

COURT OF APPEALS OF VIRGINIA

Record No. 0901-25-1

JAQUAN R. CLAIBORNE
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Causey, Raphael and Duffan

Argued at Lexington, Virginia

Opinion Issued September 15, 2026*

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

Robert B. Rigney, Judge

Harry Dennis Harmon, Jr., for appellant.

Andrew T. Hull, Assistant Attorney General (Jason S. Miyares,¹ Attorney General, on brief), for appellee.

MEMORANDUM OPINION BY JUDGE KEVIN M. DUFFAN

Jaquan R. Claiborne appeals the Circuit Court of the City of Norfolk's denial of his motion to suppress evidence following a traffic stop. Claiborne contends that the police lacked a reasonable, articulable suspicion to stop his vehicle and improperly conducted a protective sweep of the vehicle after learning that he was a convicted felon. We disagree and affirm the circuit court's decision.

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

¹ Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

BACKGROUND²

“On appeal, we state the facts ‘in the light most favorable to the Commonwealth, giving it the benefit of any reasonable inferences.’” *Hill v. Commonwealth*, 297 Va. 804, 808 (2019) (quoting *Commonwealth v. White*, 293 Va. 411, 413 (2017)). Under this standard, we “discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences that may be drawn therefrom.” *Diaz v. Commonwealth*, 80 Va. App. 286, 295 (2024) (quoting *Kelly v. Commonwealth*, 41 Va. App. 250, 254 (2003) (en banc)). We also “give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.” *Hill*, 297 Va. at 808.

At about 1:45 a.m., Norfolk Police Department Officers Seth Williams and John Ball were patrolling a high-crime area of Norfolk. Officer Williams was driving directly behind Claiborne and observed Claiborne pull into a gas station parking lot “as if [he] was kind of trying to get out of our way.” Claiborne cut through the gas station parking lot, passed by the gas pumps, re-entered the road, and continued driving in the other direction. Officer Williams, who had bypassed the station, went through a small roundabout and came back toward the station a few seconds later, and resumed following Claiborne.

Claiborne kept driving around the neighborhood. In doing so, Claiborne “slow-rolled” several stop signs, with the vehicle showing brake lights but not coming to a complete stop. Because of Claiborne’s failure to stop at stop signs and his suspicious driving, plus the fact that it was late at night in a high-crime area, Officer Williams conducted a traffic stop.

² “Although parts of the record are sealed, this appeal requires unsealing certain portions to resolve the issues raised by [the appellant]. To the extent that certain facts are found in the sealed portions of the record, we unseal those portions only as to those specific facts mentioned in this opinion.” *Khine v. Commonwealth*, 75 Va. App. 435, 442 n.1 (2022). “The rest remains sealed.” *Id.*

Claiborne pulled over and Officer Williams stopped behind him. Officer Ball informed Officer Williams that he observed Claiborne reaching toward the center console of his vehicle as the officers began to exit the police cruiser. Officer Williams also observed Claiborne's furtive movements in the vehicle, "look[ing] as if somebody was . . . coming out of the seat almost and then [going] to the center console." When the officers approached the car, Claiborne had his driver's license in his hand. Claiborne falsely claimed to have gotten gas at the station the officers observed him pulling into.

Claiborne was "very nervous," not "very responsive," and "seemed like he quickly wanted to get out of the situation." Claiborne denied placing anything in the center console. Because of Claiborne's movements as the officers approached the vehicle and the time and area of the stop, Officer Williams asked Claiborne to exit the vehicle so they could speak behind it. Claiborne initially refused to get out of the vehicle but complied after he was told that refusing would be "obstruction." A passenger, however, was allowed to stay in the vehicle.

While reviewing Claiborne's information, Officer Williams saw Claiborne's "codes and criminal history." Officer Williams then returned from his police cruiser and resumed speaking with Claiborne. Officer Williams explained that he and Officer Ball had observed "a lot of movement" around the center console of the vehicle "as if somebody was putting something in there," and referenced Claiborne's suspicious driving.

