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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3328-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM G. KREVOLT,

Defendant-Appellant.

Argued November 2, 2022 – Decided March 2, 2023

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Accusation No. 20-11-0626.

Kevin S. Finckenauer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Tamar Yael Lerer, Assistant Deputy Public Defender, of counsel and on the briefs).

Nancy A. Hulett, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex County Prosecutor, attorney; Nancy A. Hulett, of counsel and on the brief).

PER CURIAM

Defendant William G. Krevolt appeals from a March 15, 2021 order denying his motion to suppress evidence of controlled dangerous substances (CDS)—twenty-eight grams of crack cocaine and ten bundles of heroin—and \$1,103 in cash seized from his pants during a warrantless search following a motor vehicle stop.¹ Defendant was the front-seat passenger. He also challenges his eight-year sentence with a thirty-two-month period of parole ineligibility following his plea to third-degree possession of a CDS and second-degree possession with intent to distribute.

After carefully reviewing the record in light of the arguments of the parties and the applicable principles of law, we conclude defendant's motion to suppress should have been granted because the police unlawfully ordered defendant out of the car and wrongfully detained and searched him. We reverse the motion court's order denying defendant's motion to suppress, and we vacate defendant's conviction and sentence.

¹ We note that defendant was charged and convicted of CDS found on his person, not in the vehicle.

I.

We discern the following facts from the motion to suppress hearing. On May 5, 2020, at 8:40 p.m., detective Davis Salazar of the Perth Amboy Police Department Special Investigations Unit conducted a motor vehicle stop when he observed co-defendant Evan Petracca driving a Volvo the wrong way down a one-way street in the downtown area of Perth Amboy and headed toward "the heart of town." The detective was in a marked patrol car and in full uniform. On that date, this State was under a public health emergency due to the COVID-19 pandemic. Police officers were placed in the area for a "show of presence" due to the COVID-19 lockdown. All non-essential retail businesses were closed, including those in the area where Petracca and defendant were traveling, pursuant to the Governor's executive orders. Detective Salazar ran a computer check on the Volvo's license plate. The registration indicated the vehicle was from "out of town."

Detective Salazar testified that as he approached the Volvo, he looked for the presence of "indicators"—certain behaviors that are typically suspicious in nature—which he defined as "deception and possible underlying other crimes," based on his training and experience. One such indicator detective Salazar observed was that defendant "rose in his seat," which the detective construed as

an "indication of possibly concealing contraband and/or weapons in the vehicle or on their person." The detective also noted defendant appeared to look "nervous."

Detective Salazar asked both defendant and Petracca where they were coming from. Petracca said he was coming from a friend's house, but defendant said he was coming from his girlfriend's house. Detective Salazar believed that their responses were "different," which made him suspicious. The Volvo was "messy," which also raised the detective's suspicions.

Detective Salazar then asked the suspects if there was "anything in the vehicle [he] should know about, [such as] any drugs, guns, or contraband." Petracca said "no," and, according to detective Salazar, defendant looked at Petracca nervously before "hesitantly" also responding "no." The detective also observed defendant breathing heavily and staring at Petracca. Detective Salazar's body worn camera was not working at the time, and therefore, the conversation was not captured on video.

Detective Salazar then ordered Petracca out of the car and led him to the rear of the vehicle. The detective advised Petracca that he was going to conduct a safety pat-down of him. Although detective Salazar testified at the hearing that he only ordered Petracca out of the vehicle, body worn camera footage from

lieutenant Carmelo Jimenez revealed both Petracca and defendant were ordered out of the car. On lieutenant Jimenez's recorded footage, a voice is heard stating, "[o]kay guys, get out of the car."² Petracca said that detective Salazar could search him, at which point the detective asked Petracca for his consent to search the Volvo. Petracca responded, "what is the probable?" Detective Salazar answered, "we'll have a look. I'm asking to look inside." Petracca refused to consent to a vehicle search. Petracca told detective Salazar he did not want the police to "tear up" the vehicle, which was "full of garbage" and "dirty." According to detective Salazar, Petracca's refusal to consent to search the car was an "indicator" of criminal activity. Detective Salazar described the interior of the vehicle as a "cluttered mess" and having "worms."

