IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. YALE E. STEVENS, Defendant-Appellant.	SUPREME COURT NO. 20-1393

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HONORABLE JOHN C. NELSON, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 9th day of July, 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 Yale Stevens, 1129 Oak Street, Sioux City, IA 51105.

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Sagiv Galai, Prosecutors Have the Power to Stop Bad Roadside Drug Tests From Ruining People's Lives, American Civil Liberties Union, (Feb. 26, 2019),
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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Defendant-Appellant Yale Stevens appeals his conviction, sentence, and judgment following a bench trial on the minutes of testimony and verdict finding him guilty of Possession of a Controlled Substance - First Offense (Methamphetamine), a Serious Misdemeanor, in violation of Iowa Code section 124.401(5) (2019).

Course of Proceedings

On March 2, 2020, the State charged Stevens with Possession of a Controlled Substance - First Offense (Methamphetamine), a Serious Misdemeanor, in violation of Iowa Code Section 124.401(5) (2019). (Trial Information) (App. pp. 4-5). Stevens waived his right to speedy trial. (Waiver of Speedy Trial) (App. p. 6).

On March 30, 2020, Stevens filed a Motion to Suppress alleging the search of Stevens' person was unconstitutional because the K9's alert to the presence of contraband inside the vehicle in which Stevens was passenger was an insufficient nexus to search Stevens, who was outside the vehicle. (Motion to Suppress) (App. pp. 7-10). The State resisted the motion to suppress. (State's Resistance) (App. pp. 11-14).

A hearing on the motion was held. (Supp. Tr. p. 1; Order re: Motion, p. 1) (App. p. 15). Following presentation of evidence and arguments from the parties, the court denied Stevens' motion to suppress. (Order re: Motion pg. 4) (App. p. 18). The court concluded that because the car Stevens was riding in had been seen leaving a "known drug house," the K9 signaled on the passenger side of the car, and Stevens mumbled when questioned, a sufficient nexus was established to search Stevens. (Order re: Motion pg. 3) (App. p. 17). Despite denying the motion, the court found ruling on the motion to be a "difficult call." (Sentencing Tr. p. 4 L. 18 – p. 5 L. 1).

The case proceeded to trial on August 27, 2020. (Trial Tr. p. 1). Stevens waived his right to jury trial. (Trial Tr. p. 2 L.12 – p. 3 L. 17; Jury Trial Waiver) (App. pp. 20-21). Following a colloquy with Stevens regarding his waiver, the district court proceeded to a trial considering a stipulated record of the minutes of testimony and attached reports and State's Exhibit 1—the dash cam video recording from the stop. (Trial Tr. p. 3 L. 18 – p. 4 L. 15). The court found Stevens guilty of Possession Methamphetamine - First Offense. (Verdict p. 3) (App. p. 24).

The district court sentenced Stevens to five days in the Woodbury County Jail with a credit for time served. (Sentencing Order p. 1) (App. p. 26). Stevens was also ordered to undergo a substance abuse evaluation and pay a fine of $315 plus statutory surcharges. (Sentencing Order) (App. p. 26-27).

Stevens filed a timely notice of appeal on October 28, 2020. (Notice of Appeal) (App. p. 29).

Statement of Facts

At approximately 1 a.m. on February 26, 2020, Sergeant Brian Clausen of the Sioux City Police Department, observed a tan Audi leaving what he believed to be a drug house and began to follow it. (Supp. Tr. p. 4 L. 10-25). Sergeant Clausen subsequently observed that the vehicle's center brake light was not working and, because he was in plainclothes, called a uniformed officer, Officer Nick Thompson, to conduct a traffic stop. (Supp. Tr. p. 4 L. 21 – p. 5 L. 13; State's Ex. 1 at 0:45).

The car had two occupants. Officer Thompson first addressed Kyle Stevens, the defendant's brother, who was driving. (Supp. Tr. p. 7 L.16-17; State's Ex. 1 at 1:46). Sergeant Clausen spoke with the defendant, Yale Stevens, who was seated in the back passenger seat of the car. (Supp. Tr. p. 6 L. 5-10; State's Ex. 1 at 5:38). Approximately nine minutes into the stop, the driver was arrested for driving while suspended and removed from the vehicle. (Supp. Tr. p. 8 L. 21-25; p. 36 L. 16-20; State's Ex. 1 at 8:24).

Stevens was also ordered out of the vehicle by Sergeant

Clausen so that a third officer, Officer Michael Simons, could conduct a K9 vehicle sniff. (Supp. Tr. p. 9 L. 7-11; State's Ex. 1 at 9:36). After exiting the vehicle, Stevens consented to a pat down search. (Supp. Tr. p. 9 L. 15-19). Nothing was found. (Supp. Tr. p. 9 L. 20 - p. 10 L. 1).

After Sergeant Clausen removed Stevens from the car, Officer Simons conducted the dog sniff of the vehicle. (Supp. Tr. p. 8 L. 21 – p. 10 L. 11; p. 19 L. 10-18). Officer Simons testified that when the K9 indicates, "it's real plain. It's very obvious. The dog's tail stops wagging. The dog sits and stares at where the odor is coming from." (Supp. Tr. p. 21 L. 9-11). Simons "started in the passenger front bumper area and worked [his] way counterclockwise." (Supp. Tr. p. 22 L. 3-23). Simons testified that the dog indicated at the driver's side door. (Supp. Tr. p. 22 L. 24 – p. 23 L. 16). He then put her inside the vehicle even though it would have been "tough for her – for a passive dog to go inside a car and then actually sit down." He, however, thought she was "interested" in the passenger side of the car because she sniffed all around and spent the majority of her time on the passenger side. (Supp. Tr. p. 23 L. 17 – p. 25 L. 14).