Claiborne denied having anything in the vehicle that the officers "need[ed] to be aware of" and refused when Officer Williams asked if he would consent to a search. Officer Williams replied that he was going to search the vehicle "due to the furtive movement" and Claiborne's suspicious driving and failure to stop at stop signs, all of which caused him to believe that Claiborne had placed something in the center console that he "did not want [the officers] to find."

Claiborne again denied placing anything in the center console and refused when Officer Williams asked if he could “take a look,” asserting that the officers “[could] not look in [his] car.” The exchange briefly continued, and as Officer Williams began to walk toward the driver’s door, Claiborne moved between Officer Williams and the vehicle, at which time the officers placed Claiborne in handcuffs.

Concerned about the possibility of weapons in the vehicle, the officers conducted a protective sweep. The officers recovered a firearm from the center console and then found 2 zip-lock bags filled with 1,568 tablets of fentanyl and 9 plastic bags filled with marijuana totaling to about a pound.

At the hearing on his motion to suppress, Claiborne argued that the traffic stop was improper, based on racial profiling, and that he never failed to come to a complete stop at the various stop signs. In a written decision, the circuit court disagreed and denied the motion to suppress. After reviewing the evidence before it, the circuit court concluded that Claiborne failed to stop at the stop signs and this failure provided the officers with a proper basis for stopping his vehicle. The circuit court added that, based on the dash cam video, it observed movement from the driver’s side as if the driver was putting something to the right of him, thus confirming the officer’s testimony. Finally, the circuit court added that Claiborne’s furtive movements, nervous demeanor, and movement toward Officer Williams as he approached Claiborne’s vehicle to search it, “[w]hen looked at collectively, . . . gave rise to a reasonable, articulable suspicion and justified the search.”

After the decision, Claiborne conditionally pleaded guilty to one count each of possession of a Schedule I or II drug with the intent to distribute, possession with intent to distribute more than an ounce but less than five pounds of marijuana, selling a Schedule I or II drug while possessing a firearm, and possessing a firearm after being convicted of a nonviolent felony. His

plea agreement preserved his right to appeal the circuit court’s decision on the motion to suppress. Claiborne was sentenced to a total of eight years with four years suspended. Claiborne appeals.

ANALYSIS

In reviewing the circuit court’s denial of a motion to suppress, “the burden is upon [the appellant] to show that the ruling, when the evidence is considered most favorably to the Commonwealth, constituted reversible error.” *Hill v. Commonwealth*, 68 Va. App. 610, 616-17 (2018) (alteration in original) (quoting *Andrews v. Commonwealth*, 37 Va. App. 479, 488 (2002)). We are “bound by the trial court’s findings of historical fact unless ‘plainly wrong’ or without evidence to support them and we give due weight to the inferences drawn from those facts by resident judges and local law enforcement officers.” *Hawkins v. Commonwealth*, 65 Va. App. 101, 106 (2015) (quoting *McGee v. Commonwealth*, 25 Va. App. 193, 198 (1997) (en banc)). But “we consider *de novo* whether those facts implicate the Fourth Amendment and, if so, whether the officers unlawfully infringed upon an area protected by the Fourth Amendment.” *Hughes v. Commonwealth*, 31 Va. App. 447, 454 (2000) (en banc) (citing *McGee*, 25 Va. App. at 198).

The Fourth Amendment provides, in part, that “[t]he right of the people to be secure in their persons, . . . and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. If the Fourth Amendment is violated, the exclusionary rule “prohibits the introduction of evidence, tangible or testimonial, acquired during an unlawful search.” *Carlson v. Commonwealth*, 69 Va. App. 749, 758 (2019).

I. The Traffic Stop

A “traffic stop for a suspected violation of law is a ‘seizure’ of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment.” *Heien v.*

North Carolina, 574 U.S. 54, 60 (2014). “While an arrest requires probable cause, a mere investigatory stop requires only a ‘reasonable suspicion’ that unlawful activity ‘may be afoot.’” *Shifflett v. Commonwealth*, 58 Va. App. 732, 735 (2011) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)).