Detective Salazar then clarified with Petracca, "[y]ou'll give me consent to search you, but you won't give me consent to search the car[?]" Petracca stated "[t]his is my ride. Why are you tearing my car apart? . . . There's nothing in the car, but there's no reason for you to search the car." Detective Salazar interpreted Petracca's refusal to consent to search the Volvo as an "indicator" of

² The three body worn camera recordings reviewed during the motion to suppress hearing were from lieutenant Jimenez, detective Jackie Terracino, and officer Ryan Moskwa. The defense introduced footage from officer Moskwa's body worn camera, which was a minute and forty-seven seconds long. It is unknown how much other footage, if any, was on Moskwa's camera.

criminal activity. At the hearing, detective Salazar testified, "I found it kind of weird to—you know, if [Petracca] had nothing to hide, why wouldn't—he grant me consent to search the vehicle?"

Upon defendant exiting the vehicle, detective Terracino conducted a pat-down search of him, which was negative for weapons and CDS at that time. Detective Salazar then instructed Petracca and defendant to sit on the curb with their legs crossed and outstretched. Detective Salazar observed defendant sweating, shaking, acting nervous, and twitching. When defendant walked to the curb, the detective noticed he "had in his crotch . . . an oddly shaped, unnatural bulge." The detective explained individuals "commonly" hide drugs in their crotch area.

In addition, the detective testified that when defendant was sitting on the curb, defendant had his "legs crossed but instead of in, he had them out[,] drawing more attention to his appearance. While seated on the curb, Petracca kept apologizing to defendant. Detective Salazar overheard defendant say to Petracca, "[j]ust let them search the vehicle." Additional officers responded to the scene, who were wearing body cameras.

At 9:06 p.m., a K-9 unit was requested by detective Salazar "based on the totality of his observations up to that point." Detective Salazar testified that he

was "building probable cause" by calling for the K-9. He added, "I didn't believe I had enough—I wanted to build my probable cause a little bit further." While awaiting arrival of the K-9 unit, the officers had Petracca and defendant stand against a wall with their legs crossed and their arms crossed around their chest. Thus, up to the point before calling in the K-9 unit and while waiting for the K-9 unit to arrive, detective Salazar admitted he did not have probable cause to detain defendant, but he spoke to defendant "just to get a further reading off of him. Again, still building that [probable cause]"

The K-9 unit arrived at 9:40 p.m. and sniffed the outside of the Volvo. After the K-9 unit arrived on the scene, but before the sniff of the Volvo began, Petracca admitted there was a crack pipe that solely belonged to him in the center console of the vehicle. The K-9 sniff resulted in a positive indication for CDS. Detective Terracino removed her body worn camera and gave it to detective Salazar so he could record the search of the Volvo.

After conducting a complete search of the Volvo, two glass crack pipes, two hypodermic syringes, and copper mesh used to smoke crack cocaine, were seized in the center area of the car. One of the crack pipes was in plain view. Petracca was then arrested, placed in handcuffs, and searched incident to his arrest.

Detective Salazar explained he could not release defendant because "he was still pending possible arrest for the same items" that Petracca took ownership of until Petracca gave a formal statement stating the items exclusively belonged to him. In addition, detective Salazar testified he "was still investigating the bulge" in defendant's pants. According to detective Salazar, defendant "was still subject to further investigation, which would include bringing him back to headquarters. Because [Petracca] took ownership [of the contraband found inside the vehicle], I [detective Salazar] would have to put that . . . on the record, in the [interrogation room], to prevent later [Petracca] recanting."

