IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KHALEN RICHARD PRICE WILLIAMS, Defendant-Appellant.	)	S.CT. NO. 19-1857

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE LAWRENCE P. MCLELLAN (SUPPRESSION)
AND HONORABLE SAMANTHA GRONEWALD
(TRIAL & SENTENCING), JUDGES

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED DECEMBER 16, 2020

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CERTIFICATE OF SERVICE

On the 4th day of January, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Khalen Williams, 1334 11th St., Des Moines, IA 50314.

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QUESTIONS PRESENTED FOR REVIEW

I. Was error preserved for appeal on Williams' argument that Maryland v. Wilson should be rejected under the Iowa Constitution? Trial counsel cited the Iowa Constitution and argued that Wilson was bad law as to passengers in Lyft vehicles.

II. Even assuming Officer Holtan had the authority to order Williams out of the vehicle in which he was a backseat passenger, did he have reasonable suspicion to conduct a Terry pat-down search for weapons?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW Defendant-Appellant and pursuant to Iowa R. App. P. 6.1103 requests further review of the December 16, 2020, decision in State of Iowa v. Khalen Richard Price Williams, Supreme Court No. 19-1857.

1. The Court of Appeals erred in affirming the denial of Williams' motion to suppress and his resulting conviction for Felon in Possession of a Firearm, a class D felony in violation of Iowa Code section 724.26 (2017).

2. The Court of Appeals determined error was not preserved on Williams' appellate claim that Maryland v. Wilson should not be followed under article I section 8 of the Iowa Constitution. Williams respectfully contends the Court of Appeals misapplied the rules of error preservation, and that his arguments were at least minimally preserved given the arguments raised before the District Court. King v. State, 797 N.W.2d 565, 571 (Iowa 2011); State v. Coleman, 890 N.W.2d 294, 286 (Iowa 2017). Iowa R. App. P. 6.1103(1)(b)(1) (2020).

3. Regardless of whether a defendant is a passenger in a regular vehicle or a vehicle for hire, Article I Section 8 would give more deference to the expectation of privacy of vehicle passengers than would the Fourth Amendment.

4. The Court of Appeals erred in finding Officer Holtan has reasonable suspicion to conduct a Terry pat-down search for weapons. Officers did not suspect Williams of any criminal activity. There was no indication Williams was currently armed and dangerous, especially where Holtan's own testimony and body camera footage contradicted his claims.

WHEREFORE, Williams respectfully requests this Court grant further review of the Court of Appeals' decision in his case.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Khalen Williams from his conviction, sentence, and judgment for Felon in Possession of a Firearm, a class D felony in violation of Iowa Code section 724.26 (2017), entered following a bench trial on a stipulated record.

Course of Proceedings: Williams accepts the Court of Appeals' recitation of the course of proceedings.

Facts: The District Court found the following n its written findings of fact:

> On February 14, 2019 Defendant was a passenger in a vehicle being driven by a Lyft driver. The Des Moines police stopped the vehicle because the Lyft driver failed to stop for a stop sign, was speeding, had one nonfunctioning brake light and a dirty license plate making it impossible for the officer to read the license plate. During the course of the stop, Defendant was removed from the vehicle for a pat-down. A 9mm semiautomatic pistol was removed from the left breast pocket of Defendant's outer coat. Having previously been convicted of Eluding, a Class D Felony, in Polk County Case No. FECR311978, Defendant was then charged with Felon in Possession of a Firearm in violation of Iowa Code section 724.26.2.

(Findings of Fact pp. 1-2)(App. pp. 31-32)(footnotes omitted).

ARGUMENT

I. Error was preserved for appeal on Williams' argument that Maryland v. Wilson should be rejected under the Iowa Constitution. Trial counsel cited the Iowa Constitution and argued that Wilson was bad law as to passengers in Lyft vehicles.