After removing the dog from the car, Officer Simons told Sergeant Clausen that the K9 had indicated and advised him to search the passenger. (State's Ex. 1 at 11:12-11:15; Supp. Tr. p. 10 L. 12-17; p. 24 L. 11-19). Sergeant Clausen asked Stevens if he had anything illegal on him, and he did not answer. (Supp. Tr. p. 10 L. 18 – 23). Sergeant Clausen testified that Stevens "started to mumble about having something in his pocket, but he never did tell me what it was and reached towards his coat pocket." (Supp. Tr. p. 10, L. 19 – p. 11 L. 2).

Sergeant Clausen stopped him and reached into Stevens' pocket himself. He found a heat-sealed baggie with a "crystal-like substance" inside. (Supp. Tr. p. 12, L. 10-20; Minutes, p. 9: Officer Loera Report) (Conf. App. p. 12). The substance field-tested positive for methamphetamine; the weight was .51 grams. (Supp. Tr. p. 12, L. 18-20; Minutes, p. 9: Officer Loera Report) (Conf. App. p. 12).

Additional facts will be discussed when relevant.

ARGUMENT

I. The dog's signal on the driver's side of an empty car provided an insufficient nexus to search Stevens, a former passenger in the car, and the search violated Stevens' rights under the Fourth Amendment and article I, section 8.

A. Preservation of Error. Stevens moved to suppress evidence of the crystalline substance discovered in his pocket after a drug dog signaled on the car in which he had been a passenger on the grounds that it violated his rights under the Fourth Amendment of the United States Constitution and article I, Section 8 of the Iowa Constitution. (Motion to Suppress) (App. pp. 7-10). The trial court denied the motion. (Order re: Motion) (App. pp. 15-19). Error was preserved. See Lamasters v. State, 821 N.W.2d 856, 862 (Iowa 2012).

B. Standard of Review. "'When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state or federal Constitutional right, our standard of review is de novo.'" State v. Coffman, 914 N.W.2d 240, 244 (Iowa 2018) (quoting State v. Storm, 898 N.W.2d

140, 144 (Iowa 2017)). “We examine the whole record and make ‘an independent evaluation of the totality of the circumstances.’” Coffman, 914 N.W.2d at 240 (quoting Storm, 898 N.W.2d at 144). “‘Each case must be evaluated in light of its unique circumstances.’” Coffman, 914 N.W.2d at 244 (quoting State v. Kurth, 813 N.W.2d 270, 272 (Iowa 2012)). “We give deference to the entire district court’s fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings.” State v. Tyler, 867 N.W.2d 136, 152 (Iowa 2015).

C. Merits. The Fourth Amendment was designed to protect individuals from arbitrary searches. See Carpenter v. United States, 138 S.Ct. 2206, 2214 (2018); see also Boyd v. United States, 166 U.S. 626, 630 (1886). One of the central aims of the Framers in ratification of the Fourth Amendment was “‘to place obstacles in the way of too permeating police surveillance.’” Carpenter 138 S.Ct. at 2214 (quoting United States v. Di Re, 332 U.S. 581, 587 (1948)). Accordingly, when faced with a Fourth Amendment challenge, the court’s analysis is driven by an understanding of what would have been an unreasonable search at the time the amendment was adopted. Id. (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)).

A physical intrusion constitutes a search and “requires a warrant supported by probable cause.” Id. (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)). Warrantless searches are presumed unreasonable, and the State bears the burden of overcoming that presumption. See Welsh v. Wisconsin, 466 U.S. 740, 750 (1984). To overcome this burden, the State must show probable cause to search as well as exigent circumstances. See Payton v. New York, 445 U.S. 573, 587-89 (1980).

Like the Fourth Amendment, “Article I, Section 8 of the Iowa Constitution protect[s] individuals against unreasonable searches and seizures.” State v. Naujoks, 637 N.W.2d 101, 107 (Iowa 2001) (quoting State v. Canas, 597 N.W.2d 488, 492 (Iowa 1999)). Reasonableness drives the analysis, as well as a balancing of privacy rights and the interests of law enforcement. See Naujoks, 637 N.W.2d at 107 (citing State v. Loyd, 530 N.W.2d 708, 711 (Iowa 1995)); State v. Keehner, 425 N.W.2d 41, 44 (Iowa 1988). Further, whether or not a search is reasonable is fact dependent. See Naujoks, 637 N.W.2d at 107; State v. Roth, 305 N.W.2d 501, 504 (Iowa 1981). In order to find an exception to the warrant requirement under article I, section 8, there must be probable cause and exigent circumstances. See Naujoks at 107. Probable cause is not necessarily the level of proof required for a conviction but be "more than a bare suspicion." Brinegar v. United States, 338 U.S. 160, 175 (1949).

A person does not shed their right to privacy simply by being a passenger in a car: "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." United States v. Di Re, 332 U.S. 581, 587 (1948). This principle was again articulated in Wyoming v. Houghton:

> At the same time, I would point out certain limitations upon the scope of the bright-line rule that the Court describes. Obviously, *the rule applies only to automobile searches*. Equally obviously, the

> rule applies to containers found within automobiles. *And it does not extend to the search of a person found in that automobile.*

Wyoming v. Houghton, 526 U.S. 295, 307-308 (1999) (Breyer, J., concurring) (emphasis added). "It has long been the law that probable cause to search a car does not justify the search of a passenger." State v. Horton, 625 N.W.2d 362, 365 (2001).