When asked why he felt it was necessary to search defendant, detective Salazar stated, "because I had already ruled out the vehicle, [Petracca], and [defendant] was the last—before I even transport him inside to headquarters, so I have to sanitize him before I place him inside my vehicle." The detective explained he believed defendant possibly had CDS on his person and any potential evidence had to be preserved before defendant was transported to headquarters as standard protocol. Detective Salazar removed a cellular phone and opened a pack of cigarettes from defendant's pockets. After securing defendant, detective Salazar then proceeded to search around his crotch area

because of the "unnatural bulge" he had earlier observed. The detective felt a hard item, which he "believed to be crack cocaine," and he "recovered it." Detective Salazar testified he recovered approximately twenty-eight grams of crack cocaine and ten bundles of heroin, which contained ten glassine envelopes.

The vehicular search also uncovered two crack pipes, two hypodermic needles, and copper mesh. Detective Salazar stated he had "eliminated" Petracca "as far as the . . . presence of CDS and [defendant] was next." Based on the contraband found in the vehicle and on his person, defendant was arrested and searched incident to his arrest.

On December 17, 2020, defendant was charged with: third-degree possession with intent to distribute less than one-half ounce of heroin and/or fentanyl, N.J.S.A. 2C:35-5(b)(3) (count one); second-degree possession with intent to distribute more than one-half ounce of cocaine, N.J.S.A. 2C:35-5(b)(2) (count two); second-degree possession with intent to distribute heroin and/or fentanyl and/or cocaine within 500 feet of Perth Amboy Public Library, N.J.S.A. 2C:35-7.1(a) (count three); third-degree possession with intent to distribute heroin and/or fentanyl and/or cocaine within 1,000 feet of school property, N.J.S.A. 2C:35-7(a) (count four); and third-degree financial facilitation of criminal activity, N.J.S.A. 2C:21-25(a) (count five).

At the suppression hearing, defendant conceded detective Salazar had probable cause to stop Petracca's vehicle because he was traveling the wrong way on a one-way street. However, defendant asserted detective Salazar failed to present specific and articulable safety concerns to justify ordering him, as the front-seat passenger, out of the vehicle. Defendant further contended the answers given as to the suspects' whereabouts prior to the stop were "not contradictory," and they only appeared nervous because the police had stopped them. Defendant argued that since Petracca claimed ownership of the contraband found in his vehicle, the investigatory stop as to defendant was unconstitutional. In addition, defendant also asserted the police detained him without probable cause for a lengthy period of time—thirty-four minutes—to obtain the K-9 unit to conduct a sniff search of Petracca's Volvo.

On March 15, 2021, the motion court denied defendant's motion in an order and written opinion. The court found the police had reasonable suspicion that a motor vehicle infraction had occurred. The court also determined the police had probable cause to arrest defendant when they searched him "because they had found drug paraphernalia in the vehicle prior to the search," and the search was lawful pursuant to the automobile exception to the search warrant

requirement. The court held the State met its burden of demonstrating that the warrantless search of defendant was conducted pursuant to a lawful arrest.

On April 5, 2021, a plea hearing was conducted. Defendant pled guilty to third-degree possession with intent to distribute less than one-half ounce of CDS (count one) and second-degree possession with intent to distribute more than one-half ounce of CDS (count two). On June 2, 2021, defendant was sentenced in accordance with the plea agreement, and the remaining counts of the indictment were dismissed. An amended judgment of conviction to correct jail credits was entered on August 3, 2021.

On appeal, defendant presents the following arguments for our consideration:

POINT I

OFFICERS TOOK A NUMBER OF ACTIONS WITHOUT APPROPRIATE LEGAL JUSTIFICATION. WHETHER IT BE BECAUSE OFFICERS ILLEGALLY ORDERED DEFENDANT OUT OF THE CAR, ILLEGALLY DETAINED HIM WHILE WAITING FOR A DRUG DOG, THE CONVERSION OF THAT DETENTION INTO AN UNLAWFUL DE FACTO ARREST, OR THE ILLEGAL SEARCH OF HIS PERSON, THE EVIDENCE FOUND MUST BE SUPPRESSED.