Preservation of Error: Error was preserved by the District Court's denial of Williams' motion to suppress. (Motion to Suppress; Order re: Motion to Suppress)(App. pp. 10-14, 19-28). State v. Niehaus, 452 N.W.2d 184, 186 (Iowa 1990).

Standard of Review: The Court reviews claims of unconstitutional searches and seizures de novo. State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015).

Merits: The Court of Appeals did not reach the merits of Williams' challenge to Officer Holtan's exit order under Article I section 8 of the Iowa Constitution. The Court of Appeals determined Williams made a "passing reference" to the state constitutional law claim in his motion to suppress, and spent

most of the suppression hearing challenging Maryland v. Wilson's application to Lyft passengers.[1] Opinion pp. 5-7.

Williams' argument on appeal was preserved. In his motion to suppress, Williams cited both the Fourth Amendment and Article I Section 8 of the Iowa Constitution in support of his claims of an improper warrantless search and seizure, an extended seizure, an improper Terry pat-down, and involuntary custodial interrogation. (Motion to Suppress pp. 3-5)(App. pp. 12-14).

The first reference to Maryland v. Wilson, 519 U.S. 408 (1997), came in the State's resistance to the motion to suppress. (State's Resistance to Motion to Suppress)(App. pp. 15-18). The State cited to Wilson in support of its contention that Officer Holtan had blanket authority to order Williams out

1. The Court of Appeals' opinion noted Williams "made mention" of trial counsel's argument with respect to Lyft passengers at oral argument but did not "sufficiently develop" the argument for appeal. Opinion p. 6 n.2. Appellate counsel clarifies that her statements regarding Lyft vehicles during oral argument were -- to the best of her recollection -- made in response to specific questions on the topic.

of the vehicle. (State's Resistance to Motion to Suppress p. 2)(App. p. 16).

As a result, the arguments presented at the suppression hearing focused on Wilson's application to passengers. (Supp. Tr. p. 43 L.20-p. 44 L.21, p. 47 L.5-p. 50 L.9). In his argument, trial counsel recognized the relevant case law was essentially "universal" with nothing specific to Lyft or Uber vehicles. (Supp. Tr. p. 46 L.19-24). But he noted the case law relied upon a nexus between the driver and passenger that did not necessarily exist for a Lyft vehicle. (Supp. Tr. p. 46 L.25-p. 50 L.1). Accordingly, he argued Office Buck was not entitled to have any interaction with Williams. (Supp. Tr. p. 50 L.2-9).

On appeal, Williams does not pursue any challenge with respect to his interaction with Buck.[2] Instead, Williams focuses on his interaction with Officer Holtan.

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2. Case law under both the federal and state constitutions permit an officer to ask for identification and question passengers of a vehicle stopped for traffic infractions so long as these activities do not extend the duration of the stop. State v. Coleman, 890 N.W.2d 284, 299 (Iowa 2017)

With respect to Holtan, Williams' arguments in the District Court briefly reiterated his claim that there was a greater expectation of privacy for Lyft passengers. (Supp. Tr. p. 50 L.23-p. 51 L.5). The majority of his argument focused on Holtan's claims of officer safety as a justification for ordering Williams out of the vehicle and patting him down. (Supp. Tr. p. 51 L.6-p. 53 L.17). More specifically, trial counsel described how the video of Holtan's interaction with Williams did not show any change in demeanor until after Holtan issued the exit order for the purposes of conducting a pat-down for weapons. (Supp. Tr. p. 53 L.18 -p. 54 L.18).

The District Court ruled that, because there was no dispute as to the legitimacy of the traffic stop, Wilson gave Holtan the authority to order Williams out of the vehicle. (Order re: Motion to Suppress p. 5)(App. p. 23). The court went on to hold that Holtan had reasonable suspicion that Williams was armed and dangerous. (Order re: Motion to

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(Iowa Constitution); Rodriguez v. United States, 575 U.S. 348, 355 (2015)(checking driver's license, registration and proof of insurance are ordinary activities related to traffic stops).

