks to create: "Our case law instructs members of the public to submit to a police officer's show of authority, not to look for an exit. Case law tells people to obey words and deeds of law enforcement that communicate demands for directed behavior and to raise constitutional objections thereafter." Rosario, 229 N.J. at 275. "The show of law enforcement attention focused on defendant that occurred here should result in a person's staying put and engaging with the officer who has exhibited such a pointed intention to interact with that person." Id. at 274. Put simply, a "person involved in a police encounter should [not] have an incentive to flee or resist, thus endangering himself, the police, and the innocent public." Crawley, 187 N.J. at 451.

A. The Appellate Division Focused On Irrelevant Factors In Determining That No Stop Had Occurred.

The subjective intent of the officer does not determine whether a seizure has occurred. See Maryland, 167 N.J. at 483 (finding that officer's testimony that suspect was 'free to leave' was not probative); See also Rodriguez, 172 N.J. at 126 (citing Maryland 167 N.J. at 483). The Appellate Division discussed at length and in fact added emphasis in its opinion to the officer's stated intention upon approaching the Defendant to "conduct a field interview." Carter, Slip Op. at 3. The panel went on to clarify that the officer did not have the intention "to search or even frisk" the Defendant. But the court's focus on these details is misplaced, as the officer's intention is irrelevant to determining whether the interaction constituted a seizure.

The Defendant's compliance with the officers' order also does not cure the illegality of the stop. In fact, this Court flatly rejected the federal standard of incorporating submission to an officer's display of authority into the determination of whether a seizure has taken place. See Tucker, 136 N.J. at 163-66. In California v. Hodari D., the United States Supreme Court held that a seizure requires a show of authority to which the suspect yields. Unless a suspect submits to an officer's authority, there is only "attempted seizure," which falls outside of the scope of protection of the Fourth Amendment. 499 U.S. 621, 626, 626 n.2. (1991). In

Tucker, this Court rejected that approach, instead opting to protect "the reasonable expectations of citizens." 136 N.J. at 165. The Appellate Division stressed that Carter stopped "without incident" in response to the officers command. Carter, Slip Op. at 3. However, compliance with officers' order to stop is not a relevant component of determining whether a seizure has taken place in the State of New Jersey. Carter's compliance does not change the fact that the stop itself was unlawful.

B. Officers Lacked Reasonable and Articulable Suspicion To Justify The Stop.

The officers lacked reasonable and articulable suspicion necessary to justify the investigatory stop of Carter. Police officers are justified in making investigatory stops when, under the totality of the circumstances, they possess particularized and articulable facts which, along with rational inferences from those facts, "give rise to a reasonable suspicion of criminal activity." Rodriguez, 172 N.J. at 126 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)). Officer Johnson admitted that when the officers approached Carter on the street, they did not have any reason to suspect him of anything. (1T:19-22 to 20-10). The fact that the officers were familiar with Carter from prior CDS violations is not sufficient to justify the stop. See State v. Love, 338 N.J. Super. 504, 508 (App. Div. 2001) (holding that knowledge of a suspect's prior criminal record may be considered but is

independently insufficient to justify a stop). Past criminal activity does not give officers a blank check to harass and stop an individual on the street.

CONCLUSION

For the reasons set forth above, the Court should grant certification. Without intervention from this Court, police officers will believe that they have *carte blanche* to "inform" citizens to stop without reasonable suspicion. Similarly, courts will require defendants to establish that a warrantless search was unlawful, rather than requiring the State to establish that the search was lawful.

Respectfully submitted,

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