In order to conduct a separate search of a passenger, the police must have independent probable cause to search the passenger. See State v. Merrill, 538 N.W.2d 300, 302 (Iowa 1995) (upholding search of passenger when the officer smelled burnt marijuana on his person and saw him hiding paraphernalia in his hand). Independent probable cause boils down to whether "a reasonably prudent person would believe that evidence of a crime will be discovered in the place to be searched." State v. Moriarty, 566 N.W.2d 866, 868 (Iowa 1997). "We look to the totality of circumstances, to determine whether probable cause existed, including 'the sum total ... and the synthesis of what the police have heard, what they know, and what they observe as trained officers.'" State v.

Predka, 555 N.W.2d 202, 207 (Iowa 1996) (quoting State v. Edgington, 487 N.W.2d 675, 678 (Iowa 1992)). "Furtive movements coupled with additional suspicious circumstances can provide sufficient grounds for a warrantless search." Merrill, 538 N.W.2d at 302 (citing State v. Riley, 501 N.W.2d 487, 489 (Iowa 1993)).

At least three states have held that probable cause to search a car based on a dog sniff does not constitute probable cause to search a former passenger of the car. See State v. Harris, 280 S.W.3d 832, 845 (Tenn. Crim. App. 2008); Wallace v. State, 791 A.2d 968, 986 (Md. Ct. Spec. App. 2002); People v. Fondia, 740 N.E.2d 839, 843-45 (Ill. App. Ct. 2000).

In State v. Harris, the Tennessee Court of Criminal Appeals noted that it knew "of no broad application of the vehicle search exception to the warrant requirement . . . that underwrites the search of a *person* who occupied the vehicle prior to the dog sniff." Harris, 280 S.W.3d at 843 (emphasis in original). The court cited two key reasons for concluding the search of the former occupant was unconstitutional: 1) the driver and passengers had been asked to step out of the vehicle prior to the dog's signal, so the dog did not react to substances on the defendant's person, and 2) another occupant had been in the seat near the door where the dog signaled. See Harris, 280 S.W.3d at 844. Thus, the Court held that the search was impermissible under both the Fourth Amendment and Article I, Section 7 of the Tennessee Constitution. See Harris, 280 S.W.3d at 845.

The Maryland Court of Special Appeals found that a K9's signal on a car did not justify the search of a passenger in the car under the Fourth Amendment, relying on United States v. Di Re, 332 U.S. at 587, and cases from other states, because the K9's indication that the car contained contraband did not provide a sufficient link to any wrongdoing on the part of the passenger. See Wallace, 791 A.2d at 986.

The Illinois Court of Appeals found similarly when faced with the question of whether probable cause to search a passenger could be based upon probable cause to search a vehicle under the Fourth Amendment. See Fondia, 740

N.E.2d at 843-45. The Illinois court was particularly concerned with the officer's failure to have the dog sniff the occupants of the car after they had been removed and concluded the officers "willful ignorance" by failing to do so undermined the reasonableness of their actions. Fondia, 740 N.E.2d at 843.

1. *The search of Stevens' person was unreasonable under the Fourth Amendment*. In this case, the search of Stevens' person, based merely on the K9's signal on the empty car, was unsupported by probable cause, and therefore was unreasonable under the Fourth Amendment. Stevens was a passenger in the backseat of a car driven by his brother. Undercover police officer Clausen observed the vehicle "leaving a suspected drug house" with a non-functioning brake light. (Minutes of Testimony, p. 4: Clausen narrative) (Conf. App. p. 7). He then called for a uniformed officer, Officer Thompson, who also observed that the brake light was not working and proceeded to conduct a traffic stop. (Minutes of Testimony, p. 4: Clausen narrative) (Conf. App. p. 7). Officer Thompson

approached the driver's side door, and Stevens handed over his ID after being asked for it. (State's Ex. 1 at 1:45-2:40). The driver was removed from the car and arrested for driving with a suspended license. (Supp. Tr. p. 8 L. 21-25; p. 36 L. 16-20; State's Ex. 1 at 8:24). Stevens was ordered out of the vehicle by Sergeant Clausen; however, this conversation was not caught on the video. (State's Ex. 1 at 8:30; Supp. Tr. p. 9 L. 1-16).

Once out of the vehicle, Stevens consented to a pat-down search, which yielded no weapons or anything suspicious. (Supp. Tr. p. 9 L. 15 – p. 10 L. 11). While Stevens and Sergeant Clausen were speaking, another officer conducted a K9 sniff of the empty car. (Supp. Tr. p. 10, L. 12-17). After the sniff, the K9 handler told Sergeant Clausen to "get in his pockets," meaning he should search Stevens. (State's Ex.1 at 11:12-11:15). When Clausen asked Stevens if he knew why the dog would indicate for an illegal substance, Stevens said he did not know why. (Supp. Tr. p. 10 L. 18-21). Stevens was also asked if had anything illegal on his person, and he did not respond. (Supp. Tr. p. 12 L. 2-12).