Suppress)(App. pp. 19-28). Without making a specific reference to either the state or federal constitution, the District Court denied Williams' motion to suppress with respect to his seizure, search, and subsequent statements. (Order re: Motion to Suppress p. 9)(App. p. 27).

Contrary to the Court of Appeals' opinion, this record was at least minimally adequate to preserve Williams' claims for appeal. "When there are parallel constitutional provisions in the federal and state constitutions and a party does not indicate the specific constitutional basis, we regard both federal and state constitutional claims as preserved." King v. State, 797 N.W.2d 565, 571 (Iowa 2011). See also State v. Gaskins, 866 N.W.2d 1, 6 (Iowa 2015)(citing King). In State v. Coleman, *neither* Coleman's motion to suppress *nor* the District Court's ruling on the motion to suppress specifically mentioned either the state or federal constitution. State v. Coleman, 890 N.W.2d 294, 286 (Iowa 2017). Nonetheless, the Iowa Supreme Court determined claims under *both*

constitutions were preserved by the failure to cite either. Id.[3] This is in comparison to State v. Prusha, where error was not preserved on a state constitutional claim because the defendant cited only the Fourth Amendment. See State v. Prusha, 874 N.W.2d 627, 630 (Iowa 2016).

In this case, defense counsel cited both the state and federal constitutions. (Motion to Suppress pp. 3-5)(App. pp. 12-14). The District Court applied Wilson in summary fashion to reject Williams' arguments. (Order re: Motion to Suppress p. 5)(App. p. 23). This was sufficient to preserve error for appeal.

Furthermore, even where a defendant does not articulate a different framework for analyzing constitutional claims under a corollary provision of the Iowa Constitution, the Iowa Supreme Court reserved the right to apply the principles in a different manner. State v. Coleman, 890 N.W.2d at 286; King v. State, 797 N.W.2d at 571.

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[3]. Notably, the Court of Appeals' opinion cites Coleman in its discussion of error preservation, but quotes the dissent rather than the controlling majority opinion. Opinion p. 7.

The underlying issue in this case is whether Wilson is good law for a state constitutional claim involving a warrantless exit order and search of a passenger in a vehicle that also happens to be a Lyft vehicle. While the status of the vehicle as a Lyft vehicle may have some application to a passenger's expectation of privacy, the fact remains that the Iowa Supreme Court has not ruled on whether the Wilson rationale applies to passengers *of any nature* under Article I Section 8 of the Iowa Constitution. This argument was preserved for appeal.

As to the merits, there is no dispute that the Fourth Amendment permits an officer who has lawfully stopped a vehicle for a traffic infraction to order both the driver and the passenger to exit the vehicle. Pennsylvania v. Mimms, 434 U.S. 106, 111 n. 6 (1977)(drivers); Maryland v. Wilson, 519 U.S. 408, 414-15 (1997)(applying the Mimms rule to passengers). The United States Supreme Court considered the intrusion on the driver and passenger to be minimal compared to the need to ensure officer safety. Pennsylvania

v. Mimms, 434 U.S. at 110-11; Maryland v. Wilson, 519 U.S. at 413-14.

The Iowa Supreme Court, meanwhile, initially followed Mimms but required reasonable and articulable suspicion regarding passengers in its Fourth Amendment analysis. See State v. Becker, 458 N.W.2d 604 (Iowa 1990) (abrogated on other grounds by Knowles v. Iowa, 525 U.S. 113, 117–118 (1998)); State v. Riley, 501 N.W.2d 487, 489 (Iowa 1993). Only after Wilson was issued did the Iowa Supreme Court apply the same analysis to both drivers and passengers for purposes of the Fourth Amendment. See State v. Smith, 683 N.W.2d 542, 545 (Iowa 2004)(recognizing Becker was effectively overruled by Wilson). Notably, the Court has never addressed the applicability or viability of Wilson under the Iowa Constitution. Williams asks this Court to do so now.