In considering what constitutes a proper basis for an investigatory stop, courts have recognized that an “articulable suspicion” is a “conclusion that can be expressed in words sufficient to persuade a reasonable listener to come to a like conclusion.” *Mason v. Commonwealth*, 291 Va. 362, 369 (2016); see *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (recognizing that a reasonable suspicion is more than an unparticularized suspicion or “hunch”). “Whether an officer has a reasonable suspicion to justify . . . a detention is ‘based on an assessment of the totality of the circumstances.’” *Hill*, 68 Va. App. at 619 (alteration in original) (quoting *Branham v. Commonwealth*, 283 Va. 273, 280 (2012)). It is well established that “[a]n officer may effect a traffic stop when he has reasonable suspicion to believe a traffic or equipment violation has occurred.” *Gross v. Commonwealth*, 79 Va. App. 530, 536 (2024) (alteration in original) (quoting *McCain v. Commonwealth*, 275 Va. 546, 553 (2008)).

Here, the circuit court, after hearing the officer’s testimony, found that the officers stopped Claiborne because he failed to make a complete stop at multiple stop signs, which is a traffic infraction. As a result, the police officers could properly stop his vehicle under the Fourth Amendment. *See id.*

While Claiborne challenges this factual finding as being incorrect, we are bound to the circuit court’s factual findings as long as the findings are supported by the evidence and are not plainly wrong. *See Hill*, 68 Va. App. at 616-17. The officers testified that Claiborne rolled through the stop signs, and the circuit court found them credible. As an appellate court, it is not our role to second guess a factual determination rooted in testimony. *See Jones v. Eley*, 256 Va.

198, 201 (1998) (noting a circuit court is better able to determine witness credibility and weigh testimony because it sees and hears them). Thus, we conclude that the police officers possessed reasonable suspicion to stop Claiborne.³ See *Shifflett*, 58 Va. App. at 736 (quoting *Braun v. Maynard*, 652 F.3d 557, 561 (4th Cir. 2011) (recognizing that the standard for reasonable suspicion “is not an exacting one”)).

This conclusion, however, does not end the analysis because Claiborne also contends that the protective sweep was improper.

II. The Protective Sweep of the Vehicle

The Fourth Amendment permits police officers to conduct a pat down of a person or a protective sweep for a weapon under certain circumstances. See *Gross*, 79 Va. App. at 536. Particularly in this case, a vehicle sweep “is permissible if the police officer possesses a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.” *Bazemore v. Commonwealth*, 82 Va. App. 478, 492 (2024) (quoting *Michigan v. Long*, 463 U.S. 1032, 1049 (1983)). A vehicle sweep may be justified by safety concerns even if it occurs during an investigatory detention that falls short of an arrest. *Bagley v. Commonwealth*, 73 Va. App. 1, 14 (2021). Moreover, such a sweep is permitted “even if the suspect is under police restraint at the time the search is conducted, because the suspect may be able to escape such restraint, or may later regain access to the vehicle if he is not arrested.” *Bazemore*, 82 Va. App. at 492

³ Though the officers may have considered Claiborne’s “suspicious” driving in their decision to conduct a stop, we rely solely on the circuit court’s finding that Claiborne rolled through stop signs and committed a traffic offense. See *Gross*, 79 Va. App. at 536. Because we decide cases on the best and narrowest grounds, we need not—and do not—decide whether any other factor justified the stop. See *White*, 293 Va. at 419 (“[T]he doctrine of judicial restraint dictates that we decide cases ‘on the best and narrowest grounds available.’” (quoting *Commonwealth v. Swann*, 290 Va. 194, 196 (2015))).

(quoting *Gross*, 79 Va. App. at 537). Protective sweeps, however, have a narrow purpose and a “sole justification” to ensure the “protection of the police officer and others nearby.” *Gross*, 79 Va. App. at 536-37 (quoting *Terry*, 392 U.S. at 29).