It was at this point Sergeant Clausen told Stevens he believed he had something illegal on him and that he was going to search his person. (Supp. Tr. p. 10 L. 19-25). He testified that Stevens mumbled something: “That’s when he started to mumble about having something in his pocket, but he never did tell me what it was.” (Supp. Tr. p. 11 L. 1-2). Stevens began to reach in his pockets, but he was stopped by Sergeant Clausen before completing the motion. (Supp. Tr. p. 12 L. 10-12). Sergeant Clausen reached into Stevens’ coat pocket and pulled out a baggie of a “crystal-like” substance. (Supp. Tr. p. 12 L. 18-20).

The district court found three factors relevant to the determination of whether probable cause existed to search Stevens: 1) the car was seen leaving a “known” drug house; 2) the K9 signaled on the passenger side of the vehicle; and 3) Stevens “mumbled” when questioned about contraband and reached for his pockets but did not clearly deny guilt. (Order Re: Motion, p. 3) (App. p. 17). Because these factors do not provide probable cause justifying the search, the district court erred in denying the motion to suppress.

a. "Drug House": In the Minutes of Testimony, Sergeant Clausen stated the vehicle was seen leaving a "suspected" drug house. (Minutes of Testimony p. 4, Sergeant Clausen Report) (Conf. App. p. 7). In his testimony, he said the vehicle was seen "leaving what I believed to be a known drug house." (Supp. Tr. p. 4 L. 21-25). However, the record contains no information to support the assertion that the home was, in fact, a "drug house." None of the officers testified as to why they suspected it was a drug house. Even if the Sergeant Clausen's conclusory characterization were credited, and it is assumed the house was a "drug house," the record contains no indication that Stevens or his brother were themselves seen leaving the house. And Clausen's testimony reveals nothing about he meant when he said the car was "leaving" the house. Was it parked in the driveway? On a nearby street? Or did he only see the car driving near the house?

Notably, the district court did not find the "drug house" assertion compelling, but rather, called it "conclusory": "The car was seen leaving a 'known drug house.' This alone is not compelling or persuasive at all, especially in light of the dearth of evidence presented at hearing in regard to the conclusory nature of the comment." (Order Re: Motion to Suppress, p. 3) (App. p. 17).

Thus, without some support for the bare allegation that the house was a "drug house," this factor does not support a finding of probable cause.

b. K9 Signal on Vehicle: The district court concluded the K9 signaled on the passenger side and rear passenger side of the vehicle, where Stevens had been seated. (Order re: Motion, p. 3) (App. p. 17). However, because the record does not support the court's conclusion, the appellate court is not bound by this finding. See Tyler, 867 N.W.2d at 152.

The K9 handler, Officer Simons, testified he had been an officer for twenty-years, had six or seven years of experience as a K9 officer, and the K9 that conducted the sniff was his third K9 partner. (Supp. Tr. p. 16 L. 5-22). He further testified that the K9 must be certified yearly and that this dog had been certified twice in the previous thirteen months. (Supp. Tr. p. 17 L. 11-22). Officer Simons testified that the K9 in this case signals by sitting down and staring at where the odor is coming from. "It's very obvious. The dog's tail stops wagging. The dog sits and stares at where the odor is coming from." (Supp. Tr. p. 21 L. 9-11). "The dog that I have, there's no in between, so when a K-9 officer says that the dog indicated, there's no in between with this dog. This dog either sits or doesn't sit . . . I've searched hundreds of cars, and the dog doesn't sit, then there's no indication." (Supp. Tr. p. 20 L. 21 – p. 21 L. 7). Officer Simons testified that the dog indicated outside the driver's door and the same is reflected in his narrative in the Minutes of Testimony. (Supp. Tr. p. 23 L. 14-16; Minutes of Testimony p. 13: Officer Simons narrative) (Conf. App. p. 16).

Officer Simons also testified to letting the dog in the vehicle and stated that "she was very interested in the passenger side of the vehicle." (Supp. Tr. p. 25 L. 3-9).

However, just before that statement, Officer Simons testified that it is difficult for the K9 to signal inside the vehicle, and further, that the dog was "all over the place." (Supp. Tr. p. 24 L. 11-19). Thus, he did not testify that the K9 actually signaled on the passenger side, either inside or outside the car. The Minutes of Testimony do not indicate that the dog signaled on the passenger side either. The record only supports a conclusion that the dog indicated outside the driver's side of the vehicle. (Minutes of Testimony, p. 13: Officer Simons narrative; p. 5: Clausen narrative) (Conf. App. pp. 16; 8). See United States v. Jacobs, 986 F.2d 1231, 1233 (8th Cir. 1993) (dog's "interest" in a package "did not amount to an official 'alert'").

Officer Simons testified that he told Sergeant Clausen that he thought the passenger needed to be searched because the dog was "interested" in the passenger side of the car. (Supp. Tr. p. 24 L. 5-19). Officer Simons did not have the dog sniff either Stevens or the driver to confirm or dispel his concern about the dog's "interest" before they searched

Stevens.

As well, none of the officers searched the passenger side of the vehicle before Stevens was searched. Although Officer Simons testified that he searched the car, the testimony at the suppression hearing and the dash cam video footage indicates that this search did not occur until after Stevens was searched. (Supp. Tr. p. 11 L. 13-16) (Sergeant Clausen testified that vehicle was searched after he dealt with Stevens); State's Ex. 1 at 10:20-19:00 (showing Officer Simons telling Clausen to search the passenger, putting the K9 away and then returning to search the car)).

As well, the driver was not searched before Stevens was searched. (State's Ex. 1 at 15:30-15:35; 17:30-18:30) (before driver is searched officer approaches and advises that "stuff" had been found on the passenger, Stevens).