Article I Section 8 of the Iowa Constitution protects Iowans from unreasonable searches and seizures:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause,

> supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

Iowa Const. Art. I § 8. This provision is nearly identical to the language of the Fourth Amendment. U.S. Const. amend. IV. Yet "[e]ven 'in ... cases in which no substantive distinction [appears] between state and federal constitutional provisions, we reserve the right to apply the principles differently under the state constitution compared to its federal counterpart.'" State v. Gaskins, 866 N.W.2d 1, 6 (Iowa 2015)(quoting King v. State, 797 N.W.2d 565, 571 (Iowa 2011). The Court will construe Article I Section 8 "in a broad and liberal spirit" and strongly favors the warrant requirement. State v. Coleman, 890 N.W.2d 284, 286 (Iowa 2017).

In recent years, Iowa has broadened the protections from warrantless searches and seizures provided to citizens under article I section 8. This Court has recognized it should apply Article I, section 8, "in a broad and liberal spirit." State v. Height, 91 N.W. 935, 937 (Iowa 1902); State v. Cline, 617 N.W.2d 277, 285-86 (Iowa 2000). Its protections "are not

meant to benefit the public generally. They are meant to protect individual citizens and their reasonable expectations of privacy." State v. Gaskins, 866 N.W.2d 1, 16 (Iowa 2015).

A warrantless search is presumed unreasonable unless an exception applies. Id. at 7. In one of the few state constitutional decisions mentioning Wilson in any fashion, the Iowa Supreme Court lamented the U.S. Supreme Court's case law as a "a free-floating and open-ended concept of "reasonableness" that is unhinged from the warrant requirement expressly contained in the Fourth Amendment." State v. Ingram, 914 N.W.2d 794, 804 (Iowa 2018).

Iowa does not appear to have directly addressed the applicability of Wilson under the Iowa Constitution. Other states, however, have flatly declined to follow Wilson under their state constitutions. New Jersey requires an officer have specific and articulable facts to justify an exit order for a passenger based due to the intrusion placed upon a passenger without culpability. State v. Smith, 637 A.2d 158, 166-16

(N.J. 1994). See also State v. Bacome, 154 A.2d 1253, 1258-60 (N.J. 2017).

In State v. Sprague, the Vermont Supreme Court explicitly recognized that ordering a passenger out of a vehicle was a separate intrusion from the original stop of the vehicle and therefore a separate seizure under Chapter I Article 11 of the Vermont Constitution. See State v. Sprague, 824 A.2d 539, 544-45 (Vt. 2003)(requiring objective facts and circumstances supporting reasonable suspicion). The Court expressed concern that a bright-line rule permitting exit orders would subject most citizens to such intrusions without significant benefit to the public or police, and would invite "arbitrary, if not discriminatory, enforcement." Id. at 545-46.

Two years after Wilson was decided, the Massachusetts Supreme Court was asked to formally adopt the bright-line rules of Mimms and Wilson, but the Court declined to do so. Commonwealth v. Gonsalves, 711 N.E.2d 108, 110-11 (Mass. 1999). A routine traffic stop, the Court said, is a circumstance where the driver and any passengers would have

a reasonable expectation that the officer complete the government's business quickly so the occupants could continue on their way. Id. at 112. "A passenger in the stopped vehicle may harbor a special concern about the officer's conduct because the passenger usually had nothing to do with the operation, or condition, of the vehicle which drew the officer's attention in the first place." Id. The Court held that the small percentage of traffic stops that may lead to the discovery of more serious crimes did not justify exit orders against the vast majority of citizens, and expressed particular concern regarding arbitrary police actions against minorities Id. The Court also questioned whether exit orders perceived as "illegitimate" might increase risks to officers. Id.

