



Officer Zappia approaches the driver's side of the vehicle which has three occupants inside, Dominique House (driver), Charles Garcia, (front seat passenger) and [REDACTED] (rear passenger) (tr. at 10-11). Officer Zappia observes several bottles of liquor in the car and cups containing alcohol (tr. at 11). Officer Robinson runs the names of the occupants and reports that House was on probation and [REDACTED] was on parole (tr. at 16).

Officer Zappia then asked House, the driver, to exit the vehicle and conducts a safety pat down of him (tr. at 37). Zappia testified that the driver had not done anything to make him fearful of his safety but frisking for weapons is a BPD policy when officers remove occupants from vehicles and the occupant is to be placed in a patrol vehicle (tr. at 37).

As Officer Zappia walks the driver back to the patrol vehicle and has a conversation with the driver (tr. at 16). After this conversation with the driver, Officer Zappia tells his partner that one of the two men remaining in the vehicle is going to have something on him (tr. at 39).

Officer Robinson asks [REDACTED] to exit the vehicle. [REDACTED] steps out and Officer Robinson begins a pat-down of him (tr. at 40-41). [REDACTED] not done anything that made Officer Zappia fearful of his safety prior to the pat-down. During the pat down, [REDACTED] pushes off the car and attempts to run (tr. at 41). Officer Robinson grabbed [REDACTED]'s shirt and both officers took him to the ground. Bryant is cuffed and a gun is recovered from his front right pocket (tr. at 17 and 41).

### **LEGAL ANALYSIS**

#### **Officers Zappia and Robinson Did Not Have Reasonable Suspicion the Defendant was Armed or Posed a Risk to Their Safety Prior to Pat Frisk**

The People bear the initial burden to establish the legality of police action (see *People v. Baldwin*, 25 N.Y.2d 66 [1969]; *People v. Malinsky*, 15 N.Y.2d 86 [1965] ). The burden then shifts to the defendant to establish that the police acted unlawfully in violation of the defendant's constitutional rights (*People v. Berrios*, 28 N.Y.2d 361 [1971] ).

An officer conducting a traffic stop for a suspected violation of the Vehicle and Traffic Officers may lawfully order occupants out of the vehicle and pat-frisk the occupants for weapons where the officer reasonably suspects an individual might be armed or pose a threat to the officer's safety (see *People v. Batista*, 88 N.Y.2d 650, 654 [1996] citing *People v. Rivera*, 14 N.Y.2d 441, 446 [1964] ; *People v. Henderson*, 26 A.D.3d 444, [2d Dept. 2006]).

The propriety of a frisk is not automatic. A frisk is permissible only if the police possess a particularized reasonable suspicion that the suspect "is armed and may be dangerous" (*People v Russ*, 61 NY2d 693, 695). The officer must have knowledge of some fact or circumstance that supports a reasonable suspicion that the suspect is armed or poses a threat to safety (*see People v. Carney*, 457 N.Y.S.2d 776, [1982]) Frisks are not authorized solely for violations of the VTL or Open Container Ordinances. *See People v. St. Clair*, 80 A.D.2d 691[1981]), *People v. Muhammad*, 502 N.Y.S.2d 859, [1986]).

The People did not meet their burden of establishing the legality of the police conduct in this case. No justification appears in the record for Officer Robinson's invasion of Bryant's personal security by searching him for weapons (*see Terry v. Ohio*, 392 U.S. 1 [1968]).

Officer Zappia demonstrated clear issues with his credibility throughout the hearing. On direct exam, Officer Zappia testified his attention was drawn to the [REDACTED] because his partner "continuously told him or asked him why he was sitting the way he was and kept telling him to sit back" [emphasis added] (tr. at 15). Officer Zappia described [REDACTED] position as "leaned over to his right side [...] with his elbow more on his knee, leaning towards the window" (tr. at 15).

People's 5 in Evidence, the body camera of Officer Robinson, shows [REDACTED] sitting in the rear seat of the vehicle with his back against the seat. After Officer Robinson makes a request for his ID, [REDACTED] reaches onto the floor to retrieve his wallet. [REDACTED] then hands his ID to Officer Robinson and is hinged forward at the waist after reaching onto the floor. Officer Robinson asks [REDACTED] to lean back and [REDACTED] immediately complies and apologizes. [REDACTED] stays seated with his back against the seat until later removed from the vehicle by Robinson.<sup>1</sup>

On cross-examination, Officer Zappia was confronted with this body camera footage. Officer Zappia then acknowledged that Officer Robinson did not make continuous requests for [REDACTED] to sit back as he had testified on direct. [REDACTED] was asked once and complied immediately and also apologized to Officer Robinson (tr. at 36). The body camera video also does not appear to depict [REDACTED] sitting in the manner described by Zappia. [REDACTED] only appears to be hinged forward slightly at the waist after retrieving his wallet from the floor.