POINT II

DEFENDANT'S SENTENCE IS EXCESSIVE.

II.

In evaluating a trial court's ruling on a suppression motion, we afford considerable deference to the judge's role as a fact-finder. State v. Locurto, 157 N.J. 463, 470-71 (1999). Our review of the judge's factual findings is "exceedingly narrow." Id. at 470; see also State v. Ahmad, 246 N.J. 592, 609 (2021). We must defer to those factual findings "so long as those findings are supported by sufficient evidence in the record." State v. Hubbard, 222 N.J. 249, 262 (2015) (internal citations omitted); see also State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). For mixed questions of law and fact, we give "deference . . . to the supported factual findings of the trial court, but review de novo the lower court's application of any legal rules to such factual findings." State v. Pierre, 223 N.J. 560, 577 (2015) (internal citations omitted).

As part of that deference, we particularly must respect the trial judge's assessments of credibility, given the judge's ability to have made "observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." Locurto, 157 N.J. at 474 (internal citations omitted). However, we owe no deference to the trial judge's conclusions of law. State v. Hinton, 216 N.J. 211, 228 (2013). Nor are we "obliged to defer to clearly

mistaken findings . . . that are not supported by sufficient credible evidence in the record." State v. Gibson, 218 N.J. 277, 294 (2014) (internal citations omitted).

"Warrantless searches are permissible only if justified by one of the few specifically established and well-delineated exceptions to the warrant requirement." State v. Robinson, 228 N.J. 529, 544 (2017) (internal quotation marks omitted) (quoting State v. Witt, 223 N.J. 409, 422 (2015)). The State bears the burden of proving the validity of a warrantless search by a preponderance of the evidence. State v. Edmonds, 211 N.J. 117, 128 (2012) (citing State v. Wilson, 178 N.J. 7, 12-13 (2003)).

The search incident to arrest exception "was limned for two specific purposes—the protection of the police and the preservation of evidence." State v. Eckel, 185 N.J. 523, 524 (2006). However, when law enforcement has probable cause to arrest, it is not unlawful to search the individual prior to placing them under arrest. State v. O'Neal, 190 N.J. 601, 614-15 (2007). In evaluating whether there is probable cause to arrest, courts consider the "totality of the circumstances . . . from the standpoint of an objectively reasonable police officer." State v. Basil, 202 N.J. 570, 585 (2010) (internal citations omitted).

Probable cause is a "'common-sense, practical standard' dealing with 'probabilities' and the 'practical considerations of everyday life,[']" and is generally understood to mean "'less than legal evidence necessary to convict though more than mere naked suspicion.'" State v. Evers, 175 N.J. 355, 381 (2003) (first quoting State v. Sullivan, 169 N.J. 204, 211 (2001); and then quoting State v. Mark, 46 N.J. 262, 271 (1966)).

III.

On appeal, defendant contends the court erred in denying his motion to suppress physical evidence because the officers exceeded their legal authority at every stage after they pulled over Petracca's vehicle. Defendant avers the officers improperly ordered him out of the car without any specific and articulable facts warranting heightened caution, and he was frisked without reasonable suspicion that he possessed a weapon. He also claims the officers unlawfully prolonged the investigative detention so that it became a de facto arrest not supported by probable cause. We agree.

As a preliminary matter, detective Salazar was patrolling downtown Perth Amboy when he saw a vehicle headed toward "the heart of the town," traveling in the opposite direction on a one-way street. As conceded by defendant, the stop was lawful, considering that detective Salazar observed a motor vehicle

violation and what he considered to be suspicious behavior on the part of Petracca. But our review of the record does not support a finding that defendant was lawfully ordered out of the vehicle. After the stop, defendant did not engage in suspicious behavior nor pose a threat to the officers. Furthermore, defendant did not engage in "evasive maneuvers" to constitute a permissible delay and detention. See United States v. Sharpe, 470 U.S. 675, 688 (1985).