Hawaii has also rejected Mimms under its state constitution, though without significant discussion. In State v. Wyatt, the Hawaii Supreme Court upheld under both the state and federal constitutions an officer's exit order where the officer had reasonable and articulable suspicions to believe the driver was under the influence of alcohol. State v. Wyatt, 687

P.2d 544 (Haw. 1984). In a footnote, the Court acknowledged the State's reference to Mimms, but stated it was not prepared to hold that under the state constitution a valid traffic stop necessarily permitted an exit order. Id. at 552 n.9.

The Hawaii Supreme Court explicitly rejected Mimms under Article I Section 7 of the Hawaii Constitution in State v. Kim:

> Footnote nine is not dicta and clearly establishes that a police officer must have cause before ordering a driver out of a vehicle after a traffic stop. We decline to adopt the standard established in Mimms by the United States Supreme Court. We instead hold that, under article I, section 7 of the Hawaii Constitution, a police officer must have at least a reasonable basis of specific articulable facts to believe a crime has been committed to order a driver out of a car after a traffic stop.

State v. Kim, 711 P.2d 1291, 1294 (Haw. 1985).

In State v. Mendez the Washington Supreme Court distinguished between the driver and any passengers:

> Where the officer has probable cause to stop a car for a traffic infraction, the officer may, incident to such stop, take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a de minimis intrusion upon the

> driver's privacy under art. I, § 7. See Kennedy, 107 Wash.2d at 9, 726 P.2d 445.
>
> However, with regard to passengers, we decline to adopt such a bright line, categorical rule. A police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy art. I, § 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy.

Id. at 728.

Although not directly addressing Wilson, the Minnesota Supreme Court case of State v. Fort is instructive. State v. Fort, 660 N.W.2d 415 (Minn. 2003). Fort was a passenger in a car stopped in a high-drug for speeding and having a cracked windshield. Id. at 416. Once officers discovered neither the driver nor Fort had valid driver's licenses, they had both men exit the vehicle so it could be towed. Id. at 417. One of the officers started questioning Fort as to whether he had any drugs or weapons on him, and conducted a pat-down search. Id.

While the Minnesota Supreme Court determined the initial seizure was valid, the Court found the scope and duration of the stop was expanded without reasonable articulable suspicion of other criminal activity. Id. at 418-19. Notably, the Minnesota Supreme Court's reference to limiting the expansion of either the scope or duration of the stop under the Minnesota Constitution has a parallel to case law under Article I Section 8 of the Iowa Constitution. See State v. Coleman, 890 N.W.2d 284, 299 (Iowa 2017)("Limiting both the scope and duration of warrantless stops on the highway provides important means of fulfilling the constitutional purpose behind article I, section 8, namely, ensuring that government power is exercised in a carefully limited manner.").

As noted by many of these cases, the bright-line rule created by Mimms and Wilson is devoid of any real balance between the interests of law enforcement and the liberty interests of citizens. The bright-line rule presumes citizens always present a threat to officer safety, and applies regardless of the technical justification for the stop. These assumptions

are contrary to Iowa's deference to the warrant requirement, and to Iowa's initial case law regarding passengers.

As discussed above, the Iowa Supreme Court previously recognized a distinction between a driver stopped for a traffic violation and a passenger in such a vehicle. State v. Becker, 458 N.W.2d 604 (Iowa 1990) (abrogated on other grounds by Knowles v. Iowa, 525 U.S. 113, 117–118 (1998)). The Court would later concede that Becker – a Fourth Amendment case – was effectively overruled by Mimms, but it stands for the Court's respect for the different status of a passenger and the need to justify additional intrusions. See State v. Smith, 683 N.W.2d 542, 543 (Iowa 2004)(acknowledging abrogation of Becker). This is a position consistent with those states that have rejected Wilson under their state constitutions.