> By not conducting additional dog sniffs of defendant or the car's other occupants (which the officers had it entirely in their power to do), the officers willfully denied themselves this additional, critical information that would have sharpened their focus on whom to search, leaving themselves in a position of "willful ignorance."
>
> This posture of "willful ignorance" dissipates

> the reasonableness of the police conduct in this case, given the nature of that conduct, which was a search of defendant's person, not merely a container within the car.

Fondia, 740 N.E.2d at 842–43.

Under these circumstances, given the lack of a record that the dog actually indicated on the passenger side of the vehicle, the failure of the officers to search the vehicle or the driver for narcotics before searching Stevens, and the failure of the officers to have the K9 sniff Stevens to confirm or dispel the concern over the dog's "interest" in the passenger side of the car, a reasonably prudent person would not believe that evidence of a crime would be discovered on Stevens' person and the dog's indication on the empty car does not support probable cause to search Stevens. See Moriarty, 566 N.W.2d at 868.

c. Mumbling. The district court relied on Steven's behavior when he was questioned about the dog's signal on the car to find probable cause existed to search him. Specifically, the court noted that Stevens "mumbled something and reached for his pockets." (Order re: Motion p. 3) (App. p.

17). The court found his "lack of a clear denial signified guilt." (Order re: Motion, p. 3) (App. p. 17).

Sergeant Clausen testified that after Officer Simons told him to search the passenger, he asked Stevens why the dog would indicate on the vehicle. (Supp. Tr. p. 10 L. 19-21).

> "[H]e stated he did not know why. I asked him if he had anything illegal on him, and he just kind of looked at me. I advised him at that point that I was going to search his person. That's when he started to mumble about having something in his pocket, but he never did tell me what it was and reached towards his coat pocket."

(Supp. Tr. p. 10 L. 19 - p. 11 L. 2). Clausen stopped him and reached into the coat pocket himself and found a baggie containing a "crystal-like" substance. (Supp. Tr. p. 12 L. 18-20).

There are a number of reasons a suspect may stay silent or fail to deny guilt in response to questioning. See Mikah Story Thompson, Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence, 47 U. Louisville L. Rev. 21, 40-43 (2008). These reasons range from nervousness, to fear, to anger, to being worried about being presumed guilty. See id. at 48. They may also remain silent

> because they have no idea how to respond to the questions posed to them. As one commentator notes, "When individuals are unsure of how to respond to ambiguous comments or conduct by others, they may remain silent to gauge the situation and determine whether or not to respond or terminate discourse." Individuals may not know how they should react to embarrassing or socially awkward situations and instead choose silence.

Id. at 49.

Anyone in Stevens' position would be easily susceptible to such fear and nervousness in this situation. There were up to six officers on the scene, including a drug dog. (Minutes, p. 4-6: Clausen narrative) (Conf. App. pp. 7-9) (identifying, in addition to himself, Officers Thompson, Cramer, Loera, Niehus, and Simons and K9 on the scene). Stevens' brother was being arrested, the police had his ID, and he was not going to be able to drive away because the vehicle was not registered to him.

Further, there are a number of reasons someone might reach in their pockets. The stop here occurred in February at 12:45 a.m. (Minutes, p. 10: Officer Thompson narrative)

(Conf. App. p. 13). It was clearly cold that night, as the officers can be seen wearing heavy coats and hats. (State's Ex. 1). As well, when an officer directs the driver to sit on the front bumper of the squad car, the officer comments that the good thing about sitting there is being able to get heat from the engine. (State's Ex. 1 at 12:10-12:15). A little later on in the video, both the driver and the officer discuss how his hands were "frozen," and later the officer tells the driver that he can "warm up" inside the squad car. (State's Ex. 1 at 14:10-14:40; 21:55-22:05). In this situation, Stevens' attempt to put his hands in his pockets was just as likely due to cold as to an indication of guilt.

Thus, Stevens' failing to clearly deny guilt and reaching toward his pocket do not support a finding a probable cause to search him in this case.

d. Other circumstances. Officer Thompson, who conducted the traffic stop, testified that there were no behaviors that were out of the ordinary or that drew his attention, other than Stevens' brother indicating that his license was invalid. (Supp. Tr. p. 34 L. 1-5). The officers did not know the brothers or have a history with them. (State's Ex. 1 at 5:10-5:35).

As well, there was no odor detected by the officers nor any paraphernalia found in the vehicle that could be attributed to Stevens. Stevens did consent to a pat-down search prior to the K9's signal, and that search did not yield weapons or anything illegal. (Minutes of Testimony p. 5: Clausen narrative) (Conf. App. p. 8). This fruitless pat-down should have dispelled any suspicion the officers may have had. See Terry v. Ohio, 392 U.S. 1, 8-11 (1968).

Because the circumstances of this case do not support a finding of probable cause to search Stevens, the officer acted unreasonably by conducting a search of Stevens' person. The K9's signal on the driver's side of the empty vehicle did not provide probable cause for the search of Stevens' person as he stood outside the car. Nor did the other surrounding circumstances provide probable cause to search Stevens.

