

"NO PLACE IN OUR LAW":
the constitutionality of racial profiling

Article I, § 12 of the New York Constitution guarantees the right of the people to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This monograph will address the following question: does a traffic stop premised on racial profiling violate that guarantee?

To answer the question, we must first understand the law of traffic stops. The police may stop a vehicle, in relevant part, upon probable cause to believe that the driver has committed a traffic infraction (*People v. Robinson*, 97 NY2d 341, 349 [2001]). In *Robinson*, the defendant challenged the constitutionality of a pretextual traffic stop (i.e., one motivated by something other than the reason justifying the stop). In Buffalo, like many other American cities, the police commonly pull over motorists for traffic infractions as a pretext to investigate suspected drug or firearm possession. This is easy to do - it is nearly impossible to drive any distance without committing some violation of the Vehicle and Traffic Law. As a former Baltimore Police Officer explained while driving, "you can't actually drive a car legally. It'd be impossible. No one can get this car from here to the end of the street completely legally" (Slate, A Former Baltimore Cop Explains Why the Department Targets Black Men, uploaded August 12, 2015,

<https://www.youtube.com/watch?v=4HyKlFUMBIA&t=284>). And equipment violations - a subset of traffic infractions defined in Vehicle and Traffic Law § 375 - are more common in poorer neighborhoods, where motorists often lack the means for necessary repairs.

In *Robinson*, the Court of Appeals held that the pretextual nature of a traffic stop does not render it unconstitutional. But the court recognized the “real concern ... that police officers will use their authority to stop persons on a selective and arbitrary basis,” and emphasized that “discriminatory law enforcement has no place in our law” (*id.*, at 351-352). This language planted the seed for the Third Department’s landmark decision in *People v. Jones*, which held that “the *Robinson* standard does not preclude a challenge to a traffic stop predicated on racial profiling, at least under our State Constitution” (210 AD3d 150, 155 [3rd Dept. 2022]). The court recognized that the First Department reached a different conclusion, but held that for “for a defendant’s constitutional rights to be meaningful, the exclusionary rule must apply” (*id.*, *cf. People v. Fredericks*, 37 AD3d 183 [1st Dept. 2007]).

How can this be proven on a motion to suppress? “Whether a traffic stop was premised on racial profiling must be assessed objectively with reference to the facts and circumstances of the encounter. Such considerations may include, for example, whether the

arresting officers were involved in a plausible investigation prior to executing the vehicle stop. Also important ... is consideration of the officers' actions and comments during the encounter" (*Jones*, 210 AD3d at 156). The primary source of this information will be the body worn camera footage, if it exists. You should also look to the officer's history, including their 50-a material and their words and actions on similar incidents. In a recent case, a Buffalo Police Officer, after smashing the window of the defendant's vehicle in order to conduct a search, was confronted by a citizen who objected. The officer replied, "you know what, why don't we stop carrying guns and f**king selling drugs all the time, and maybe we won't f**king be here." This comment is an (un-smashed) window into the officer's point of view.

But what if the profiling is systemic, baked into a law enforcement agency's method of policing? In those cases, the conduct of the individual officers must be supplemented by data - and in the case of the Buffalo Police Department (BPD), there is plenty of it.

BPD policy expressly forbids racial profiling. "Members shall not consider demographic category (including but not limited to race, ethnicity, national origin, religion, gender, sexual orientation, age, disability, gender identity or expression, or affiliation with any other similar identifiable group) as a factor in conducting a

vehicle stop” (Buffalo Police Department, Manual of Procedures § 4.1). It also recognizes that neighborhood profiling is a form of racial profiling., advising officers that “[t]argeting specific neighborhoods for traffic enforcement based on these demographic categories is a form of discriminatory policing and is prohibited” (*id.*).

The data suggests that the practice does not always live up to this ideal.

In a 2018 lawsuit, the plaintiffs, using data obtained from BPD, alleged that more than 85 percent of traffic checkpoints took place in predominantly Black and Latino neighborhoods (Aaron Besecker, “Lawsuit Alleges Racial Discrimination by City, Police at Traffic Checkpoints,” *The Buffalo News*, June 28, 2018). In sworn depositions, five retired officers testified that officers commonly used a racial slur against Blacks, received little to no training on racial bias and profiling, and sometimes failed to forward complaints of racial discrimination to Internal Affairs (Deidre Williams, “Council Members: Reported Racist Actions by Buffalo Police Officers ‘Unacceptable’,” *The Buffalo News*, November 26, 2022). In 2020, against the backdrop of protests following the murder of George Floyd, Buffalo Mayor Byron Brown required that officers issue “stop tickets,” and record the race of the driver, any time a citizen was pulled over

but not ticketed. The purpose of this directive, he said, was to "end unconstitutional stops and increase officer accountability." An analysis of the stop tickets determined that Blacks were 2½ times more likely to be stopped than whites, despite making up a smaller share of the city's population (Daniel Telvock, "Critics Say Buffalo Police's Traffic Enforcement Targets Minorities - and There's Data That Supports Their Claims," WIVB, March 2, 2022).

When assessing whether to file a motion to suppress based on racial profiling, it is important to consider all of these factors: whether the traffic stop was preceded by a legitimate investigation, the words and actions of the officer, the officer's history, and the presence of systemic profiling within the law enforcement agency.

"Racial profiling punishes innocent individuals for the past actions of those who look and sound like them. It misdirects crucial resources and undercuts the trust needed between law enforcement and the communities they serve. It has no place in our national discourse, and no place in our nation's police departments" (Ben Jealous, Columbia University, Columbia Celebrates Black History and Culture, <https://blackhistory.news.columbia.edu/people/benjamin-t-jealous>). It is up to defense attorneys to ensure that it has no place in our law.