Furthermore, the justification often given for permitting officers to issue exit orders to either drivers or passengers – officer safety – is not necessarily supported by statistics. Every year, law enforcement officers conduct tens of millions of traffic stops, with the dominant narrative in the case law

being that "each one of these stops is not just highly dangerous but also potentially fatal." Jordan Blair Woods, Policing, Danger Narratives and Routing Traffic Stops, 117 Mich. L. Rev. 635, 637 (Feb. 2019).

In a recent study, Jordan Blair Woods "gathered and analyzed incident narratives from a comprehensive sample of over 4,200 cases of violence against officers during traffic stops across more than 220 law enforcement agencies in the state of Florida over a 10-year period." Id. at 639. His findings did not support the dominant narrative regarding the dangerousness of traffic stops. Id. at 640.

> Based on a conservative estimate, I found that the rate for a felonious killing of an officer during a routine traffic stop for a traffic violation was only 1 in every 6.5 million stops. The rate for an assault that results in serious injury to an officer was only 1 in every 361,111 stops. Finally, the rate for an assault (whether it results in officer injury or not) was only 1 in every 6,959 stops. Less conservative estimates suggest that these rates may be much lower.
> ***
> The study also identified that routine traffic stops have a different risk profile than criminal enforcement stops: defined in this Article as stops initiated to investigate or enforce the criminal law beyond a traffic violation. The study is the first to

> systematically examine how violence against the police may differ within these stop categories. I found that the most common weapons used to assault officers during routine traffic stops were "personal weapons"--namely, a driver's or passenger's hands, fists, or feet. Conversely, the most common weapon used to assault officers during criminal enforcement stops was the motor vehicle itself (for instance, using the car to run over an officer).

Id. at 640-41.

Woods' article suggests that Mimms' bright-line rule permitting exit orders for drivers may actually *create* risks to officer safety. Id. at 708. The findings indicated exit orders may *escalate* the situation as drivers perceived the exit requests to be an illegitimate response to a minor traffic infraction. Id. As for passengers:

> The institutionalization of pretextual traffic stops and concentrated police surveillance in certain communities can lead not only drivers, but also passengers, who are innocent of non-traffic-based crime to resist officers with minor violence when officers invoke greater authority than necessary during the stops. That greater authority includes the routine ordering of drivers and passengers out of vehicles. For these reasons, the findings and typology prompt questions about whether the rule announced in Wilson is both empirically and theoretically unsound.

Id. at 710.

Nor should the mere presence of a firearm on a person be equated with inherent dangerousness. In 1988, 40 states either prohibited the public possession of firearms or tightly regulated such possession. Shawn E. Fields, Stop and Frisk in a Concealed Carry World, 93 Wash. L. Rev. 1675, 1688 (Dec. 2018). But as states have loosened restrictions on the ability to carry weapons, "[t]he number of adults in the U.S. holding concealed firearms permits has grown explosively in recent years--according to a recent study, from '2.7 million in 1999 to 4.6 million in 2007, 11 million in 2014, and 14.5 million in 2016.'" Royce de R. Barondes, Automatic Authorization of Frisks in Terry Stops for Suspicion of Firearm Possession, 43 S. Ill. Univ. L.J. 1, 2 (Fall 2018). An estimated 3 million adults in the United States carry firearms every day, and 9 million carry them monthly. Id. The primary reason for doing so was protection. Id.

> There was once "nearly unanimous agreement that to be armed was to be dangerous," giving officers the right to frisk armed individuals on the basis of this "blanket assumption of

> dangerousness." But in a post-Heller world, where more than forty states have little or no restrictions on the public concealed carry of firearms, courts can no longer assume that public handgun possession is unlawful.

Shawn E. Fields, Stop and Frisk in a Concealed Carry World, 93 Wash. L. Rev. 1675, 1679 (Dec. 2018)(referring to District of Columbia v. Heller, 554 U.S. 570, 582 (2007)).

Gun possession, standing alone, no longer reasonably indicates someone is engaging in criminal activity. Id. at 1694. Furthermore, to suggest that the mere possession of a firearm – without more – justifies a reasonable belief that the person is both armed *and* dangerous is to suggest that those who are legally carrying weapons for personal protection are inherently dangerous and therefore subject to a Terry frisk.