Here, even considering a protective sweep’s narrow purpose, the officers had a reasonable belief based on articulable facts that Claiborne might gain immediate control of a weapon. *Bazemore*, 82 Va. App. at 492. The totality of the circumstances in this case extended beyond Claiborne’s nervous behavior, furtive movements, and presence in a high-crime area at 1:45 a.m. Notably, the officers initially permitted Claiborne’s passenger to remain inside the vehicle and Claiborne was not placed in handcuffs. The critical inflection point occurred in the sequence of events following the discovery of Claiborne’s criminal history.⁴ Once in possession of that knowledge, Officer Williams indicated his intention to conduct a protective sweep of Claiborne’s vehicle. As he moved towards the vehicle, Claiborne immediately positioned himself between the officers and the vehicle to obstruct their path. It was only *after* this movement that the officers handcuffed Claiborne and ordered the passenger to exit the vehicle.

Reasonable articulable suspicion is a low bar that is cleared when there is a “particularized and objective basis” that the individual is armed and dangerous beyond a mere hunch. *Bazemore*, 82 Va. App. at 492-93. Under the totality of the circumstances present here, that low bar has been cleared. The officers demonstrated objective and particularized reasons to

⁴ Though there was no testimony or other evidence of exactly what Officer Williams saw when he “look[ed] up [Claiborne’s] information” and “saw his codes and criminal history up there,” according to the criminal history appended to Claiborne’s presentencing report, and also relevant to this analysis, Claiborne had a recent conviction for a felon in possession of a firearm (nonviolent within 10 years), a misdemeanor conviction for carrying a concealed weapon, and other felony and misdemeanor convictions for crimes not involving violence or firearms. Additionally, Claiborne also had charges from 2021 of murder in the second degree, abduction, malicious wounding, and using a firearm in the commission of each of those offenses for which he was found not guilty. It can be reasonably inferred this criminal history report would have been visible to Officer Williams before any protective sweep occurred.

believe Claiborne could gain immediate control of a weapon that was in the vehicle, which permitted them to conduct the protective sweep. *See, e.g., Bazemore*, 82 Va. App. at 492; *Long*, 463 U.S. at 1049.

This decision establishes a narrow holding based strictly on the totality of the circumstances. We decline to view the facts in isolation, choosing instead to place emphasis on the chronological chain of events. Our final determination rests collectively on the timing and location of the vehicle stop, the officer’s live observations of Claiborne’s movements, the discovery of his prior criminal record, and his eventual attempt to block officers from reaching his car. At bottom, we review the protective sweep’s constitutionality keeping in mind that the “ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” *Commonwealth v. Knight-Walker*, ___ Va. ___, ___ (Apr. 16, 2026) (quoting *Riley v. California*, 573 U.S. 373, 381 (2014)). Whether an officer’s actions were reasonable is not a subjective question. It does not account for, much less depend on, an officer’s motives or pretexts. To the contrary, courts frequently note that “[a]n action is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer’s state of mind, ‘as long as the circumstances, viewed *objectively*, justify [the] action.’” *Id.* at ___ (second alteration in original) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006)); *see also Whren v. United States*, 517 U.S. 806, 812 (1996) (“Not only have we never held, outside the context of inventory search or administrative inspection . . . , that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.”). This is the framework established by our superior courts, and it is the framework we are bound to follow. *See King William Cnty. v. Jones*, 66 Va. App. 531, 552 n.17 (2016) (en banc) (“It is not our function to avoid or evade the clear implications of decisions of the Virginia Supreme Court.”).

The sole question we must examine is this: would a reasonable officer believe that they were in danger when they encountered an individual with a prior conviction for a firearm related felony and a concealed weapon misdemeanor, late at night, in a high-crime area, who was rummaging through the center console of a car moments after being pulled over and, once outside the vehicle, tried to physically block police from looking through the vehicle? U.S. Supreme Court decisions, our Supreme Court's decisions, and our own decisions point to one answer: yes.

CONCLUSION

Finding no basis to disturb the circuit court's decision, we affirm its judgment.

Affirmed.

Causey, J., dissenting.

While we “give due weight to inferences drawn from those facts by . . . local law enforcement officers,” we are bound only by the trial court’s findings *with evidence to support* them. *Shifflett v. Commonwealth*, 58 Va. App. 732, 734 (2011). Because there was no evidence to support the officers’ stated reason for conducting a protective sweep of the vehicle, the trial court was plainly wrong. Therefore, I respectfully dissent.