2. *Even if the court determines the search was permissible*

under the Fourth Amendment, it violated article I, Section of the Iowa Constitution. Even if this search was permissible under the Fourth Amendment, more robust protections under article I, Section 8 of the Iowa Constitution will not allow it. Iowa has a rich constitutional history that compels an independent interpretation when an issue is raised under the state constitution. See State v. Gibbs, 941 N.W.2d 888, 910 (2020), (McDonald, J., concurring specially). The analysis of a claim, therefore, does not end with a review under the federal standards alone. Id. "Because we 'jealously' safeguard our authority to interpret the Iowa Constitution on our own terms, we do not employ a lockstep approach in following federal precedent although United States Supreme Court cases are 'persuasive.'" Schmidt v. State, 909 N.W.2d 778, 793 (Iowa 2018) (quoting State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010)).

The framers "placed the Iowa Bill of Rights at the beginning of the Iowa Constitution to emphasize its importance." State v. Baldon, 829 N.W.2d 785, 809 (Iowa

2013) (Appel, J., specially concurring). They wanted Iowa to have "the best and most clearly defined Bill of Rights." Id. at 810 (Appel, J., specially concurring) (quoting The Debates of the Constitutional Convention of the State of Iowa 100 (W. Blair Lord rep., 1857)).

The Iowa Constitution, "like other state constitutions, was designed to be the primary defense for individual rights, with the United States Constitution Bill of Rights serving only as a second layer of protection, especially considering the latter applied only to actions by the federal government for most of our country's history." Mark S. Cady, A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties, 60 Drake L.Rev. 1133, 1145 (2012).

Thus, while the Fourth Amendment and Article I Section 8 have identical text[1], that does not preclude this court from applying the principles "differently under the state constitution

[1] Article I, Section 8 and the Fourth Amendment have identical text with the exception of a semicolon between the warrant and reasonableness clauses.

compared to its federal counterpart." State v. Gaskins, 866 N.W.2d 1, 7 (Iowa 2015).

There are many cases wherein this court has interpreted article I, section 8 to be more protective than the Fourth Amendment, despite the identical language. See State v. Short, 851 N.W.2d 474, 506 (Iowa 2014) (a valid warrant is required for law enforcement's search of a home under the Iowa Constitution); State v. Baldon, 829 N.W.2d 785, 809–10 (Iowa 2013) (a prospective search provision in a parole agreement was held to be insufficient to establish voluntary consent under article I, section 8); State v. Kern, 831 N.W.2d 149, 177 (Iowa 2013) (the warrantless search of a parolee's home was found to be unconstitutional under Iowa Constitution); State v. Fleming, 790 N.W.2d 560, 567–568 (Iowa 2010) (the search of a rented room violated the Iowa Constitution when the warrant for that area was not supported by probable cause); State v. Ochoa, 792 N.W.2d 260, 291 (Iowa 2010) (warrantless search of a parolee's room by a general law enforcement officer without particularized suspicion was determined to have violated the state constitution); State v. Tague, 676 N.W.2d 197, 206 (Iowa 2004) (a traffic stop did not meet the reasonableness test of Article I, section 8); State v. Cline, 617 N.W.2d 277, 292-93 (Iowa 2000) ("good faith" exception is incompatible with the Iowa Constitution).

Because of the long tradition of interpreting the protections of article I, section 8 to be greater than its federal counterpart, even if this court concludes the search doesn't violate the Fourth Amendment, it should conclude it violates the more protective Iowa Constitution.

D. Conclusion. In conclusion, the search of Stevens' person based on the K9's signal on the empty car was conducted without probable cause and therefore was arbitrary and impermissible under the Fourth Amendment and article I, section 8 of the Iowa Constitution. See Carpenter, 138 S.Ct. at 2214; see also Naujoks, 637 N.W.2d at 107. Stevens' conviction should be vacated, and his case remanded for further proceedings.

II. The evidence was insufficient to prove the substance in Stevens' possession was methamphetamine.

A. Preservation of Error. "'When … a [sufficiency-of-the-evidence] claim is made on appeal from a criminal bench trial, error preservation is no barrier.'" State v. Howse, 875 N.W.2d 684, 688 (Iowa 2016) (quoting State v. Anspach, 627 N.W.2d 277, 231 (Iowa 2001)).

B. Standard of Review. Iowa appellate courts review challenges to the sufficiency of the evidence for errors at law. State v. Romer, 832 N.W.2d 169, 174 (Iowa 2013). "Evidence is sufficient to support a conviction if, viewing it in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Polly, 657 N.W.2d 462, 467 (2003). Although the appellate court will review the evidence "in the light most favorable to the State," the court will consider "all of the evidence presented at trial, not just evidence that supports the verdict." State v. Kemp, 688 N.W.2d 785, 789 (Iowa 2004).

C. Merits. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 US. 358, 364 (1970); see also State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976). "'[T]he evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.'" State v. Brubaker, 805 N.W.2d 164,171 (Iowa 2011) (quoting State v. Kemp, 688 N.W.2d 785, 789 (Iowa 2004)).

In this case, the State did not prove that Stevens knowingly or intentionally possessed a controlled substance. See Iowa Code § 124.401(5) (2019). Instead, the evidence submitted by the State merely created "suspicion, speculation, or conjecture" that the substance found in Stevens' pocket was methamphetamine.

The record considered by the district court during the bench trial consisted of the minutes of testimony and attachments and the video of the stop. (Trial Tr. p. 3 L. 18 – p. 4 L. 15). The attachments to the minutes include a twelvepage "offense report," with narratives from each officer on the scene of the traffic stop, and a single "department case report" describing the items seized from Stevens and his brother and taken to the police property room. (Minutes & Attachments) (Conf. App. pp. 4-18). The report describes the substance found on Stevens as a "crystalline substance" in a "heat sealed plastic bag" that field tested positive for methamphetamine. (Minutes p. 14: Department Case Report) (Conf. App. p. 17).