Courts are split on whether a person becomes inherently dangerous for Terry purposes simply because the person is armed:

> For example, in United States v. Robinson, the Fourth Circuit held that any individual who the police suspect possesses a firearm becomes a dangerous individual per se for Terry purposes. The Ninth and Tenth Circuits, in more limited discussions, similarly found that police had an

> automatic right to assume that an armed individual was necessarily dangerous. In contrast, in Northrup v. City of Toledo Police Department, the Sixth Circuit held that, "[c]learly established law require[s] [officers] to point to evidence" that suspects are both "armed and dangerous." Only in Robinson did the court discuss the dangerousness of the firearm, but the Court's holding ultimately rested on the risk the individual posed to the police.

Id. at 1705.

Williams asks this Court to follow those states that have rejected Wilson's bright-line rule permitting exit orders for passengers who are travelling in a vehicle stopped solely for traffic violations. Requiring a reasonable and articulable belief that the passenger is engaging in criminal activity or armed and presently dangerous is consistent with Iowa's respect for individual rights under article I Section 8 of the Iowa Constitution, consistent with the justification for Terry stop and frisks, consistent with the passenger's independent liberty interests and lack of control over the vehicle, and consistent with society's increasing acceptable of lawful possession of handguns.

II. Even assuming Officer Holtan had the authority to order Williams out of the vehicle in which he was a backseat passenger, he did not have reasonable suspicion to conduct a Terry pat-down search for weapons.

Preservation of Error: Error was preserved by the District Court's denial of Williams' motion to suppress. (Motion to Suppress; Order re: Motion to Suppress)(App. pp. 10-14, 19-28). State v. Niehaus, 452 N.W.2d 184, 186 (Iowa 1990).

Scope of Review: The Court reviews claims of unconstitutional searches and seizures de novo. State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015).

Merits: An officer who detains a person and pats down the person's clothing for weapons conducts both a "seizure" and a "search" for Fourth Amendment purposes. Terry v. Ohio, 392 U.S. 1, 20 (1968). In order to justify such a warrantless search and seizure, the officer must "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. A pat-down is permitted if the officer is investigating a crime or if the officer believes the

suspect is armed and presently dangerous. Id. at 22-24; State v. Bradford, 620 N.W.2d 503, 506 (Iowa 2000).

Officers Buck and Holtan had no reason to believe Williams was engaged in criminal activity. Buck encountered Williams as the passenger of a Lyft vehicle that had been pulled over for minor traffic violations. (Supp. Tr. p. 5 L.9-25, p. 13 L.9-p. 14 L.15; Ex. 1 5:50-6:10).[4] After obtaining the driver's information, Buck asked Williams for his name, birth date, and social security number. (Supp. Tr. p. 6 L.4-14; Ex. 1 6:10-7:00). Williams readily provided the information, and Buck ultimately discovered he had no active warrants. (Supp. Tr. p. 18 L.3-9; Ex. 1 6:10-7:00).

Buck specifically admitted he had no concerns about drug activity or weapons activity when he stopped the vehicle. (Supp. Tr. p. 13 L.3-8). He had no concerns regarding the backseat passenger at that time – not for safety, drugs, firearms, or criminal activity. (Supp. Tr. p. 17 L.6-18). There

4. All references to times on DVD Exhibits 1 and 2 are approximate.

was no basis for believing Williams was engaged in criminal activity to justify either the exit order or the Terry frisk.

As to whether there was a reasonable basis for suspecting Williams was armed and dangerous, Holtan's body camera speaks for itself. And it contradicts Holtan's testimony.

