

DENNY CHIN, *Circuit Judge*, dissenting, joined by GUIDO CALABRESI and ROSEMARY

S. POOLER, *Circuit Judges*:

"[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). What happened here to defendant-appellant Calvin Weaver was not reasonable.

The police officers saw Weaver, a Black man wearing a hoodie, walking on the street in the Near Westside of Syracuse around 5 p.m. He stared at their car -- an unmarked vehicle (with tinted windows) moving slowly -- for a few seconds, and he hitched up with one hand his sagging pants. The officers were suspicious and continued to watch as Weaver approached a grey sedan and entered it on the passenger side. The officers followed in their car.<sup>1</sup> When the grey sedan stopped at a corner where it could only make a right turn and only then activated its turn signal, the officers pulled the grey sedan over, for failing

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<sup>1</sup> The majority writes that the officers "encountered the sedan," Maj. Op. at 6, and "after seeing Weaver get into the gray sedan on Merriman Street, they did not stop it or follow it," *id.* at 46 n.66. The majority thus suggests that it was coincidence that "[t]he officers re-encountered the sedan on Davis Street." *Id.* Not so. Quonce testified that he was "kind of looking for the car" after he drove eastbound and saw the grey sedan begin to drive west. App'x at 134. The officers then made the two immediate rights so that they would also be driving west, at which time they observed the grey sedan, "caught up to the vehicle," and proceeded to follow it. App'x at 98. It is apparent the officers were interested in the sedan *because* Weaver entered it.

to signal at least 100 feet before the turn. The purported traffic violation was an obvious pretext for the officers to stop the vehicle.

After the officers approached the sedan, its occupants complied fully with the officers' instructions. The officers saw Weaver squirming in his seat and making a downward motion with his hands around his pelvic area. The officers ordered Weaver out of the car. Although they did not see any bulges or outlines of a weapon or see him reach underneath his clothing, they ordered him to assume a spread-eagle position with his hands on the trunk of the car, in the middle of a four-way street in full public view. Weaver complied.

Police officers may frisk an occupant of a vehicle only when they "harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). Did the police officers here have reasonable suspicion that Weaver was "armed and dangerous?" I think not. The brief stare at a slowly moving and unmarked vehicle with tinted windows and the "upward tug" of sagging pants tell us nothing. The failure of the driver to signal at least 100 feet before the turn likewise is of no moment; although the delay in signaling provided a basis for a pretextual stop, the delay did not suggest in any way that Weaver -- a passenger -- was "armed and

dangerous." The squirming in the seat and pushing down motion arguably were suggestive of an intent to hide something, but given the absence of bulges or outlines of a weapon or anything else specific and concrete, these actions likewise did not suggest the presence of a weapon or the threat of danger. *See United States v. Hussain*, 835 F.3d 307, 316 (2d Cir. 2016) (during a car stop, even if an officer suspects "that [the driver] was not licensed to drive, that he was under the influence of alcohol or narcotics, *that he was hiding contraband*, and so on," the officer cannot search the driver absent suspicion that he was "*dangerous*" (first emphasis added)). "Zero plus zero is zero." *MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 38 (2d Cir.), *cert. denied sub nom. In re Klayman*, 525 U.S. 874 (1998).<sup>2</sup>

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<sup>2</sup> The Government relies on three other facts that it claims supports the existence of reasonable suspicion: (1) the stop occurred in a "high-crime area," (2) another passenger opened his door as soon as the car was pulled over, and (3) Weaver "claimed that he did not have anything" before the officers questioned him. Appellee's Br. at 10. These facts add little to the analysis. Even assuming this was a high-crime area, it was only approximately 5 p.m., and it was light enough outside that the officers did not need to use their headlights or flashlights. Further, it is simply not reasonable to infer that an individual is armed and dangerous because he appears fidgety when approached by police, "even in a high-crime neighborhood." *United States v. McKoy*, 428 F.3d 38, 41 (1st Cir. 2005); *see id* at 40 (frisk was unreasonable where officers relied on "(1) the dangerousness of the neighborhood and (2) [the driver's] nervous appearance and movements inside the car"). And it was another passenger, not Weaver, who opened his door, and that passenger immediately closed the door when instructed by the police officers to do so. Finally, Weaver's response that he did not have anything on

It is apparent that from the moment they first saw him, the police officers were suspicious of Weaver, a Black man wearing a hoodie, even though he did not appear to be doing anything remotely illegal. They had a hunch that he was carrying a weapon or contraband or was otherwise up to no good, and while that hunch may have turned out to be correct, it was a hunch nevertheless. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989) ("The officer, of course, must be able to articulate something more than an inchoate and unparticularized suspicion or 'hunch.'" (internal quotation marks omitted)). And far more often, these hunches turn out to be baseless. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 559 (S.D.N.Y. 2013) (of 4.4 million stops made by New York Police Department officers over an approximately eight-year span, guns were seized only 0.1% of the time, while "other contraband" was seized only 1.8% of the time). The officers here identified nothing particularized to warrant the intrusion on Weaver's liberty that followed, including ordering him to assume a demeaning spread-eagle position in the middle of a four-way street in full public view. *See City of Ontario v. Quon*, 560 U.S. 746, 755-56 (2010) ("The [Fourth]

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him after being directed to show his hands surely does not suggest that he *had* a weapon -- that he was armed and dangerous.

Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government . . . ." (quoting *Skinner v. Ry. Lab. Execs. Ass'n*, 489 U.S. 602, 613-14 (1989)); *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

Judges Calabresi and Pooler have addressed a number of troubling concerns in their dissents, including the legacy of *Whren v. United States*, 517 U.S. 806 (1996), and pretextual stops; the notion that looking at an unmarked car allows a reasonable inference that a person is armed and dangerous; the use of the "high-crime area" justification where reasonable suspicion is lacking; and the notion that an order to assume a spread-eagle position does not have certain Fourth Amendment implications. I share these concerns, and I join fully in their dissents. But even taking the law as it exists, without adopting any "novel" theories of law, in my view the police officers here did not have reasonable suspicion that Weaver was armed and dangerous, and the police officers acted unreasonably in subjecting him to a spread-eagled search.

The majority makes the point that neither it nor the district court "even mention[s] Weaver's race." Maj. Op. at 62. It concludes that there are "simply no grounds for believing that [Weaver's race or racial bias] would have any bearing on the outcome of this case." *Id.* at 64. That race was not mentioned by the majority or the district court in their Fourth Amendment analyses does not mean that race did not impact the police officers' actions.

Was race a factor? Would the officers have considered Weaver's staring at their car and hitching up his pants suspicious if he had been White? Would the officers have bothered to make a pretextual stop in the circumstances here -- stopping a car for failing to signal at least 100 feet before a corner where only a right turn could be made and the car did indeed signal once it reached the corner -- if the occupants of the vehicle had been White? Would the officers have ordered Weaver to exit the vehicle and assume a spread-eagle position with his hands against the trunk if Weaver had been White?

Of course, we do not know for sure whether racial bias, implicit or otherwise, had any bearing on the outcome of the case.<sup>3</sup> We do know, however,

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<sup>3</sup> See Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Lvinson, & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. Rev. 1124, 1135 (2012) ("If we implicitly associate certain groups, such as African Americans, with certain

that the officers repeatedly noted Weaver's race and appearance in their contemporaneous reports as well as in their testimony. App'x at 33-34, 37, 59, 65, 95, 116. We also know as a general matter that Blacks are stopped by police officers far more often than Whites<sup>4</sup> and that Blacks are arrested and incarcerated at far higher rates than Whites.<sup>5</sup> And we also know that the officers here grasped

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attributes, such as criminality, then it should not be surprising that police may behave in a manner consistent with those implicit stereotypes. In other words, biases could shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk an individual, and concludes the encounter with an arrest versus a warning. These biases could contribute to the substantial racial disparities that have been widely documented in policing." (footnote omitted)).

<sup>4</sup> See NACDL Amicus Br. at 6 n.3 ("black Chicagoans were subjected to 72% of all stops (even though they constituted just 32% of the city's population")); *id.* at 9 (over a one-year period in Los Angeles, "Blacks were stopped almost 260% more often than Whites, and . . . stopped Blacks were 127% more likely to be frisked than stopped Whites"); *id.* at 9-10 ("in Philadelphia in 2019 . . . Blacks and Latinos still accounted for 88% of all frisks, with 1 in 7.2 stops of Black pedestrians resulting in a frisk. In Washington D.C. in 2019, Black people made up over 90% of those who experienced a search or pat down of their person or property, and were more than six times more likely to be frisked than White people. And in New York between 2014 and 2017, 84% of all frisks occurred during stops of Black and Latino people whereas only 9% occurred during stops of White people." (footnotes omitted)).

<sup>5</sup> See *Mandala v. NTT Data, Inc.*, 988 F.3d 664, 675 (2d Cir. 2021) (Chin, J., dissenting) ("[A]s of 2010, 40% of prisoners in the United States were African American, while African Americans represented only 13% of the overall U.S. population . . . . [A]s of 2010, Black men were incarcerated at almost seven times the rate of White men: Black men were imprisoned at the rate of 3,074 per 100,000, while White men were imprisoned at the rate of 459 per 100,000. And much of this disparity cannot be attributed to the conduct of the individuals subjected to incarceration. For example, studies show that White and Black Americans are equally likely to use drugs and that White Americans are more likely to deal them; yet, Black Americans are arrested [and

at straws, tugging at the thinnest of rationalizations -- including Weaver's staring at their car, his hitching up of his pants, and the sedan's failure to signal until it reached the corner -- to justify their actions. *See Commonwealth v. Long*, 152 N.E.3d 725, 735 (Mass. 2020) ("This court has identified the discriminatory enforcement of traffic laws as particularly toxic. Years of data bear out what many have long known from experience: police stop drivers of color disproportionately more often than Caucasian drivers for insignificant violations (or provide no reason at all)." (internal quotation marks omitted)).

I respectfully dissent.

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incarcerated] for drug crimes at far higher rates." (footnotes omitted)); *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010) ("Blacks and Latinos are sentenced to incarceration at substantially higher rates than Whites, and Whites are sentenced to probation at substantially higher rates than Blacks and Latinos.").