A. Defendant Ordered Out Of The Vehicle

A passenger of a vehicle is entitled to unrestricted liberty if the driver of a vehicle is stopped for a violation. "[O]rdering a passenger out of the car represents an intrusion on a passenger's liberty and is therefore proper only when the circumstances warrant heightened caution." State v. Bacome, 228 N.J. 94, 105 (2017). "An officer must be able to point to specific and articulable facts that would warrant heightened caution to justify ordering the occupants to step out of a vehicle detained for a traffic violation." State v. Smith, 134 N.J. 599, 618 (1994). The totality of the circumstances must amount to a heightened awareness of danger, warranting an objectively reasonable officer to secure the scene more effectively by ordering the passenger to exit the vehicle. Ibid.

Here, the heightened caution standard was not met. Detective Salazar observed defendant "r[o]se in his seat," which the officer took as "an indication

of possibly concealed contraband or weapons." Detective Salazar also noted that defendant "appeared nervous." Although "[f]urtive movement may satisfy the heightened caution standard," since the right to order a passenger out of a car is not automatic, but rather fact specific, an officer is required to provide a reasonable and articulable basis for safety-based concerns. Bacome, 228 N.J. at 107.

Since Petracca and defendant were pulled over in the vicinity where non-essential businesses were shut down and detective Salazar observed multiple "indicators" from defendant, the State contends the totality of the circumstances justified defendant being ordered out of the vehicle. However, the record is not clear as to why defendant was ordered out of the vehicle along with Petracca. At the suppression hearing, none of the officers' testimony indicates that the COVID-19 lockdown added to their suspicions of defendant's behavior. Detective Salazar also did not voice any concrete concerns for his safety, or a basis for heightened caution, as defendant complied with all of his instructions. In Bacome, a passenger in a stopped vehicle leaned forward as if to hide something under his seat, and the Court reasoned, "[i]t would be impractical to require officers to determine whether the movement was to hide a weapon or a box of tissues before taking any precautionary measures." Ibid.; see also Smith,

134 N.J. at 619 (holding that "the apparent passing of objects between the front and back seats" during the early morning hour triggered the heightened caution standard). Unlike the officer in Bacome, detective Salazar's suspicions toward defendant indicate a hunch, rather than specific and articulable concerns. There is nothing in the record demonstrating how defendant's actions created a heightened awareness of danger that warranted his removal from the vehicle. "[T]he officer must be able to articulate specific reasons why the person's gestures or other circumstances caused the officer to expect more danger from this traffic stop than from other routine traffic stops." Smith, 134 N.J. at 619. Detective Salazar failed to do so here.

B. Defendant's Detention

After defendant was improperly ordered out of the vehicle, he was then detained without reasonable suspicion of committing an offense. During a motor vehicle stop due to a traffic violation, "[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are or reasonably should have been completed." Rodriguez v. United States, 575 U.S. 348, 354 (2015). To prolong the stop "beyond the time required to complete the stop's mission," an officer must possess "reasonable suspicion independent from the justification for a traffic stop." State v. Dunbar, 229 N.J. 521, 540 (2017). Such is true of

expanding an inquiry further into matters unrelated to the stop, seeking consent to search, and K-9 sniffs. Id. at 539-40.

Reasonable suspicion that justifies a brief, investigatory stop exists if the person being stopped is engaged, or is about to engage, in criminal activity. State v. Gamble, 218 N.J. 412, 428 (2014). A stop is only permissible if the officer can "point to a specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion, and an officer's hunch is insufficient to justify a stop." State v. Pineiro, 181 N.J. 13, 21 (2004).