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<sup>1</sup> People's 5 in Evidence, Robinson's Body Camera  
File: AXON\_Body\_2\_Video\_2021-09-06\_1818-2.mp4  
Time stamp: 22:19:29 through 22:19:49 (at 45 seconds on the bottom slider through 1:09)

██████████' actions, as captured on the video, objectively do not appear to be suspicious in any way. This was the second time during the hearing where Officer Zappia was confronted with video evidence that contradicted his direct testimony and demonstrated his fabrication of the events on September 6, 2021.<sup>2</sup>

The testimony of Officer Zappia was incredible as a matter of law, as his testimony regarding ██████████ "suspicious" actions were manifestly untrue. The Court must not credit testimony which has all appearances of having been patently tailored to nullify constitutional objections. *People v. Garafolo*, 44 A.D.2d 86, 353 N.Y.S.2d 500 (N.Y. App. Div. 1974). A conclusion can only be reached that Officer Zappia fabricated the conduct of ██████████ in an attempt to make it appear as ██████████ was acting suspiciously in order to justify a search of him after the fact.

Officer Zappia then testified about a conversation he had with the driver of the vehicle during the traffic stop. The conversation occurs after the driver has been removed from the car, has been pat-frisked without a legal basis<sup>3</sup> and is being led to the patrol vehicle to be locked inside. Officer Zappia testified on direct examination that during this conversation, the driver was "alluding to he didn't want to be involved with anything that was in the vehicle" (tr. at 16).

The exact content of the conversation was captured on Officer Zappia's body camera and is as follows<sup>4</sup>:

**House (driver):** What I don't want is a misunderstanding, like you know that I'm causing trouble or anything like that. Like, I work, I got a CDL, I stay out of trouble, I'm a good person. I'm just dropping my cousins off. I'm going to my girlfriends house. Literally. I don't do anything.

**Officer Zappia:** I told you we will work with you, alright? Are you telling me there is something in the car?

**House:** No. What I'm telling you is, you know, I don't want you to have a misunderstanding like I'm causing trouble.

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<sup>2</sup> On direct (tr at 9) and again on cross (tr. at 21) examination, Officer Zappia testified that the vehicle did not come to a stop at the stop sign of Herkimer and Albany. Officer Zappia was impeached on cross-examination with People's 4 in evidence a video showing the vehicle stopped at the stop sign for over 30 seconds (tr. at 23).

<sup>3</sup> Officer Zappia testified that he patted down House, because it is "policy when we take someone out of a car, we pat them down for safety" and that Mr. House had not done anything that made Officer Zappia fearful for his safety (tr. at 37).

<sup>4</sup> People's 5 in Evidence Zappia's Body Camera  
File: AXON\_Body\_2\_Video\_2021-09-06\_1818.mp4

Time stamp: 22:24:29 through 22:25:57 (at 5:47 on bottom slider through 7:17)

**Officer Zappia:** I told you, you have been honest with me. We will work with you.

**House:** What Im saying is, I don't want you guys to try to take me to jail when I'm just...

**Zappia:** ...when what?

**House:** I'm just relaxing and trying to enjoy...

**Zappia:** I didn't say we were taking you to jail.

**House:** No, no, all I'm saying is what I learned is that it's good to communicate.

**Zappia:** You are good man, I got you. We will work with you

**House:** I drive trucks, I work at B&L right on William and Bailey, I drive trucks, today is Labor Day so I got off today, I'm just trying to relax. As you can see nothing on me.

**Zappia:** I got you. I got you, We will work with you. You have been honest with me, I told you I'm an honest guy.

**House:** I don't...

**Zappia:** I got you. Alright man.

There is nothing contained in this conversation that indicated that the driver was "alluding that he didn't want to be involved with anything in the vehicle" as Zappia testified on direct.

The entirety of the conversation was regarding House being concerned that *he* was in trouble and was going being arrested. These concerns for himself are entirely reasonable given the fact that he was being placed in the back of a locked patrol vehicle by Zappia after having been caught by officers drinking from an open container of alcohol while he was driving (tr. at 43).

House was asked directly if he was trying to tell Zappia that there was something in the car and he responded unequivocally "No".

There is nothing in this conversation regarding weapons or any of the occupants of the vehicle being armed. Zappia testified that he believed that there was *something* in the car that House was not telling him about but that he had *no idea* what it was (tr. at 39; emphasis added). Zappia never testified that the conversation with House made him fearful of his safety or that the occupants in the car had weapons. Officer Robinson was not involved in the conversation nor was there testimony from Officer Robinson that he heard the content of the conversation.

At best, House's statements are vague and innocuous. "Behavior which is susceptible of innocent as well as guilty interpretation cannot constitute probable cause and 'innocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand.

*People v. Miller*, 121 A.D.2d 335, 338, citing *People v. De Bour*, supra, 40 N.Y.2d at 216.