Holtan testified that he recognized Williams from an incident 14 months earlier when he conducted a traffic stop with Williams as the driver. (Supp. Tr. p. 22 L.15-23, p. 24 L.12-15). Williams ran from the vehicle while holding a firearm. (Supp. Tr. p. 22 L.24-25). When Williams was taken into custody, the gun was located near him. (Supp. Tr. p. 23 L.1-2). Williams was ultimately convicted of carrying weapons. (Supp. Tr. p. 24 L.20-p. 25 L.6). Holtan also testified he learned from another officer that the other officer had arrested Williams for eluding after the first incident. (Supp. Tr. p. 23 L.3-6, p. 25 L.7-17).

Holtan said he spoke to Williams about the past incidents and then asked him if he had a firearm. (Supp. Tr.

p. 23 L.7-8). Holtan's body cam footage does not contain the full extent of this conversation, as his audio did not record for the first minute. (Ex. 2 0:00-1:00). Once the audio starts, there is some discussion between Holtan and Williams regarding an eluding or speeding incident in November. (Ex 2 1:00-1:15). Williams, who is on his cell phone with his hands visible, explains he was going home to see his child and was "just a passenger." (Ex. 2 1:00-1:20).

At approximately 1:30 in the video, Holtan asks Williams to "Go ahead and step out for me," and when Williams responds "What?" Holtan says more directly "Go ahead and step out for me real quick." (Ex. 2 1:30-1:40).

According to Holtan, he asked Williams to step out of the vehicle with the intention of conducting a Terry pat-down after Williams broke eye contact and "started to overexplain how he was a passenger in a vehicle and tried to distance himself from the vehicle." (Supp. Tr. p. 23 L.9-17). Holtan described his perception of Williams' response:

> and *at that time* his demeanor, which was friendly to this point, I observed his fight or flight response to

> be activated. And it wasn't the fight or flight response, it was the freezing in time where he was attempting to decide what was going to happen next or figure out what was going to happen next.

(Supp. Tr. p. 23 L.17-22)(emphasis added). In other words, the change in demeanor used to justify Holtan's exit order occurred *after* the exit order was given, not before.

The video itself does not support Holtan's testimony. The video showed Williams was on his cell phone with his hands visible. (Ex. 2 1:00-1:40). He was speaking to the officers in a polite manner and accurately answering their questions. (Ex. 2 1:00-1:20). He did state that he was "just a passenger" but there is no indication he was somehow "overexplaining" his status. (Ex. 2 1:00-1:40). Even Holtan had to acknowledge that passengers might be confused as to why they are under investigation if their Lyft driver gets pulled over. (Supp. Tr. p. 37 L.2-5). Moreover, there is no corroboration in the video that Williams froze or showed any signs of fight or flight. (Ex. 2 1:00-1:40).

The change in demeanor, the eluding incident from 14 months before, and another eluding incident reported by

another officer were the only bases for Holtan's belief Williams was armed. (Supp. Tr. p. 40 L.12-18). Yet nothing in the prior incidents indicated Williams was threatening or violent toward the officers during those incidents. During the current stop, Williams answered questions posed by the officers, engaged them in some discussion, and kept his hands "up and away from his body" so they would be visible. After Holtan had already given the exit order, Williams placed his phone in his pocket but quickly held his open hands up when Holtan asked him not to reach. He was compliant with all requests. The video from the stop gives no support to Holtan's claim Williams presented a present danger to officers. (Ex. 2 1:00-2:10). There was no valid basis to order Williams out of the vehicle or subject him to a Terry pat-down.

All evidence obtained after Williams was removed from the vehicle – or at the very latest after pat-down search began should be suppressed. State v. Najouks, 637 N.W.2d 101, 111 (Iowa 2001).

CONCLUSION

For all of the reasons addressed above, Defendant-Appellant Khalen Williams respectfully asks this Court to vacate the decision of the Court of Appeals, vacate the District Court's ruling denying his motion to suppress, vacate his conviction, sentence, and judgment, and remand his case for further proceedings.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.68, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,584 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Theresa R. Wilson

_____ Dated: *1/4/21*

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