We find no such support in the record here justifying the detention. Neither detective Salazar nor the other officers present on the scene offered evidence establishing reasonable suspicion defendant was committing or had committed an offense. The detective mentioned he believed there was something "suspicious about defendant looking nervous," and that defendant and Petracca provided conflicting information as to where they were coming from. Appearance of nervousness and conflicting stories, which may possibly be true, do not amount to reasonable suspicion.

"Nervousness and excited movements are common responses to unanticipated encounters with police officers on the road." State v. Rosario, 229

N.J. 263, 277 (2017). Such "cannot support a detention in the first place[,]" let alone extending that detention. Ibid.; see State v. Nyema, 249 N.J. 509, 533 (2022) (finding that "nervous behavior or lack of eye contact with police cannot drive the reasonable suspicion analysis given the wide range of behavior exhibited by many different people for varying reasons while in the presence of police"); State v. Lund, 119 N.J. 35, 47 (1990) (noting that "[o]rdinarily, mere furtive gestures of an occupant of an automobile do not give rise to an articulable suspicion suggesting criminal activity").

In State v. Carty, in addition to nervousness, the Court reasoned an officer's concern about conflicting stories does not support reasonable suspicion if that concern could possibly be incorrect. 170 N.J. 632, 648 (2002). Likewise, when detective Salazar asked defendant and Petracca where they were coming from, he made no further inquiry to confirm his belief that their stories were conflicting. Instead, the detective proceeded to ask, "if there was anything in the vehicle [he] should know about, any drugs, guns, or contraband." Hence, defendant's behavior—rising from the passenger seat, added with the appearance of nervousness and the apparent inconsistent stories at the outset of the vehicle stop—were insufficient to justify his detention.

Furthermore, the "unnatural" bulge supposedly observed by detective

Salazar after defendant stepped out of the vehicle and was ordered to sit on the curb did not create reasonable suspicion for the detention. When defendant was initially frisked³ by detective Terracino, the "unnatural bulge" in defendant's crotch area was not immediately apparent as contraband. The record indicates the cursory pat-down was negative for weapons and CDS. If detective Terracino had noticed the "unnatural bulge," she would have seized the item under the "plain feel" or "plain touch" doctrine, which is an exception to the warrant requirement in this State. See State v. Evans, 235 N.J. 125, 135 (2018).

"An investigative detention that is premised on less than reasonable and articulable suspicion is an 'unlawful seizure,' and evidence discovered during the course of an unconstitutional detention is subject to the exclusionary rule." State v. Elders, 192 N.J. 224, 247 (2007) (citing State v. Rodriguez, 172 N.J. 117, 132-33 (2002)). Because the officers would not have later seen the "unnatural bulge" protruding from defendant's crotch area if defendant had not been detained on the curb, the drugs seized on his person must be suppressed.

³ We agree with defendant that he was illegally frisked. We reiterate that prior to the frisk, detective Salazar observed defendant "rise in his seat" and "appeared nervous." Under the totality of the circumstances, detective Terracino did not have "an objectively reasonable suspicion" defendant was armed and dangerous. State v. Privott, 203 N.J. 16, 30 (2010).

In light of our decision, we need not address defendant's remaining arguments. However, we add the following remarks.

C. Defendant's De Facto Arrest

Although there is no rigid time limitation on investigatory stops, "an investigatory detention may become too long if it involves a 'delay unnecessary to the legitimate investigation of the law enforcement officers.'" State v. Chisum, 236 N.J. 530, 546 (2019) (quoting Sharpe, 470 U.S. at 687). Our Supreme Court has embraced a two-prong inquiry for determining the reasonableness of a detention. "First, the detention must have been reasonable at its inception. Second, the scope of the continued detention must be reasonably related to the justification for the initial interference. Thus, the detention must be reasonable both at its inception and throughout its entire execution." Id. at 546-47 (quoting State v. Coles, 218 N.J. 322, 344 (2014)). "There is [no] litmus-paper test for . . . determining when a seizure exceeds the bounds of an investigative stop." Id. at 547 (second alteration and omission in original) (quoting State v. Dickey, 152 N.J. 468, 476 (1998)).