The minutes of testimony identify three witnesses besides the police officers who were on the scene of the stop: Steve Polak, a supervisor in the Evidence and Property Department of the Sioux City Police Department; James Bleskacek, an employee of the Criminalistics Laboratory; and Carissa Roach, an Evidence Technician for the Sioux City Police Department. (Minutes p. 2: Description of Witnesses) (Conf. App. p. 5). Although the minutes indicate these witnesses would testify regarding their reports, no reports were attached. Thus, the only information in the record indicating that the substance found on Stevens was methamphetamine were the statements in the police reports that the substance field-tested positive as methamphetamine. (Minutes pp. 8, 14: Offense Report Sioux City Police Department Case Report) (Conf. App. pp. 11, 17).

The dash cam video is focused on the car and primarily shows the arrest of Stevens' brother, who was driving the vehicle. (State's Ex. 1). The video shows Stevens being ordered out of the car prior to the dog sniff, the sniff itself, and the search of the car, first by the dog and then by the officers themselves. (State's Ex. 1 at 8:28-19:09). Officer Simons can be heard on the video telling Sergeant Clausen to "get in his pockets," referring to Stevens. (State's Ex.1 at 11:12-11:15). However, the interaction between Stevens and Sergeant Clausen, Officer Loera, and Officer Thompson wherein Stevens is patted down, Mirandized, and ultimately searched after the dog sniff cannot be heard nor seen.

1. <u>Field tests are unreliable and field tests without confirmatory testing are insufficient to prove a substance was an illegal substance.</u> The crystalline substance found on Stevens' person was field tested positive as methamphetamine.

(Minutes p. 7: Detective Niehus Report) (Conf. App. p. 10). The State did not provide any other evidence to confirm the substance was in fact methamphetamine. The lack of expert testimony or a lab report left the district court to rely solely on the positive field test. (Verdict p.2) (App. p. 23). Because field tests are not always reliable, the failure of the State to provide evidence indicating the substance was confirmed by a laboratory test to be methamphetamine renders the evidence insufficient to support Stevens' conviction.

Several courts have found that when the State fails to establish the reliability and proper administration of a field test, the field test is insufficient beyond a reasonable doubt to show the substance is an illegal drug. See, e.g., People v. Hagberg, 733 N.E.2d 1271, 1274 (Ill. 2000) (conclusory testimony that a substance field-tested positive for cocaine without additional details was insufficient to prove the substance was cocaine beyond a reasonable doubt); State v. Jackson, 468 N.W.2d 431, 431 (Wis. 1991) ("The [field test] presented by the state may have been sufficient for a finding of probable cause. However, it does little to prove beyond a reasonable doubt an element of a crime which would be necessary for a valid conviction, i.e., that the substance recovered was cocaine."); State in Interest of J.W., 597 So.2d 1056, 1058-59 (La. Ct. App. 1992) (finding that the state failed to prove the substance was cocaine beyond a reasonable doubt when there was no laboratory testing admitted and the officer testified he presumed the rocks were cocaine); L.R. v. State, 557 So.2d 121, 122 (Dist. Ct. App. Florida 1990) (reversing for insufficient evidence when an officer testified the substance appeared to be rock cocaine and it field tested positive for cocaine but did not testify as to the reliability of the field test and no laboratory reports were introduced); People v. Jason F., 694 N.Y.S.2d 908, 910 (N.Y. Justice Ct. 1999) (finding the defendant not guilty when the state presented no laboratory testing evidence and failed to establish "evidence that [the field test] results arise from the proper use and certification of a field test that is generally accepted as scientifically reliable").

Field tests do not provide reliable evidence of a substance's composition. Field tests may be contaminated, and it is possible for the results to be misinterpreted. See Alan Harris, A Test of a Different Color: The Limited Value of Presumptive Field Drug Tests and Why That Value Demands Their Exclusion from Trial, 40 Sw. L. Rev. 531, 541-42 (2011); Ryan Gabrielson & Topher Sanders, How a $2 Roadside Drug Test Sends Innocent People to Jail, New York Times Magazine, (July 7, 2016), https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html.

Further, it is possible to have false positives. See Harris, 40 Sw. L. Rev. at 541-42. Some of those false positives may not even be an illegal substance at all. See Gabrielson & Sanders, NYT Magazine. There are numerous items that have field tested positive for an illegal drug, including vitamins, sage, chocolate chip cookies, motor oil, spearmint, soap, tortilla dough, deodorant, billiards chalk, patchouli, flour, eucalyptus, breath mints, tea, Jolly Ranchers candy, chocolate, and rosemary. A partial list of things that field testing drug kits have mistakenly identified as contraband, The Washington Post (Feb. 26, 2015) https://www.washingtonpost.com/news/the-watch/wp/2015/02/26/a-partial-list-of-things-that-field-testing-drug-kits-have-mistakenly-identified-as-contraband/; See Sagiv Galai, Prosecutors Have the Power to Stop Bad Roadside Drug Tests From Ruining People's Lives, American Civil Liberties Union, (Feb. 26, 2019), https://www.aclu.org/blog/criminal-law-reform/drug-law-reform/prosecutors-have-power-stop-bad-roadside-drug-tests-ruining; See also Lia Fernandez, Putting Law Enforcement Drug Testing Kits to the Test (Aug. 21, 2019), https://www.wrdw.com/content/news/Putting-law-enforcements-drug-testing-kits-to-the-test-557792751.html.