The proof at the hearing failed to establish that either officer reasonably feared for their safety, a prerequisite for frisking a suspect under CPL §140.50(3). Officer Zappia *specifically* testified that both men searched during the stop, House and Bryant, had done nothing that made him fearful of his safety prior to the frisk. Zappia further testified that a safety pat down was conducted because of a BPD policy that officers are to frisk occupants when they are removed from vehicles prior to being placed in a patrol vehicle (tr. at 41).

Significantly absent from the hearing in this matter is testimony from the officer who actually conducted the frisk. No testimony exists on the record that establishes that Robinson's actions were triggered by his reasonable suspicion that criminal activity was afoot or by *his* fear for his safety. *See People v. Barreto*, 555 N.Y.S.2d 303, 161 A.D.2d 305 (N.Y. App. Div. 1990). A suspect may not be frisked by a police officer who has no knowledge of facts that would provide a basis for suspecting that the individual is armed or dangerous" ( *People v. Carney*, 58 N.Y.2d 51, 52, [1982] ; see *People v. Sanchez*, 38 N.Y.2d 72, 74–75, [1975] ; *People v. Driscoll*, 101 A.D.3d 1466 1467, [2012] ).

The People did not meet their burden in establishing the legality of the police conduct that resulted in the recovery of the weapon in this case, as the hearing testimony did not establish that the officers had a reasonable suspicion that the defendant was armed or posed a risk to their safety prior to the pat frisk. As the officer had no basis to frisk defendant, the motion to suppress the physical evidence seized from his person should be granted (*see People v Rainey*, 228 AD2d 285, lv denied 88 NY2d 1023). *People v. Gonzalez*, 295 AD2d 183, 743 N.Y.S.2d 112 (N.Y. App. Div. 2002)

### **Testimony Regarding Observation of Violations of the Vehicle and Traffic Law Was Not Credible**

The testimony in support of the stop by Officer Zappia was not credible. The standard to be applied to determine the legality of a traffic stop is whether or not the police had probable cause to believe that a traffic infraction had been committed or 'reasonable suspicion that the driver or occupants of the vehicle have committed, are committing or are about to commit a crime '" *People v. Hinshaw*, 35 NY 3d 427 (2020) and *People v. Robinson*, 277 A.D. 781, 97 N.Y.S.2d 341. An automobile stop 'is a seizure implicating constitutional limitations' *People v.*

*Spencer*, 84 N.Y.2d 749, 752, [1995]. The defendant was seized when the vehicle in which he was a passenger was stopped *Brendlin v. California*, 551 U.S. 249 (2007) and therefore has standing to contest the stop of the vehicle.

On a motion to suppress physical evidence yielded from a traffic stop the People bear the initial burden of establishing the legality of the police conduct in the first instance. Implicit in this concept is that the testimony offered by the People must be *credible*. The burden then shifts to the defense to establish by a preponderance of the credible evidence that the police conduct was illegal (*People v. Berrios*, 28 NY2d 361 [1971]).

On direct examination, Officer Zappia was asked by the People what he observed about the vehicle as it pulled up to the stop sign, Officer Zappia testified “I observed the vehicle failed to come to a complete stop, began making a left hand turn before he signaled his turn and the vehicle also was missing a mirror” (tr. at 9).

Zappia’s testimony regarding observing a violation of VTL §1172, (Failure to Stop at Stop Sign) was manifestly untrue. People’s 4 in evidence, a surveillance video of the intersection of Albany and Herkimer shows unequivocally the Toyota stopped at the stop sign at the intersection of Herkimer and Albany. Officer Zappia was forced to acknowledge this fact when confronted with the video on cross examination.

Obviously when Officer Zappia provides sworn testimony about observations he claims to have observed of Vehicle and Traffic Law Violations, he cannot be believed by the Court.

People’s 4 also shows an activated turn signal as the Toyota is turning left onto Albany. The violation of VTL 1201(A),(No Stopping/Standing) Officer Zappia claims to have witnessed was not captured on video even though Officer Zappia testified that this violation occurred seconds before the car approached the stop sign (tr. at 21). When asked why the patrol vehicle is not visible in the frame for over 30 seconds while the Toyota is stopped at the stop sign Officer Zappia conceded that the patrol vehicle was 2 blocks away when he made this observation (tr. at 29), and the 30 second time lapse was the time that it took for the Officers to catch up to the Toyota.

Officer Zappia also conceded on cross examination that the violation of VTL 375(10)(B) (No Right Side Mirror) was not observed prior to the stop as he had testified on direct, but was only mentioned by Officer Robinson after the stop had occurred (tr. at 42).

Accordingly, when the court declines to credit the officer's testimony regarding an observation of a violation of the VTL, the stop of the vehicle is not legal.

For all the foregoing reasons, the evidence recovered as a result of the police search, the firearm, Suboxone, and statements of the defendant should be suppressed as fruit of the poisonous tree (*see generally Wong Sun, supra*) and [REDACTED] motion should be granted in its entirety.