Investigatory stops require only reasonable suspicion of criminal activity, scrutinized by looking to the totality of the circumstances. *See Shifflett*, 58 Va. App. at 735. Because of Claiborne’s rolling stops and his attempts to keep the police patrol car from driving behind him, the majority rightly concludes that the officers had enough reasonable suspicion to stop the vehicle.⁵

The Fourth Amendment permits police officers to conduct a protective sweep for a weapon when officers *reasonably* fear that the weapon could be employed during the course of

⁵ We cannot consider Claiborne’s seemingly aimless driving as a factor in the totality of the circumstances to support reasonable suspicion for the traffic stop. Therefore, I would find error to the extent that the trial court relied on it in its totality of the circumstances analysis. “[A]n officer may effect a traffic stop when he has reasonable suspicion to believe a *traffic or equipment violation* has occurred.” *Gross v. Commonwealth*, 79 Va. App. 530, 536 (2024) (emphasis added). Officers cannot stop a vehicle merely because they would have taken a more efficient way home. Officer Williams acknowledged during cross-examination that there was no traffic citation they could have issued Claiborne for such driving. Traffic stops are legal only when the driver breaks a traffic law. Those stops are then extended upon reasonable suspicion of criminal activity—such as *erratic* driving, excitable or evasive behavior, slurred speech, glassy eyes, flight, the presence of contraband in plain view, or other obvious signs of illegal activity. *See, e.g., Shifflett*, 58 Va. App. at 735 (finding reasonable suspicion when defendant “smelled of alcohol, had glassy, bloodshot eyes, and spoke with slurred speech”); *McCain v. Commonwealth*, 275 Va. 546, 555 (2008) (finding no reasonable suspicion of drug contraband when officers failed to “observe or notice any drugs, odor of drugs, or drug paraphernalia in the vehicle”); *Whitaker v. Commonwealth*, 279 Va. 268, 276 (2010) (finding headlong flight in a high-crime area supported reasonable suspicion); *Hill v. Commonwealth*, 297 Va. 804, 815 (2019) (finding reasonable suspicion when a defendant was sitting *alone* in his car, ignored repeated requests by the officer to show his hands, and instead began “digging down” in the rear floorboard area of the car).

the traffic stop. *See Gross v. Commonwealth*, 79 Va. App. 530, 536 (2024); *Bagley v. Commonwealth*, 73 Va. App. 1, 14 (2021). The “sole justification” of these sweeps is to ensure the “protection of the police officer and others nearby.” *Gross*, 79 Va. App. at 536-37 (emphasis added). For the search to be so justified, the officers must have had a “particularized and objective” belief that Claiborne was armed and was a danger to them. *Bazemore v. Commonwealth*, 82 Va. App. 478, 492-93 (2024). Here, to form the basis of such an objective belief, the majority looks to Claiborne’s movement about the center console after officers turned on their emergency lights, his presence in a high-crime area, and his previous felony conviction to find that reasonable suspicion of a danger to officer safety supported the protective sweep.

But law enforcement officers exceed their authority “when their methods go beyond that reasonably needed to ‘confirm or dispel’ their suspicions.” *Jackson v. Commonwealth*, 39 Va. App. 624, 651 (2003) (quoting *Hamlin v. Commonwealth*, 33 Va. App. 494, 502 (2000)). *See also McArthur v. Commonwealth*, 72 Va. App. 352, 360 (2020) (“The proper focus is ‘the more *immediate interest* of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.’” (emphasis added) (quoting *Terry v. Ohio*, 392 U.S. 1, 23 (1968))).

While furtive movement about a center console, under different circumstances, could support reasonable suspicion, a mere hunch that there may have been a firearm in the center console is not enough to support the search of Claiborne’s vehicle.

A reasonable officer with years of training and experience would not have looked at the totality of the circumstances and reasonably believed Claiborne had a gun. For one, the officers never saw a gun. Instead, the officers observed Claiborne moving his arm and shoulder above or toward the center console of his vehicle. Reaching into one’s center console is not inherently

suspicious. In fact, when the officers approached the car, Claiborne had his driver's license in his hand. He very well could have reached into the console to get his driver's license out of it.

To support its analysis of the so-called furtive movement about the center console, the majority relies on *Hill v. Commonwealth*, 297 Va. 804, 816 (2019), *Gross*, 79 Va. App. at 539, and *Bazemore*, 82 Va. App. at 487. But the facts in the present case differ considerably from those cases because, there, each defendant made movements before or while law enforcement approached them that were so erratic that they made the officers nervous to approach the defendants. *Gross*, 79 Va. App. at 539 (defendant made a series of movements within the vehicle that gave the officers reason to believe that he could well be searching and reaching for a weapon).

In *Hill*, the defendant was alone in the vehicle and refused to engage with the officers or their questions at all. Then, he “started digging frantically between the driver’s and passenger’s seats.” *Hill*, 297 Va. at 816. In both *Hill* and *Gross*, officers feared that the defendant was *reaching* for a firearm, not that he was attempting to *conceal* one. *Hill*, 297 Va. at 816; *Gross*, 79 Va. App. at 539-40.

In *Gross*, before the defendant made any furtive movements, he had “driv[en] on for four blocks after the police had turned on their siren and flashing lights,” which “gave the officers reasonable concern that he might be reaching for and preparing to use a weapon against them during the traffic stop.” 79 Va. App. at 539. Then, only after officers approached him, *Gross* made a *series* of movements, during which he purposefully hid his hands from the officers.

In *Bazemore*, the defendant turned his entire body around to his back seat, was involved with gangs, and had a criminal history that included *violent felonies*.⁶ 82 Va. App. at 487.

In the present case, Claiborne's movements were not erratic; he did not frantically move or dig. Body camera footage, as corroborated by officer testimony, shows Claiborne lifting his center console, placing his hands back on the steering wheel with his identification card in hand, and preparing to show officers his identification card when they approached. Officers could see his hands from the beginning of the encounter. Other than a general sense of nervousness, which is not enough on its own to support probable cause,⁷ Claiborne was not fidgeting or behaving in a way that suggested he was dangerous. *See McGhee v. Commonwealth*, 280 Va. 620, 625 (2010).

Compared to our protective sweep case law, Claiborne simply did not have the same markers of dangerousness that would have formed an *objective* concern for officer safety from the beginning of the encounter. But even if the officers did have reasonable suspicion to believe Claiborne had a firearm in the center console at the beginning of the encounter, by the time the

⁶ The majority makes a comparison to *Bazemore*, noting that Claiborne had been charged with multiple violent felonies himself. However, these *charges* had been adjudicated by the time he was stopped by the officers here. In fact, Claiborne had been tried and found *not guilty*. Considering these charges in the reasonable suspicion analysis allows law enforcement to say Claiborne is dangerous based upon crimes he did not commit. If a person was wrongfully charged with a crime, or if the Commonwealth failed to prove an element beyond a reasonable doubt, that person would be targeted, with their vehicle searched, under the guise of officer safety. This consideration, then, erodes a privacy protection that that person never relinquished.

In distinguishing *Bazemore*, it is also worth mentioning that the officer in *Bazemore* placed the driver-defendant and his passenger in handcuffs because he found a "big bag" of marijuana, whereas here, Claiborne was placed in handcuffs because he refused to consent to the search of his vehicle, after arguing with the officers about his privacy rights, and attempted to block the officer's pathway towards his vehicle.

⁷ *Cf. Henry v. Commonwealth*, No. 0771-24-2, slip op. at 5-6, 2025 Va. App. LEXIS 588, at *7-8 (Sep. 30, 2025) ("The evidence further showed that Henry was nervous, sweaty, and that he possessed a large amount of cash and a torn lottery slip. Henry also lit a cigar during the stop and admitted that he had smoked marijuana—a legal substance at the time of the search—earlier that day. These circumstances were insufficient to give rise to probable cause to search Henry's vehicle.").

officers performed the actual protective sweep, any concerns they had were and should have been dispelled. But here, by the time the protective sweep occurred, Claiborne was standing behind the vehicle, in handcuffs, with *two* officers blocking his pathway back to the driver's side of the vehicle.