Therefore, '[i]n assessing whether a detention is too long in duration to be justified as an investigative stop, [courts] . . . examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'

[Ibid. (quoting Dickey, 152 N.J. at 477).]

As our Supreme Court explained in Dickey:

the reasonableness of the detention is not limited to investigating the circumstances of the traffic stop. If, during the course of the stop or as a result of the reasonable inquiries initiated by the officer, the circumstances "give rise to suspicions unrelated to the traffic offense, an officer may broaden [the] inquiry and satisfy those suspicions."

[152 N.J. at 479-80 (alteration in original) (quoting United States v. Johnson, 58 F.3d 356, 357-58 (8th Cir. 1995)).]

"An investigative stop becomes a de facto arrest when the officers' conduct is more intrusive than necessary for an investigative stop." Id. at 478.

"There is no simple test for determining the point at which a prolonged investigative stop turns into a de facto arrest, but important factors include unnecessary delays, . . . isolating the suspect, and the degree of fear and humiliation." State v. Shaw, 237 N.J. 588, 612 (2019). Notably, when a de facto arrest arises, "the particularized suspicion that originally supported the investigatory detention is no longer sufficient and the arrest must be supported by probable cause." Coles, 218 N.J. at 346.

Here, we deem it significant that defendant was detained for the K-9 sniff after completion of the stop. Detective Salazar called the K-9 unit merely based

on his hunch, without a tip or other suspicions correlating with drug activity or paraphernalia.⁴ The detective stated he could not release defendant until Petracca claimed he owned the Volvo "on the record." The K-9 sniff unconstitutionally prolonged the encounter as to defendant because tasks related to the motor vehicle stop had been completed, that is determining whether to issue a traffic ticket to Petracca. Subjecting defendant to a K-9 sniff of Petracca's vehicle after completion of legitimate tasks was aimed at "building probable cause," as detective Salazar acknowledged. This was a violation of defendant's constitutional rights. See Rodriguez, 575 U.S. at 357. Since the officers did not possess "a well[-]grounded suspicion" that defendant committed a crime during the extended detention waiting for the K-9 unit, Sullivan, 169 N.J. at 211, the subsequent search of defendant's person and his arrest are invalid. Hence, the drugs and contraband seized from defendant's person should have been suppressed. See State v. O'Neill, 193 N.J. 148, 171 n.3 (2007).

⁴ Detective Salazar testified Petracca's refusal to provide consent to search his vehicle was an indicator of criminal activity; however, Petracca asserted his right under Article I, Paragraph 7 of our State's Constitution. See State v. Sui Kam Tung, 460 N.J. Super. 75, 97 (App. Div. 2019) (attaching no "probative value" as to the defendant's refusal to consent to search, and noting various state and federal courts hold that "exercising a constitutional right is not admissible as evidence of guilt").

IV.

"The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution protect individuals from unreasonable searches and seizures." State v. Gray, 474 N.J. Super. 216, 224 (App. Div. 2022). In sum, officers frisked both defendant and Petracca based only upon a belief there was "possible" contraband and/or weapons in the vehicle or on their persons. The officers' suspicion was not particularized as to defendant. Detective Salazar then detained defendant without reasonable suspicion that he committed an offense. We conclude, detective Salazar and the other officers' actions constituted an impermissible search of defendant in violation of his Fourth Amendment rights, and the evidence which flowed from it, the drugs and contraband, should have been suppressed as to defendant. The court erred in denying defendant's motion to suppress.

The March 15, 2021 order denying defendant's motion to suppress is therefore reversed, and defendant's conviction and sentence are vacated. The matter is remanded to the trial court for entry of an order granting defendant's motion to suppress and for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION