

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
5
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7 AUGUST TERM, 2017

8
9 ARGUED: OCTOBER 11, 2017

10 DECIDED: AUGUST 24, 2018

11
12 No. 16-1112-cr

13
14 UNITED STATES OF AMERICA,
15 *Appellee,*

16
17 *v.*

18
19 HECTOR SANTILLAN (AKA "BANE"),
20 *Defendant-Appellant,*

21
22 JUNIOR RIVERA-VASQUEZ,
23 *Defendant.**

24
25
26 Appeal from the United States District Court
27 for the Southern District of New York.
28 No. 1:13-cr-138-1 – Robert W. Sweet, *District Judge.*
29
30

* The Clerk of Court is directed to amend the caption to conform to the above.

1 Before: WALKER, POOLER, *Circuit Judges*, and CRAWFORD, *District*
2 *Judge*.**

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4
5 Defendant-Appellant Hector Santillan appeals his conviction
6 and sentence entered in the United States District Court for the
7 Southern District of New York (Robert W. Sweet, *J.*) following a jury
8 trial. Santillan was convicted of participating in a conspiracy to
9 distribute or possess with intent to distribute heroin, oxycodone, and
10 cocaine, and distributing and possessing with intent to distribute
11 500 grams or more of cocaine. He was sentenced to 151 months'
12 imprisonment.

13 Santillan's primary argument on appeal is that the district court
14 erred in denying his pre-trial motion to suppress physical evidence
15 recovered and statements made during a traffic stop and search.
16 Specifically, Santillan argues that: (1) the traffic stop was
17 unreasonably prolonged to the point that it became a *de facto* arrest
18 for which probable cause was lacking; (2) there was no reasonable
19 basis to frisk Santillan for weapons; (3) his statements were used
20 against him in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); and
21 (4) police officers obtained consent to search a car in which he was a
22 passenger through coercion. Santillan also argues that the
23 government impermissibly vouched for its cooperating witness

** Judge Geoffrey W. Crawford, of the United States District Court for the District of Vermont, sitting by designation.

1 during trial, his trial counsel was ineffective, and the district court
2 committed procedural errors when calculating his sentence.

3 In this opinion, we address Santillan's challenges to the stop
4 and search. We conclude that the police officer conducting the traffic
5 stop had reasonable suspicion to extend the stop when Santillan and
6 the driver appeared nervous and were unable to provide information
7 about where they were coming from. The stop did not ripen into a *de*
8 *facto* arrest because the police officer used reasonable methods and
9 intrusions to confirm or dispel his suspicions. Although certain
10 evidence was improperly seized during a frisk, the physical evidence
11 would have inevitably been discovered and thus suppression was not
12 warranted. While accompanying statements should have been
13 suppressed, the error was harmless. We find no merit in each of
14 Santillan's other challenges to his sentence and conviction, which are
15 resolved by a summary order issued simultaneously with this
16 opinion. Accordingly, we AFFIRM Santillan's conviction and
17 sentence.

18 Judge POOLER dissents in a separate opinion.

1
2 KRISTY J. GREENBERG, Assistant United States
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12
13 Hector Santillan, Ayer, MA, *pro se*.
14

15 JOHN M. WALKER, JR., *Circuit Judge*:

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17 and sentence entered in the United States District Court for the
18 Southern District of New York (Robert W. Sweet, J.) following a jury
19 trial. Santillan was convicted of participating in a conspiracy to
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25 erred in denying his pre-trial motion to suppress physical evidence
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3 basis to frisk Santillan for weapons; (3) his statements were used
4 against him in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); and
5 (4) police officers obtained consent to search a car in which he was a
6 passenger through coercion. Santillan also argues that the
7 government impermissibly vouched for its cooperating witness
8 during trial, his trial counsel was ineffective, and the district court
9 committed procedural errors when calculating his sentence.

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13 the driver appeared nervous and were unable to provide information
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15 *facto* arrest because the police officer used reasonable methods and
16 intrusions to confirm or dispel his suspicions. Although certain
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18 would have inevitably been discovered and thus suppression was not
19 warranted. While accompanying statements should have been
20 suppressed, the error was harmless. We find no merit in each of
21 Santillan's other challenges to his sentence and conviction, which are
22 resolved by a summary order issued simultaneously with this

1 opinion. Accordingly, we AFFIRM Santillan's conviction and
2 sentence.

3 BACKGROUND

4 On February 12, 2013, Santillan was a passenger in a car that
5 Junior Rivera-Vasquez was driving from Manhattan to
6 Massachusetts. Early in the afternoon, Westchester County
7 Department of Public Safety Officer Isai Moreira, who was patrolling
8 in a marked car on the Hutchinson River Parkway, observed Rivera-
9 Vasquez commit five violations of New York's Vehicle and Traffic
10 laws over a three-minute span: (1) tires touching the fog line; (2)
11 speeding; (3) changing lanes without signaling; (4) a second incident
12 of tires touching the fog line; and (5) following too closely. Officer
13 Moreira signaled for Rivera-Vasquez to pull to the side of the
14 highway. He testified at the suppression hearing that he planned for
15 the vehicle stop to occur in a "safety zone," but the car pulled over
16 approximately 50 feet ahead of that zone. Joint Appendix ("J.A.") 47.
17 At that point, the shoulders of the heavily trafficked Hutchinson River
18 Parkway were narrowed somewhat by snow that had accumulated as
19 a result of a recent storm.

20 Officer Moreira approached the driver's side window and, after
21 obtaining Rivera-Vasquez's license and registration, asked
22 Rivera-Vasquez where the two men were going to and coming from.
23 Officer Moreira testified at the suppression hearing that

1 Rivera-Vasquez told him they were going back to Massachusetts but
2 was “unable to provide an answer [to where they were coming from].
3 He basically looked over to [Santillan] and said we’re coming from
4 his aunt’s house,” but “could not give me any location specifically.”
5 J.A. 49. Officer Moreira then asked Santillan for his identification, and
6 Santillan provided a photocopy of a state license. Officer Moreira
7 repeated his question about where the two men had come from.
8 Santillan “was mentioning some type of city or town in—he
9 eventually mentioned New Jersey.” J.A. 50–51. Officer Moreira
10 testified that he spoke to the men in a combination of English and
11 Spanish, and that he is fluent in both languages. Officer Moreira
12 testified that both men “appeared very nervous, were avoiding
13 making eye contact,” “their voice was kind of shaky and they were
14 speaking in a low voice,” and that Rivera-Vasquez’s “hands were
15 shaking as he [handed] over the documents.” J.A. 50. Officer Moreira
16 returned to his patrol car to conduct license checks. Rivera-Vasquez’s
17 license and registration were valid, and there were no outstanding
18 warrants for either party. We note that the nervousness Officer
19 Moreira witnessed occurred even though neither man had an
20 outstanding warrant.

21 It is undisputed that at this point, approximately eight minutes
22 after initially stopping the car, Officer Moreira had the information
23 necessary to cite Rivera-Vasquez for the traffic violations he had

1 observed. However, Officer Moreira continued his investigation. At
2 Officer Moreira's request, Rivera-Vasquez got out of the car and
3 answered additional questions in Spanish regarding his relationship
4 with Santillan, their trip to Santillan's aunt's house, and Santillan's
5 aunt's name. Rivera-Vasquez did not know the name of Santillan's
6 aunt or the location of her home, where, he said, he and Santillan had
7 stayed overnight. He said he did not know Santillan well. Officer
8 Moreira performed a pat-down of Rivera-Vasquez, removed his
9 wallet and cell phone, then asked him to sit (uncuffed) in the back of
10 the patrol car. He told Rivera-Vasquez that he was not in trouble.

11 Officer Moreira then asked Santillan a few questions in Spanish
12 before asking him to get out of the car. Officer Moreira asked Santillan
13 where he and Rivera-Vasquez were coming from and how well they
14 knew each other. Santillan responded that he did not know Rivera-
15 Vasquez well, that they had stayed for one or two nights at Santillan's
16 aunt's house, and that his aunt lived somewhere in New Jersey,
17 although "[h]e had difficulty pronouncing the name [of the location]
18 and [Officer Moreira] had difficulty understanding [it]." J.A. 57.
19 During this conversation, Officer Moreira saw that there were energy
20 drinks and "multiple cell phones," which he later clarified to mean
21 more than one cell phone, in the center console. J.A. 58, 191. At this
22 point, Officer Moreira had already removed Rivera-Vasquez's cell
23 phone from his pocket, and thus had reason to believe that the car

1 contained more cell phones than occupants. At some point, Officer
2 Moreira noticed the passenger seat was higher than the driver's seat.
3 J.A. 59, 177. Officer Moreira also "observed [Santillan] to be very
4 hesitant in exiting" the car and "observed [Santillan] kind of look
5 down in his general area as a quick look over before he exited." J.A.
6 58-59.

7 In response to further questions, Santillan indicated that he had
8 no luggage, but had extra clothes in the car, and that he had \$80 on
9 him. Officer Moreira patted Santillan down and removed \$1,000 from
10 Santillan's back pants pocket. When Officer Moreira asked why he
11 had "lied" about the amount of money he had on him, Santillan
12 replied that he thought Officer Moreira was only asking about the
13 money in his front pockets. J.A. 61. Officer Moreira asked Santillan to
14 sit (uncuffed) in the back of a second patrol car which had arrived
15 during the stop. As with Rivera-Vasquez, Officer Moreira informed
16 Santillan that he was not in trouble or under arrest.

17 By this time, approximately 17 minutes had elapsed since
18 Officer Moreira first initiated the traffic stop. Officer Moreira then
19 asked for and received Rivera-Vasquez's verbal consent to search the
20 car. Officer Moreira and another officer searched the car for
21 approximately 20 minutes, during which time they noticed that the
22 seat material covering the passenger seat appeared to be different
23 than and newer than the material on the driver's seat. In addition, the

1 officers noticed that there was plastic wrapping in the space between
2 the cushion and the backrest of the passenger seat. According to
3 Officer Moreira's experience, which was based in part on Drug
4 Enforcement Administration training, the plastic wrapping was
5 consistent with wrapping used to transport narcotics. Officer Moreira
6 then requested a narcotics dog.

7 At this point, approximately 37 minutes after the stop began,
8 Officer Moreira wrote Rivera-Vasquez citations for three of the five
9 violations of New York's Traffic and Vehicle laws. About 67 minutes
10 after the stop began, the "narcotics canine" arrived on the scene and
11 indicated that the front passenger seat of the car was positive for the
12 presence of drugs. J.A. 75. Officer Moreira pulled back the seat and
13 found two packages of material later determined to contain cocaine.

14 Approximately 80 minutes after the stop began, both
15 Rivera-Vasquez and Santillan were arrested. At the police station,
16 Rivera-Vasquez signed a written consent to search form, which
17 Officer Moreira stated was to "reassure the consent that [he] had
18 received on the scene." J.A. 82. Shortly thereafter, both Rivera-
19 Vasquez and Santillan were arraigned on a complaint charging them
20 with drug offenses.

21 Santillan, joined by co-defendant Rivera-Vasquez, moved to
22 suppress all evidence found on his person and in the car, as well as
23 his statements to Officer Moreira. He argued in relevant part that the

1 officers lacked probable cause or reasonable suspicion to detain him
2 longer than eight minutes into the stop, the point at which Officer
3 Moreira had the information needed to issue traffic citations. He also
4 argued that the pat-down of his person was not supported by a
5 reasonable suspicion to believe that he was armed, that his statements
6 regarding the \$1,000 should be suppressed because they were the fruit
7 of illegally obtained evidence, and that his other pre-arrest statements
8 should be suppressed because they were obtained through the
9 coercive nature of a *de facto* arrest without *Miranda* warnings. The
10 district court denied this motion and a motion to reconsider following
11 *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), in which the Supreme
12 Court addressed the unlawful prolongation of traffic stops.

13 After the suppression motion was denied, Rivera-Vasquez
14 agreed to plead guilty and to become a cooperating witness against
15 Santillan. Rivera-Vasquez testified at Santillan's trial regarding
16 Santillan's role in distributing cocaine, heroin, oxycodone, and
17 Percocet. He testified that he had delivered oxycodone to Santillan
18 "several times" in packages of "between 1,500 and 2,000 pills." J.A.
19 517-18. Rivera-Vasquez also testified that Santillan had engaged in
20 other criminal activity, including the possession of an assault rifle
21 while trafficking in drugs and an attempted kidnapping of a person
22 whom Santillan and others suspected of stealing narcotics and
23 narcotics proceeds. According to Rivera-Vasquez's testimony,

1 Santillan and two other men asked the target of the attempted
2 kidnapping to join them in a car. When the target opened the car door
3 and saw Santillan holding an assault rifle, he fled. Rivera-Vasquez
4 testified that he had seen Santillan with a specific assault rifle, and
5 identified that assault rifle as the same one pictured in photographs
6 recovered from Santillan's phone.

7 The jury convicted Santillan on both counts of conspiracy and
8 possession of drugs with intent to distribute. The district court
9 sentenced Santillan principally to 151 months' imprisonment, at the
10 bottom of his sentencing guidelines range of 151 to 188 months.
11 Santillan timely appealed.

12 DISCUSSION

13 Santillan argues that we should vacate his conviction and
14 sentence because the district court erred by denying his motion to
15 suppress evidence seized from the vehicle and from his person and
16 statements he made during the course of the stop. His principal
17 contention is that the stop was unreasonably prolonged in violation
18 of the Fourth Amendment.¹ See *Rodriguez*, 135 S. Ct. at 1612, 1616.
19 Under *Rodriguez*, authority for a traffic-stop seizure ends when the
20 tasks tied to the traffic infraction are—or reasonably should have
21 been—completed, unless the officer develops reasonable suspicion of

¹ On appeal, Santillan does not challenge the basis of the traffic stop.

1 criminal activity sufficient to extend the stop. *Id.* at 1614–15. We
2 disagree with Santillan.

3 First, we conclude that Officer Moreira had reasonable
4 suspicion to extend the traffic stop. Second, we determine that Officer
5 Moreira had reasonable suspicion to believe that Santillan was armed,
6 and therefore had sufficient justification to frisk him. Although the
7 \$1,000 recovered during the frisk should not have been removed from
8 Santillan's pockets, it would have inevitably been discovered and
9 admitting Santillan's statements about it was harmless error. Third,
10 Santillan was never subject to custodial arrest and *Miranda* warnings
11 were not required. Fourth, Santillan's detention never ripened into a
12 *de facto* arrest, either due to the stop's duration or to the fact that
13 Santillan was placed in a police car, because Officer Moreira took
14 reasonable steps under the circumstances, and therefore probable
15 cause for Santillan's detention was not required. Finally, Santillan
16 cannot challenge the search of the car because he had no reasonable
17 expectation of privacy in it.

18 **I. Officer Moreira had Reasonable Suspicion to Prolong the**
19 **Stop of Santillan and his Investigatory Tactics Were**
20 **Reasonable**

21 On review of a challenged suppression order, we examine the
22 district court's findings of fact for clear error, reviewing *de novo*
23 questions of law and mixed questions of law and fact, including the

1 existence of reasonable suspicion to stop or extend a stop. *See United*
2 *States v. Singletary*, 798 F.3d 55, 59 (2d Cir. 2015). We view the totality
3 of the circumstances through the eyes of a reasonable and cautious
4 officer on the scene, whose insights are necessarily guided by the
5 officer's experience and training. *Id.* at 60–62. *See also United States v.*
6 *Bayless*, 201 F.3d 116, 133 (2d Cir. 2000) (noting that we ask “if the
7 conduct would appear suspect to one familiar with the practices of
8 narcotics couriers,” even if it would appear innocuous to an untrained
9 observer) (internal quotation marks omitted).

10 “Reasonable suspicion requires more than an inarticulate
11 hunch.” *United States v. Compton*, 830 F.3d 55, 61 (2d Cir. 2016)
12 (internal quotation marks and alteration omitted). “The suspicion
13 must derive from specific and articulable facts which, taken together
14 with rational inferences from those facts, provide detaining officers
15 with a particularized and objective basis for suspecting wrongdoing.”
16 *Id.* (internal quotation marks omitted). The reasonable suspicion
17 standard is “not high” and is “less demanding than probable cause,
18 requiring only facts sufficient to give rise to a reasonable suspicion
19 that criminal activity *may* be afoot.” *Singletary*, 798 F.3d at 60 (internal
20 quotation marks and citation omitted). Conduct that is as consistent
21 with innocence as with guilt may provide the basis for reasonable
22 suspicion where there is some indication of possible illicit activity. *See*
23 *United States v. Padilla*, 548 F.3d 179, 187 (2d Cir. 2008). “[N]ervous,

1 evasive behavior is a pertinent factor in determining reasonable
2 suspicion.” *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

3 In determining whether a traffic stop has reasonably been
4 extended into an investigatory seizure, we consider whether: (1) the
5 officer’s action was justified at its inception; and (2) the officer
6 diligently pursued a means of investigation that was likely to confirm
7 or dispel his or her suspicions quickly, during which time it was
8 necessary to detain the defendant. *United States v. Foreste*, 780 F.3d
9 518, 526 (2d Cir. 2015).

10 Here, Santillan does not dispute that the traffic stop, based
11 upon driving infractions, was valid at its inception. Santillan argues,
12 rather, that Officer Moreira lacked reasonable suspicion to prolong
13 the stop past the eight-minute mark, when the tasks needed to issue
14 the traffic citations were complete. We disagree. Officer Moreira had
15 reasonable suspicion to prolong the stop taking into account the
16 circumstances as a whole, including Santillan and Rivera-Vasquez’s
17 nervous behavior, illustrated by their avoidance of eye contact with
18 Officer Moreira and visibly shaking hands, coupled with their
19 inability to provide a clear answer as to where they had come from—
20 a fact that cannot be explained as the result of a language barrier
21 because Officer Moreira is fluent in Spanish and spoke to the men in
22 both English and Spanish.

1 We recognize that this is a close case, and that the factors
2 establishing reasonable suspicion are not overwhelming. We
3 conclude, however, that they were sufficient here to provide Officer
4 Moreira, an experienced police officer trained in narcotics trafficking
5 interdiction, with articulable and specific facts leading him to believe
6 that the two men may have been involved in some type of criminal
7 activity and that Officer Moreira had the authority to investigate
8 further.

9 Officer Moreira testified that Rivera-Vasquez and Santillan
10 were “very nervous” despite having no outstanding warrants that
11 could have explained their nervousness. J.A. 50.² Nervousness,
12 particularly extreme nervousness, is a factor supporting reasonable

² Although Judge Pooler professes shock that we would permit a negative inference based upon Rivera-Vasquez and Santillan being “very nervous” despite there being no open warrants against them, this is but one reasonable inference that an experienced officer could draw from the circumstances, as Officer Moreira did at trial. *See* J.A. 446. Judge Pooler devotes considerable attention to the factor of nervousness in her dissent, and we agree that there may be innocent explanations for showing some degree of nervousness in the presence of law enforcement officers. We disagree, however, that such possible innocent explanations negate reasonable suspicion here, where nervousness is just part of the totality of circumstances that Officer Moreira was permitted to consider. We assess reasonable suspicion from the perspective of a trained law enforcement officer on the scene, not from the perspective of an appellate judge. Thus, rather than spinning out innocent explanations for each factor piece by piece or substituting our view, in hindsight, for that of an experienced officer, our task is to consider the entire picture—as understood by the officer—to determine whether his suspicion had a reasonable basis.

1 suspicion. *See United States v. Bailey*, 743 F.3d 322, 334 (2d Cir. 2014);
2 *id.* at 350 (Pooler, J., concurring in part and dissenting in part)
3 (“Understandably, nervousness, odd, or furtive behavior have all
4 been identified by the Supreme Court as . . . important factor[s] in the
5 reasonable suspicion analysis, because such behavior in the presence
6 of law enforcement is reasonably linked to criminal activity.”).

7 In addition, Santillan and Rivera-Vasquez’s joint inability to
8 readily explain where they had just come from—even though
9 Rivera-Vasquez was driving and Santillan was purportedly related to
10 the woman from whose house they had allegedly come—provided
11 further basis for Officer Moreira to continue the investigation. We
12 have long recognized that reasonable suspicion may be based, at least
13 in part, on an implausible story, an implausible explanation of the
14 purpose of a trip, or a story that simply does not ring true. *See United*
15 *States v. Reyes*, 821 F.2d 168, 169–70 (2d Cir. 1987) (collecting cases).
16 Our sister circuits are in accord. *See United States v. Green*, 897 F.3d
17 173, 185–86 (3d Cir. 2018); *United States v. Calvetti*, 836 F.3d 654, 667
18 (6th Cir. 2016); *United States v. Collazo*, 818 F.3d 247, 258, 260 (6th Cir.
19 2016); *United States v. Sanford*, 806 F.3d 954, 956–57 (7th Cir. 2015);
20 *United States v. Simpson*, 609 F.3d 1140, 1148–51 (10th Cir. 2010); *United*
21 *States v. Foreman*, 369 F.3d 776, 784–85 (4th Cir. 2004). Further, Officer
22 Moreira noted at the trial that the stop occurred on the Hutchinson
23 River Parkway, a location that Officer Moreira knew to be a corridor

1 for drug trafficking.³ See *Wardlow*, 528 U.S. at 124; see also *Padilla*, 548
2 F.3d at 188.

3 Although any one of these factors, standing alone, might not
4 support reasonable suspicion, we do not subject factors pertaining to
5 an officer's reasonable suspicion to such a "divide-and-conquer
6 analysis." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Rather, we
7 view each factor as part of "the whole picture" from which an officer
8 draws "certain common sense conclusions about human behavior,"
9 *United States v. Cortez*, 449 U.S. 411, 418 (1981), even if those
10 conclusions "might well elude an untrained person." *Arvizu*, 534 U.S.
11 at 273 (internal quotation marks omitted). We consider and weigh
12 these factors "not in terms of library analysis by scholars, but as
13 understood by those versed in the field of law enforcement." *Cortez*,
14 449 U.S. at 418. Under this approach, we conclude that these factors,
15 taken together, provided Officer Moreira with reasonable suspicion.
16 The men's nervousness and inability to specify where they had come
17 from would have suggested to a reasonable officer with Officer
18 Moreira's experience that the men were struggling to fabricate a cover

³ While "[i]t is settled law that the validity of an arrest or search can be supported by evidence which was adduced at trial even though [it] was not presented at the pretrial suppression hearing," *United States v. Caniesco*, 470 F.2d 1224, 1226 (2d Cir. 1972), we need not rely on Officer Moreira's trial testimony here. The other factors supporting reasonable suspicion were sufficient.

1 story. We therefore hold that Officer Moreira had reasonable
2 suspicion to prolong the traffic stop.⁴

3 We next examine whether Officer Moreira diligently pursued a
4 means of investigation that was likely to confirm or dispel his
5 suspicions quickly. *Foreste*, 780 F.3d at 526. *See also United States v.*
6 *Sharpe*, 470 U.S. 675, 685 (1985). For the reasons that follow, we hold
7 that Officer Moreira diligently pursued reasonable means of
8 investigation and that Santillan was never subject to custodial
9 interrogation or a *de facto* arrest.

10 **A. Officer Moreira had reasonable suspicion that Santillan**
11 **was armed, the \$1,000 recovered during the frisk would**
12 **have inevitably been discovered, and admitting**
13 **Santillan’s statements about it was harmless error**

14 Santillan argues that the \$1,000 seized from his pocket should
15 have been suppressed because Officer Moreira lacked reasonable
16 suspicion to subject him to a pat-down or frisk. He reasons that if

⁴ In response to our decision in *United States v. Gomez*, 877 F.3d 76 (2d Cir. 2017), the government suggested, for the first time in a letter submitted via Fed. R. App. P. 28(j), that the good-faith exception provides a further basis to affirm because the Supreme Court had not decided *Rodriguez* when Officer Moreira stopped Santillan. *See United States v. Santillan*, No. 16-1112-cr, Dkt. No. 93 (2d Cir. Dec. 11, 2017). We decline to consider this argument because the government forfeited it and proffered no reason for doing so, particularly after Santillan filed a reconsideration motion predicated on *Rodriguez*. *See* No. 16-1112-cr, Dkt. No. 95 (2d Cir. Dec. 14, 2017); J.A. 357–67; *cf. Gomez*, 877 F.3d at 94–95.

1 Officer Moreira had truly been concerned for his safety, he would
2 have frisked both Rivera-Vasquez and Santillan immediately upon
3 asking them to get out of the car, or he would not have turned his
4 back on Santillan as Santillan got out. We are not persuaded.

5 For the frisk to have been lawful, Officer Moreira must have
6 had reasonable suspicion that Santillan was armed and dangerous.
7 *See Arizona v. Johnson*, 555 U.S. 323, 326–27 (2009). Officer Moreira had
8 reasonable suspicion to believe that Santillan was armed and
9 dangerous based on the totality of the circumstances. We have
10 already concluded that Officer Moreira had reasonable suspicion to
11 believe that Santillan was involved in some type of criminal activity.
12 Further questioning heightened rather than dispelled those
13 suspicions. In addition, Officer Moreira testified that he had observed
14 several indicators of possible narcotics activity, specifically the
15 differences between the seat heights and the presence of multiple cell
16 phones.

17 Narcotics activity and weapons often go hand in hand, *see*
18 *United States v. Oates*, 560 F.2d 45, 62–63 (2d Cir. 1977), and the type
19 of investigative detention at issue here is fraught with danger for the
20 officer. *See Johnson*, 555 U.S. at 330–31; *Pennsylvania v. Mimms*, 434 U.S.
21 106, 110 (1977); *see also Oates*, 560 F.2d at 63. Officer Moreira had a
22 sufficient basis to suspect that Santillan may have been armed and
23 dangerous to conduct a frisk in order to ensure his own safety and the

1 safety of other officers as the investigation continued. *See United States*
2 *v. McCargo*, 464 F.3d 192, 200 (2d Cir. 2006).

3 Santillan suggests that Officer Moreira's decision to question
4 Santillan before frisking him casts doubt on whether Officer Moreira
5 had sufficient reason to conduct the frisk. We disagree. Officer
6 Moreira questioned Santillan in order to confirm or dispel his
7 suspicions. Only then did he subject Santillan to a more-intrusive
8 frisk. This course of action was *less* intrusive, and *more* in line with the
9 protection of constitutional rights, than requiring Officer Moreira to
10 have frisked Santillan as soon as he left the car or not at all. Neither
11 common sense nor our own precedent demand such a choice. *See*
12 *United States v. Diaz*, 854 F.3d 197, 207 (2d Cir. 2017).

13 Santillan next argues that Officer Moreira unlawfully seized
14 \$1,000 from his pants pocket and neither the money nor Santillan's
15 statements about it should have been admitted. We agree with the
16 district court that Officer Moreira's frisk exceeded Fourth
17 Amendment limitations. During a pat-down or frisk for weapons and
18 contraband, officers are only permitted to remove for further
19 inspection objects that are immediately apparent as such. *See, e.g.,*
20 *Minnesota v. Dickerson*, 508 U.S. 366, 375–76 (1993). The \$1,000 in cash
21 Santillan had on his person was neither weapons nor contraband, and
22 Officer Moreira should not have removed it from Santillan's pockets
23 during the frisk. Nevertheless, we conclude, as did the district court,

1 that the \$1,000 was admissible because it would have been inevitably
2 discovered during a search incident to arrest after the officers
3 discovered cocaine in the car. *See, e.g., Nix v. Williams*, 467 U.S. 431,
4 443–44 (1984); *United States v. Eng*, 971 F.2d 854, 861–62 (2d Cir. 1992).

5 While the \$1,000 was admissible, it still was improperly taken
6 and thus Santillan’s statements about it were not admissible. They
7 were the fruit of the poisonous tree and should have been suppressed.
8 *See Bailey*, 743 F.3d at 341.

9 Nevertheless, where evidence obtained in violation of
10 constitutional rights is wrongfully admitted at trial, the error can be
11 deemed harmless where it appears “beyond a reasonable doubt” that
12 it “did not contribute to the verdict obtained.” *See Weaver v.*
13 *Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (quoting *Chapman v.*
14 *California*, 386 U.S. 18, 24 (1967)); *United States v. Dhinsa*, 243 F.3d 635,
15 658–64 (2d Cir. 2001). In order to assess harmlessness, we must
16 “consider the importance of the erroneously admitted statements to
17 the government’s proof of guilt.” *Bailey*, 743 F.3d at 342. A number of
18 factors inform this analysis, chief among them the strength of the
19 prosecution’s case absent the erroneously admitted statements. *See*
20 *United States v. Okatan*, 728 F.3d 111, 120 (2d Cir. 2013). We also
21 consider the materiality of the improperly admitted evidence to
22 critical facts in the case, whether the evidence was cumulative, and
23 the prosecutor’s conduct regarding the evidence. *Id.*

1 Although Santillan notes that the government relied on
2 Santillan's statements throughout his trial, we easily conclude that the
3 statements were cumulative because of the overwhelming evidence
4 of Santillan's guilt and the relative insignificance of the statements
5 pertaining to the \$1,000. The government presented a strong case,
6 consisting of the narcotics uncovered in the car, pictures from
7 Santillan's cellphone, the \$1,000 in cash from Santillan's person, and
8 the corroborated testimony of Rivera-Vasquez. Santillan's statements
9 about the \$1,000 and the prosecutor's argument that his initial
10 dishonesty tended to prove that he knew about the narcotics hidden
11 in the car were not of major import in light of the totality of the
12 evidence against Santillan. *See Bailey*, 743 F.3d at 344–45 (noting that
13 where the government first has to prove exculpatory disclaimers were
14 false, in order to urge the jury to infer consciousness of guilt, those
15 statements cannot be deemed particularly important to the
16 prosecution's case); *United States v. Treacy*, 639 F.3d 32, 45–46 (2d Cir.
17 2011). Thus any error in admitting the statements was harmless.

18 **B. There was no custodial interrogation or *de facto* arrest and**
19 ***Miranda* warnings were not required**

20 Santillan argues that all of his statements should have been
21 suppressed because he was subjected to a *de facto* arrest but was not
22 given *Miranda* warnings. Thus, any evidence recovered from the car
23 should have been suppressed as the fruit of an unlawful *de facto* arrest.

1 We agree with the district court that Santillan was never subject to
2 custodial interrogation or a *de facto* arrest and thus these arguments
3 are without merit.

4 We review *de novo* a district court's determination as to whether
5 a suspect was in custody for the purposes of *Miranda*. See *United States*
6 *v. Newton*, 369 F.3d 659, 668 (2d Cir. 2004). We use a two-step,
7 objective test, that asks whether: (1) a reasonable person in the
8 defendant's position would have understood that he or she was free
9 to leave; and (2) there was a restraint of freedom of movement akin to
10 that associated with a formal arrest. See *United States v. Faux*, 828 F.3d
11 130, 135 (2d Cir. 2016). For the second step, relevant factors are
12 whether the suspect is told that he or she is free to leave, the location
13 and atmosphere of the interrogation, the language and tone used by
14 the law enforcement officers, whether the subject is searched or
15 frisked, and the length of the interrogation. *Tankleff v. Senkowski*, 135
16 F.3d 235, 243–44 (2d Cir. 1998); see also *Newton*, 369 F.3d at 672
17 (explaining that the *Tankleff* factors are relevant to the second part of
18 the *Miranda* custody inquiry, and clarifying the order in which the
19 questions are asked).

20 In considering whether Santillan would reasonably have
21 considered himself free to leave, we note both the similarities and
22 dissimilarities as between this stop and a typical traffic stop.
23 Although we have already concluded that this traffic stop was

1 prolonged into an investigatory stop, the location and atmosphere of
2 the questioning resembled a traffic stop in those respects that bear on
3 the question of whether Santillan would have been any less free to
4 leave than he would have been during a typical traffic stop. First,
5 Santillan was questioned in public view on the side of the road about
6 his relationship to the driver and details about their travels. Second,
7 Officer Moreira never handcuffed Santillan or displayed a weapon.
8 Although Santillan was frisked and directed to wait in the police car
9 while Officer Moreira and two more officers who arrived later
10 continued their investigation, he was told that he was not under
11 arrest. On the balance, this stop bore a much greater similarity to a
12 traffic stop or *Terry* stop than to the type of custodial interaction that
13 would trigger the requirement of *Miranda* warnings. See *Berkemer v.*
14 *McCarty*, 468 U.S. 420, 437–39 (1984).

15 As for the “ultimate inquiry” of whether there was a restraint
16 of freedom of movement akin to that associated with a formal arrest,
17 *Newton*, 369 F.3d at 670, we consider whether a reasonable person in
18 Santillan’s position would have understood that his detention was
19 not likely to be “temporary and brief” and whether a person stopped
20 under the circumstances at issue would feel that he was “completely
21 at the mercy of the police.” *Id.* at 675 (quoting *Berkemer*, 468 U.S. at
22 437–38). See also *Howes v. Fields*, 565 U.S. 499, 509 (2012). In *Newton*, we
23 addressed the distinctions between a Fourth Amendment and a

1 *Miranda* analysis, 369 F.3d at 669–72, concluding that *Miranda*’s
2 concern is not with the reasonableness of an officer’s actions but with
3 “the facts known to the seized suspect and whether a reasonable
4 person would have understood that his situation was comparable to
5 a formal arrest.” *Id.* at 675. Here, Santillan was questioned, frisked,
6 and asked to sit in the back of a police car, but he was not handcuffed
7 and was told that he was not under arrest. He could observe two
8 police officers attempting to deal with the difficulties of interviewing
9 two people on a snow-covered shoulder of a heavily trafficked
10 highway following a legitimate traffic stop and could reasonably
11 appreciate that his placement in a patrol car was for safety reasons.
12 Under these circumstances, we conclude that a reasonable person
13 would not have felt that he was subject to a formal arrest, and
14 therefore that *Miranda* warnings were not required.

15 Our analysis of whether a *de facto* arrest occurred, however,
16 shifts from Santillan’s perspective of the seizure to Officer Moreira’s.
17 Specifically, we ask whether Officer Moreira’s actions were
18 reasonable under the circumstances. *See id.* at 673–74. To determine
19 whether a stop is so intrusive that it becomes a *de facto* arrest, we look
20 to: the amount of force used by police, the need for such force, and
21 the extent to which the suspect’s freedom of movement was
22 restrained. *United States v. Vargas*, 369 F.3d 98, 101 (2d Cir. 2004). In
23 particular, we consider the number of officers involved, whether the

1 target of the stop was suspected of being armed, the duration of the
2 stop, and the physical treatment of the suspect, including whether
3 handcuffs were used. *United States v. Perea*, 986 F.2d 633, 645 (2d Cir.
4 1993).

5 Santillan's arguments that the stop became a *de facto* arrest
6 focus on two aspects: (1) he was placed in the back of a police car; and
7 (2) the duration of the stop was too lengthy to be considered an
8 investigatory stop. We disagree. The stop was not extended
9 unreasonably and did not employ tactics more invasive than
10 necessary under the circumstances, which included the dangers and
11 difficulty of questioning two suspects separately on a highway
12 shoulder narrowed by snow. *See Florida v. Royer*, 460 U.S. 491, 504
13 (1983); *Mimms*, 434 U.S. at 111. At all times, Officer Moreira and the
14 two officers eventually assisting him were engaged in steps to dispel
15 or confirm their reasonable suspicions. *See United States v. Tehrani*, 49
16 F.3d 54, 61 (2d Cir. 1995). Although those steps prolonged the stop,
17 they did not do so unreasonably. *See Bailey*, 743 F.3d at 336.

18 Officer Moreira's decision to place Santillan in the back of a
19 police car did not transform the stop into an arrest because the
20 decision was a reasonable response to legitimate safety concerns. *See*
21 *Vargas*, 369 F.3d at 102. Because we conclude that Officer Moreira's
22 actions were at all times reasonable steps to confirm or dispel his
23 suspicions and were appropriate responses to the hazardous

1 conditions presented, we have no reason to explore whether the
2 plastic wrapping discovered in the seat cushions, together with the
3 other evidence, would have provided sufficient probable cause to
4 arrest Santillan earlier in the stop.

5 **C. Santillan cannot challenge the search of the car because he**
6 **had no reasonable expectation of privacy in it and the**
7 **district court did not clearly err in holding that**
8 **Rivera-Vasquez consented to the search**

9 Finally, Santillan argues that the evidence from
10 Rivera-Vasquez's car should be suppressed because
11 Rivera-Vasquez's consent to search was tainted by an unreasonably
12 prolonged and intrusive stop and was therefore not voluntarily given.
13 Although Santillan has standing to challenge the prolongation of the
14 traffic stop, *see Brendlin v. California*, 551 U.S. 249, 251 (2007), he lacked
15 standing to challenge the search of the car because he had no
16 reasonable expectation of privacy in a car being driven by and
17 registered under the name of a man he claimed not to know very well.
18 *See Rakas v. Illinois*, 439 U.S. 128, 142–43, 148 (1978).

19 "Fourth Amendment rights are personal rights that may not be
20 asserted vicariously." *Id.* at 133. "Accordingly, a defendant's Fourth
21 Amendment rights are violated 'only when the challenged conduct
22 invade[s] *his* legitimate expectation of privacy rather than that of a
23 third party.'" *United States v. Haqq*, 278 F.3d 44, 47 (2d Cir. 2002)

1 (quoting *United States v. Payner*, 447 U.S. 727, 731 (1980)). A
2 “defendant seeking suppression of evidence found without a search
3 warrant must show that he had a reasonable expectation of privacy in
4 the place or object searched.” *United States v. Delva*, 858 F.3d 135, 148
5 (2d Cir. 2017). One need not be the owner of the property for his
6 privacy interest to be one that the Fourth Amendment protects, so
7 long as he has the right to exclude others from dealing with the
8 property. *Perea*, 986 F.2d at 639–40.

9 Santillan had no reasonable expectation of privacy in
10 Rivera-Vasquez’s car because he had no right to exclude others from
11 it and he assumed the risk that its owner would grant consent for the
12 search. *See United States v. Paulino*, 850 F.2d 93, 97 (2d Cir. 1988). *See*
13 *also United States v. Buettner-Janusch*, 646 F.2d 759, 764 (2d Cir. 1981).
14 Because Santillan did not have an objectively reasonable expectation
15 of privacy in the area under or behind the passenger seat, he has no
16 standing to challenge whether Rivera-Vasquez’s consent to search
17 was voluntary. We note, however, that the district court found that it
18 was, and we would not disturb such a finding absent a showing of
19 clear error, which Santillan fails to make here. *See United States v.*
20 *Arango-Correa*, 851 F.2d 54, 57 (2d Cir. 1988).

21 * * *

22 We have considered each of Santillan’s challenges to the stop,
23 frisk, and search and find them unavailing. We therefore affirm the

1 district court's denial of Santillan's motions to suppress evidence
2 from the car and from his person. While the district court erred in
3 admitting statements regarding the \$1,000, the error was harmless.

4 CONCLUSION

5 For the foregoing reasons, we AFFIRM the district court's
6 denial of Santillan's motion to suppress evidence recovered from the
7 vehicle search and search of his person and the statements he made
8 over the course of the stop. For the reasons stated in this opinion and
9 in the summary order issued simultaneously with this opinion that
10 addresses Santillan's remaining arguments, we AFFIRM the
11 judgment of the district court in all respects.

1 POOLER, *Circuit Judge*:

2
3 I respectfully dissent. I would hold that the officers lacked reasonable
4 suspicion to prolong the stop beyond the time needed to issue the traffic citation,
5 in violation of the Fourth Amendment and *Rodriguez v. United States*, 135 S. Ct.
6 1609 (2015), and reverse the judgment of the district court.

7 This case is a clear example of officers acting on a “mere hunch,” without
8 reasonable suspicion. *Dancy v. McGinley*, 843 F.3d 93, 106 (2d Cir. 2016). The
9 indefinite, nondescript nature of the officers’ suspicions is apparent from Officer
10 Moreira’s testimony, which is replete with passages like, “I felt that his behavior
11 was suspicious. It was raising my suspicion, at least. He was too nervous.
12 Something was off...” Joint App’x at 54. As this and similar testimony
13 demonstrates, in deciding to detain, question and search Santillan and Rivera-
14 Vasquez, the officers relied principally on their perception that the men were
15 “too nervous” and “off.” Joint App’x at 50, 54, 59. Such subjective and slippery
16 descriptions simply are not the type of “specific and articulable facts” we require
17 to support reasonable suspicion. *United States v. Singletary*, 798 F.3d 55, 59 (2d
18 Cir. 2015). Beyond nervousness, the sole additional factor given for prolonging
19 the stop was an unsatisfactory response from the men regarding their point of

1 origin. But nearly every stop will produce some answer that could be as vaguely
2 unavailing in the mind of the officer as the answers given here. Accordingly, by
3 condoning the officers' handling of this incident, I fear the majority may winnow
4 the protections of the Fourth Amendment to a near nullity whenever an officer
5 deems an individual simply "too nervous." Joint App'x at 54.

6 I. No Reasonable Suspicion to Prolong Traffic Stop

7 In *Rodriguez*, the Supreme Court clarified that, when an officer conducts a
8 traffic stop, "[a]uthority for the seizure ... ends when tasks tied to the traffic
9 infraction are—or reasonably should have been—completed." 135 S. Ct. at 1614;
10 see also *United States v. Gomez*, 877 F.3d 76, 89-90 (2d Cir. 2017) (holding that
11 *Rodriguez* abrogates prior Circuit rule regarding duration of traffic stops). As a
12 result, "unrelated inquiries that prolong or add time to a traffic stop violate the
13 Fourth Amendment absent reasonable suspicion of a separate crime." *Gomez*, 877
14 F.3d at 90.

15 Here, Officer Moreira testified that he had obtained all the information he
16 needed to issue the traffic citation eight minutes into the stop. Thus, to comport
17 with the Fourth Amendment, the prolongation of the stop after this point must
18 be justified by reasonable suspicion of an independent crime.

1 As the majority explains, the basis for reasonable suspicion to extend the
2 stop past the eight-minute mark effectively amounts to (i) nervousness, and
3 (ii) an unsatisfactory description of the pair's point of origin. Op. at 15. With
4 regard to nervousness, on direct, Officer Moreira gave the following descriptions
5 of Santillan and Rivera-Vasquez's behavior throughout the stop:

- 6 • "They appeared very nervous, were avoiding making eye contact. I
7 noticed that their voice was kind of shaky and they were speaking in a low
8 voice, and Mr. Vasquez's hands were shaking as he was handing me over
9 the documents." Joint App'x at 50.
- 10
- 11 • *With regard to Rivera-Vasquez*: "I felt that his behavior was suspicious. It
12 was raising my suspicion, at least. He was too nervous. Something was
13 off..." Joint App'x at 54.
- 14
- 15 • *With regard to Santillan*: "[I noticed] his nervous behavior, the fact that he
16 looked over the area. It was a totality of the situation. He looked over the
17 area where he was sitting. His nervous behavior. ... His vague answers,
18 his hesitance to exit the vehicle, his shakiness in the voice, and his nervous
19 behavior was just a little off." Joint App'x at 59.¹

¹ I note that these last two answers were given in response to questions about why Officer Moreira felt he needed to frisk Santillan and Rivera-Vasquez. The frisks occurred after the eight-minute mark, and Officer Moreira cited nothing more as justification. I find this testimony pertinent to the analysis of whether reasonable suspicion existed prior to the eight-minute mark because it tracks the behavioral descriptions Officer Moreira gave about the pair both before and after the eight-minute mark: namely, that he found them to be too nervous. At no point did Officer Moreira testify that the men exhibited more extreme behavior. Further, on the separate question of whether the frisks were warranted, in my view, these answers are surely insufficient to establish that Officer Moreira reasonably believed that the pair were "armed and dangerous," *Arizona v. Johnson*, 555 U.S. 323, 129 S.Ct. 781, 784 (2009), as needed to justify the frisks.

1 Officer Moreira also testified that the pair gave answers that he considered
2 inordinately vague about their point of origin. Both Rivera-Vasquez and
3 Santillan said they were coming from Santillan's aunt's house. Rivera-Vasquez
4 did not identify a geographical location; Santillan said that the aunt's house was
5 in New Jersey, and tried to further name "some type of city or town," which
6 Officer Moreira did not understand. Joint App'x at 50-51.

7 In my view, looking to the totality of the circumstances, these grounds do
8 not provide a basis for anything more than "an inchoate and unparticularized
9 suspicion or hunch," and are insufficient to satisfy the Fourth Amendment.

10 *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (quotation marks omitted). Though we
11 do not demand much to satisfy the reasonable suspicion standard, I disagree
12 with my colleagues that this case falls just over the line into permissible territory.

13 First, there are myriad reasons to be wary when, as here, an officer appeals
14 repeatedly to his assessment that "something was off." Joint App'x at 54; *see also*
15 Joint App'x at 59. It is the very definition of an "inarticulate hunch[]." *Terry v.*
16 *Ohio*, 392 U.S. 1, 22 (1968). The protections of the Fourth Amendment depend on
17 requiring something more than a faint statement of intuition. As the Supreme
18 Court has routinely emphasized, "[i]f subjective good faith alone were the test,

1 the protections of the Fourth Amendment would evaporate, and the people
2 would be secure in their persons, houses, papers and effects, only in the
3 discretion of the police.” *Id.* (quotation marks omitted).

4 Beyond the assertions that “something was off,” Officer Moreira testified
5 that Santillan and Rivera-Vasquez were “very nervous,” “too nervous,” and
6 exhibited “nervous behavior.” Joint App’x at 50, 54, 59. A pronounced nervous
7 reaction is, of course, a “pertinent factor in determining reasonable suspicion.”
8 *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Depending on the severity or
9 character of the nervousness, and the combination of other factors present, it may
10 well contribute to a finding of reasonable suspicion. Our inquiry is based on a
11 “totality of the circumstances principle,” *United States v. Singletary*, 798 F.3d 55,
12 60 (2d Cir. 2015) (quotation marks omitted), and thus we must look to all
13 pertinent indicia of legal wrongdoing—including, naturally, the individual’s
14 actions. *See, e.g., United States v. Arvizu*, 534 U.S. 266, 276-77 (2002). For example,
15 flight from the police, viewed in conjunction with other factors, may provide
16 sufficient grounds to investigate. *See Wardlow*, 528 U.S. at 124-25.

17 But reports of generalized nervousness, like Officer Moreira gave here, do
18 not independently contribute much towards establishing a “particularized and

1 objective basis” for a stop. *Wardlow*, 528 U.S. at 128. Though less problematic
2 than a statement that “something was off,” an officer’s report of nervousness is
3 similarly subjective, indefinite, and too easily conflated with intuition. “Whether
4 you stand still or move, drive above, below, or at the speed limit, you will be
5 described by the police as acting suspiciously should they wish to stop or arrest
6 you. Such subjective, promiscuous appeals to an ineffable intuition should not be
7 credited.” *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) (Posner, J.).
8 We must be particularly skeptical where, as here, the reported nervousness is not
9 evidenced by some more extreme behavior—such as flight from the police—but
10 only by more generalized observations.

11 Further, we should not blind ourselves to the reality that an individual’s
12 race and ethnicity often will affect assessments of that individual’s behavior. *See*
13 *United States v. Hussain*, 835 F.3d 307, 314–15 (2d Cir. 2016) (“Part of our trouble is
14 that stops fitting the same fact pattern (but, say, different passengers of another
15 race, gender, or ethnicity) would, we think, rarely if ever lead the police to
16 suspect the passengers posed an immediate danger.”). Murky descriptors like
17 “nervous” may well implicate biases—which are often implicit and unknown to
18 the officer—that code one individual’s behavior as more suspicious only because

1 of the color of her skin. See Al Baker, *Confronting Implicit Bias in the New York*
2 *Police Department*, N.Y. Times, July 15, 2018 (discussing NYPD's recent efforts to
3 address implicit bias among officers). "[S]pecificity in articulating the basis for a
4 stop is necessary in part because according the police unfettered discretion to
5 stop and frisk could lead to harassment of minority groups and severely
6 exacerbate police-community tensions." *Dancy*, 843 F.3d at 111 (quotation marks
7 omitted). Relying on an officer's report of generalized nervousness is simply too
8 imprecise to meet this goal.

9 To the degree that Officer Moreira testified to objective indicia of
10 nervousness—shaky hands, and a “kind of shaky” voice, Joint App'x at 50—
11 these reactions are quite mundane. Nearly everyone is nervous enough to exhibit
12 some type of reaction when stopped by the police. Unlike a sudden flight from
13 law enforcement, *Wardlow*, 528 U.S. at 124-25, these common indications of
14 nervousness are a normal, routine response to being stopped. We have
15 recognized that many individuals understandably find police contact “stressful
16 and prefer to avoid interactions with law enforcement when possible.” *United*
17 *States v. Compton*, 830 F.3d 55, 62-63 (2d Cir. 2016) (Walker, J.). In the context of a
18 traffic stop, the knowledge that an officer may soon issue a ticket, or may take

1 further action, is unnerving under the best of circumstances. Thus, using
2 “commonsense judgments and inferences about human behavior,” these
3 common indications of nervousness are of comparatively little value in finding
4 reasonable suspicion. *Wardlow*, 528 U.S. at 125.

5 Troublingly, in an effort to vindicate the actions of the officers, my
6 colleagues come perilously close to claiming that only guilty people—or those
7 with an open warrant for arrest—should experience nervousness when stopped
8 by police. They write that Santillan and Rivera-Vasquez were “‘very nervous’
9 despite having no outstanding warrants that could have explained their
10 nervousness.” *Op.* at 16. This is shocking: an open warrant is hardly the only
11 reason an individual might feel nervous. For most of us, the stop alone suffices to
12 upend any feeling of calm.

13 Further, it is worth noting that a review of the dashboard footage, which
14 was introduced at the suppression hearing, casts some doubt on the objective
15 presence of visible nervousness. When both Rivera-Vasquez and Santillan were
16 asked to step out of the vehicle (after the eight-minute mark), the ensuing
17 interactions took place in full view of Officer Moreira’s dashboard camera
18 (though only very limited audio is captured). I would expect any nervousness to

1 be on full display at this point, after Officer Moreira escalated the situation by
2 asking the men to step out of the vehicle. But the footage leaves the opposite
3 impression. Officer Moreira testified that both Santillan and Rivera-Vasquez's
4 nervousness resulted in the pair avoiding eye contact, speaking in a low voice,
5 and, in Rivera-Vasquez's case, shaky hands. But on the video both Santillan and
6 Rivera-Vasquez seem to be looking the officers in the face, speaking with
7 reasonable animation, and, at one point, even perhaps joking with the officers. I
8 will admit the two appear potentially to be cold. It was, after all, February in
9 New York City, and snow lined the roadsides. But, based on my review of the
10 pair's demeanor on camera, I simply do not share Officer Moriera's perception
11 that they were visibly, highly nervous. Thus, while I would not argue that the
12 district court clearly erred in accepting the officers' testimony to the effect that
13 Santillan and Rivera-Vasquez were nervous, it is worth noting that this case
14 provides a strong example of why nervousness often lies in the eye of the
15 beholder.

16 Finally, in addition to nervousness, the sole other factor at the eight-
17 minute mark was the unsatisfactory answer given by the pair regarding their
18 point of origin. Rivera-Vasquez reported that they were traveling from

1 Santillan's aunt's house; Santillan said the aunt's house was in New Jersey, and
2 tried to specify a town, but Officer Moreira was unable to understand him. These
3 answers are hardly suspect.

4 Beginning at the outset of the traffic stop, when asked where they were
5 coming from, Rivera-Vasquez, the driver, said Santillan's aunt's house. First, it is
6 important to recall that officers routinely ask similar questions, but drivers are
7 under no obligation to provide such information. *See Berkemer v. McCarty*, 468
8 U.S. 420, 439 (1984) (during *Terry* stops, including traffic stops, "detainee is not
9 obliged to respond" to officer's questions); *but see Hiibel v. Sixth Judicial Dist.*
10 *Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 187 (2004) (consistent with the
11 Fourth Amendment, state law may require detainee to identify herself during
12 *Terry* stop). Rivera-Vasquez nonetheless reported that he was coming from
13 Santillan's aunt's house. Though perhaps it would have been preferable to give a
14 geographic location, it is not particularly noteworthy that Rivera-Vasquez could
15 not immediately do so. After all, it was Santillan's aunt's house, not Rivera-
16 Vasquez's, where they reported beginning the trip. And both Rivera-Vasquez
17 and Santillan produced identification showing that they were from out of state—
18 Rivera-Vasquez from Massachusetts, and Santillan from New Hampshire. Thus

1 Rivera-Vasquez's reply might well have reflected only a lack of familiarity with
2 the area. Further, in an era when many drivers are fully dependent on computer
3 mapping programs to provide directions, it is unsurprising that the men—both
4 from out of state—may have had a somewhat imprecise understanding of the
5 location of the aunt's house. Many people today let their cell phone tell them
6 exactly where to go, without troubling themselves as to the specifics.

7 Further, once Officer Moreira moved to the passenger side door, after
8 spending approximately one minute at the driver side door, Santillan specified
9 the state of origin as New Jersey. This would seem to be a sufficient answer to an
10 officer's query of "where are you coming from" on a routine traffic stop in New
11 York.

12 Finally, it is important to emphasize that it is unclear how much may have
13 been lost in translation, since the conversation took place in both English and
14 Spanish. The majority insists that there must not have been any
15 miscommunication since Officer Moreira is a native Spanish speaker, and
16 conversed with the men in both languages. Op. at 15. But Officer Moreira himself
17 testified that he had difficulty understanding Santillan. *See* Joint App'x at 57
18 (Officer Moreira testimony that Santillan "had difficulty pronouncing the name

1 and I had difficulty understanding the name of where he was – the city or
2 township where he was saying, but he did mention that it was in New Jersey”).
3 Thus it is not at all clear that the pair actually failed to provide the more specific
4 answers that Officer Moreira was pressing for; rather, from Officer Moreira’s
5 own recollection, it is clear that at least Santillan attempted to provide further
6 information, but Officer Moreira had difficulty understanding him.

7 Accordingly, in my view, the answers given by the men do not suffice to
8 push this stop across the line and establish reasonable suspicion. The men
9 specified that they were coming from Santillan’s aunt’s house in New Jersey, and
10 there was some difficulty speaking across two different languages, which
11 prevented them from communicating the more specific answer Officer Moreira
12 sought. Many drivers, already nervous, will provide answers that the officer
13 might find just as vaguely wanting as these.

14 Accordingly, in my view, there was not reasonable suspicion to prolong
15 the stop past the eight-minute mark, when Officer Moreira should have
16 completed the traffic citation. Though Officer Moreira felt their answers were
17 unsatisfactory and their behavior “too nervous,” such perceptions could only
18 provide a basis for a hunch (which, of course, was later proven to be correct). But

1 they do not provide articulable grounds to believe the pair were engaged in
2 “legal wrongdoing.” *Singletary*, 798 F.3d at 59. Indeed, I fear that because
3 nervousness is a near-universal response to being pulled over by a police
4 officer—regardless of whether the person has anything to hide—and because an
5 officer may easily find one answer or another vague and unsatisfactory during
6 the typical traffic stop, the majority’s analysis could be used to justify all manner
7 of investigatory stops that have no basis other than the officer’s indistinct
8 suspicion.

9 II. Events Following the Eight Minute Mark

10 Because I would not find reasonable suspicion to prolong the stop, I do not
11 address the events following the eight-minute mark in great detail. But I offer a
12 few observations, as Officer Moreira’s actions following the eight-minute mark
13 provide further indication that he was following up on a hunch, in disregard of
14 the strictures of the Fourth Amendment.

15 After the eight-minute mark, Officer Moreira returned from his patrol car
16 and asked Rivera-Vasquez to exit the vehicle. He then frisked Rivera-Vasquez,
17 pulled out his wallet, examined its contents, and asked Rivera-Vasquez to sit in
18 the back of his patrol car, thus locking him in the backseat (after reassuring him

1 that he “wasn’t in any trouble,” Joint App’x at 55). Officer Moreira then repeated
2 this process with Santillan, removing the contents of his pockets and asking him
3 to sit in the back of another police car.

4 First, it is plain that these actions violated the Fourth Amendment. Even
5 the majority concludes that the search of Santillan’s pockets was impermissible,
6 since there was no basis to believe that what turned out to be cash was either a
7 weapon or contraband, as required to remove an item for inspection during a
8 safety frisk. Op at 21-22. Of course, removing the contents of the pair’s pockets
9 did serve one clear purpose: allowing Officer Moreira to continue his
10 investigation by riffling through the men’s belongings in hopes of turning up
11 evidence.

12 Second, Officer Moreira’s testimony following the eight-minute mark
13 shows that his suspicions were elevated by a number of utterly commonplace
14 items. For example, Officer Moreira testified to becoming increasingly suspicious
15 after observing energy drinks, one extra cellphone, and cell phone chargers. I
16 imagine many college students might be surprised to hear that energy drinks
17 figured prominently into the calculus. Similarly, anyone who has been required

1 to carry a separate cell phone specifically for work might find the officers'
2 suspicions based on one extra phone rather strained. I certainly do.

3 * * *

4 Accordingly, I cannot agree that the officers had reasonable suspicion to
5 prolong the stop any longer than necessary to issue the ticket. Generalized
6 nervousness combined with an imprecise response about the point of origin is
7 simply not enough to satisfy the Fourth Amendment.

8 In my view, finding reasonable suspicion based largely on ineffable
9 perceptions that an individual was “too nervous” runs roughshod over the
10 requirement that an officer provide a “particularized and objective basis” for a
11 stop. *Wardlow*, 528 U.S. at 128. Further, finding reasonable suspicion here risks
12 granting officers unfettered discretion to detain anyone they wish based on a
13 passing hunch. Many—if not most—traffic stops will yield nervous drivers and
14 one or another answer that the officer could find unsatisfactory in some regard.
15 Though reasonable suspicion is not a demanding standard, if it is to retain any
16 meaning, it must require more than the impressionistic suspicions that Officer
17 Moreira supplied here.

18 For these reasons, I respectfully dissent.