Before deciding to conduct a protective sweep, Officer Williams told Claiborne to exit the vehicle. They walked him to the back of the car and asked him for his consent to search the vehicle. As Officer Williams walked toward the driver's door, Claiborne took a step between the officer and the vehicle, as though to stop the officer's egress towards it. He had refused to consent to the search of his vehicle three times at this point, citing his constitutional right to privacy of his personal property.⁸ The officers then placed Claiborne in handcuffs. It was only after he was handcuffed—because he refused to consent to the search—that the officers cited concerns about the possibility of weapons in the vehicle and conducted a protective sweep. Also by then, they had conducted a pat down of Claiborne's person. They knew he was unarmed. He could no longer be a threat to the officers' safety because he had no “*immediate control*” of any weapon. *Gross*, 79 Va. App. at 536 (emphasis added). And, importantly, Claiborne was actively trying to keep the officers *out* of the vehicle, not trying himself to get *into* the vehicle.

The majority dismisses these facts, noting that a protective sweep can occur “even if the suspect is under police restraint at the time the search is conducted, because the suspect may be able to escape such restraint, or may later regain access to the vehicle if he is not arrested.”

Bazemore, 82 Va. App. at 492 (quoting *Gross*, 79 Va. App. at 537). But during the *entire*

⁸ While the reasonable suspicion standard is a lower bar to clear than probable cause, the officers placing Claiborne in handcuffs because he refused the search sets dangerous precedent. See, e.g., *McArthur*, 72 Va. App. at 362 (“The exercise of one's Fourth Amendment right to decline a warrantless search can never rise to the level of reasonable articulable suspicion that a person is armed and dangerous.”). Such a rule would give officers carte blanche to search a vehicle any time a citizen with a criminal history asserts their constitutional rights in a high-crime area.

encounter, officers allowed a passenger to stay in the cabin of the vehicle *unmonitored*. Officers never asked the passenger any investigatory questions, and *both* officers abandoned her in the passenger seat—at the front of the car, less than an arm’s reach from the alleged firearm—without any supervision, while one officer returned to the police cruiser to run Claiborne’s identification and the other officer took Claiborne behind the vehicle to pat him down.⁹ *Cf. Bazemore*, 82 Va. App. at 487 (noting that officers asked investigatory questions to the passenger and removed *both* the passenger and the driver-defendant). A reasonable officer who was in fear for his safety because they believed a firearm was concealed in the center console would not have left a passenger unattended with said firearm for almost five minutes. The trial judge even noted as much, from the bench, when he said, “I do[not] think anybody speculated [that the contraband] was a weapon. That might have been an implication, but I don’t know that anybody -- I never heard anybody say weapon.”

The majority asserts that our Fourth Amendment jurisprudence requires us to view the officers’ reasoning behind the stop under an objective standard, binding the court’s hands when the facts do not support the officers’ stated justifications. However, we need not close our eyes to obvious pretextual behaviors. Law enforcement officers cannot, *in retrospect*, cite a perceived danger—i.e., a threat to their safety—that was not supported by the record in an effort to right an unlawful pretextual stop. *See, e.g., Baskerville v. Commonwealth*, 76 Va. App. 673, 685 (2023) (“A finding of exigency justifying warrantless entry is not ‘based on a retrospective analysis of the circumstances.’ Instead, the circumstances are considered as they appeared to a reasonably trained police officer *when the decision to enter was made*.” (emphasis added) (quoting *Moreno v. Commonwealth*, 73 Va. App. 267, 276 (2021))).

⁹ The majority notes the presence of the passenger in its statement of facts but does not grapple with her presence near the firearm in its de novo application of the Fourth Amendment to those facts.

Here, the officers did not fear for their safety with Claiborne handcuffed and at the rear of the vehicle, and a passenger in the front seat during the entire encounter. In fact, the officers told him he would be free to leave when his identification check came back. Additionally, no traffic citation was ever given. The objective basis cannot serve as a blanket retrospective justification when, looking at the totality of the encounter, a reasonable officer would never have acted in a similar way. Thus, because the record does not support reasonable suspicion in this case, I respectfully dissent.