Given the unestablished reliability and frequent false positives, forensic scientists, law enforcement officials, and even manufacturers of the field tests have expressed that the tests are not conclusive and should only be used as presumptive screening tools, not a tool for criminal conviction.

See Harris, 40 Sw. L. Rev. at 544-45; State v. Martinez, 59 A.3d 975, 990-91 (Conn. App. 2013); Hall, USA Today. This unreliability has factored into the reasoning of other courts in refusing to find proof of a controlled substance beyond a reasonable doubt without other supporting evidence.

In this case, the State provided no evidence other than the conclusion that the substance field-tested positive for methamphetamine. No evidence was included about what kind of field tests were utilized, how the substance was tested, whether the tests were reliable, how much experience or training the officer had with field-testing for illegal substances. (Minutes p. 9: Officer Leora narrative; p. 14: Department Case Report) (Conf. App. pp. 12, 17). In fact, the district court itself noted the lack of evidence. The district court "wishe[d] it had the benefit of an expert's testimony and test results indicating the substance was methamphetamine." (Verdict, pg. 3) (App. p. 24). Without some other information to support a conclusion that the field test was reliable and correctly administered, the positive field test in insufficient to support

Stevens' conviction.

2. The surrounding circumstantial evidence in this case is inadequate to prove the substance was methamphetamine.

The State is not necessarily required to submit a confirmatory test to convict someone of a drug offense, but without such a test, the surrounding circumstantial evidence must establish evidence beyond a reasonable doubt to support the conviction. See Brubaker, 805 N.W.2d at 172. The circumstantial evidence in this case is not sufficient to prove the substance was, in fact, methamphetamine.

A number of factors may be considered when determining if sufficient circumstantial evidence supports "the proposition that the substance was an illegal substance when expert testimony did not identify the substance." Brubaker, 805 N.W.2d at 172-73. These factors include

> "evidence of the physical appearance of the substance involved in the transaction, evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug, evidence that the substance was used in the same manner as the illicit drug, testimony that a high price was paid in cash for the substance, evidence that transactions involving the substance were

> carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence."

Id. at 173 (quoting United States v. Dolan, 544 F.2d 1219, 1221 (4th Cir. 1976)).

The State need not prove all these factors and they are not exclusive. Id. "Rather, we look at these circumstances in light of the evidence produced at trial to determine whether the state produced sufficient evidence to support the proposition that the substance was an illegal substance when expert testimony did not identify the substance as illegal." Id. at 173.

Relying on Brubaker, the district court considered the surrounding circumstances, including the statements by Stevens and his brother, observations by the officers regarding the substance's appearance, the car's presence at a "suspected" drug house, and the K9's signal on the car to conclude the State had proven the substance was methamphetamine. (Verdict, pp. 2-3) (App. pp. 23-24). The circumstantial evidence here, considered in light of the

Brubaker factors and in conjunction with the positive field test, was insufficient to prove that the substance was a controlled substance beyond a reasonable doubt.

a. Physical appearance of the substance. The district court relied on the appearance of the substance: “The substance looked like methamphetamine.” (Verdict p. 2) (App. p. 23). However, consistent appearance with a controlled substance is not enough to show a substance is in fact illegal. See Brubaker, 805 N.W.2d at 172-74. In Brubaker, a criminalist testified to comparing pills found in the defendant’s possession to a picture of Clonazepam pills, a controlled substance. Id. at 172. The criminalist testified the pills were consistent with the appearance of Clonazepam. Id. Nonetheless, the Iowa Supreme Court was not convinced the testimony as to the appearance, even by an expert describing a prescription medication that was uniformly produced and marked, was sufficient for conviction beyond a reasonable doubt. Id. Likewise, here, the minutes of testimony contain statements by the officers indicating that the baggie found on

Stevens' person contained a "crystal" or "crystal-like" substance. (Minutes pp. 10-12: Officer Thompson, Officer Cramer Reports) (Conf. App. pp. 13-15). Just because the substance looked like methamphetamine does not mean it was methamphetamine. See Brubaker, 805 N.W.2d at 173. This is especially true of street drugs, which are unlike prescription pills that are uniformly manufactured.

b. Evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug and evidence that the substance was used in the same manner as the illicit drug. The minutes of testimony indicate that the baggie found in Stevens' pocket was heat sealed, indicating Stevens had not ingested the substance therein. (Minutes p. 14: Sioux City Police Department Case Report) (Conf. App. p. 17). Whether the substance "produced the expected effects when sampled by someone familiar with the illicit drug" is therefore inapplicable. Further, Stevens did not act nervous or appear to be under the influence at the time of the stop that would allow a reasonable inference that the substance was methamphetamine. See State v. Pettyjohn, No. 17-1236, 2018 WL 3650335 at *3-4 (Iowa Ct. App. Aug. 1, 2018) (The Court found that the evidence was sufficient to conclude substance was methamphetamine because of officer observations of the defendant's behavior consistent with being under the influence of methamphetamine).

c. Testimony that a high price was paid in cash for the substance, evidence that transactions involving the substance were carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence. According to the minutes, Stevens told Sergeant Clausen that he paid $30 for the "dope" that was found on him and his brother. (Minutes p. 6: Sergeant Clausen Report) (Conf. App p. 9).[2] Presumably the transaction occurred at the suspected

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[2] Stevens' brother called the substance "meth." (Minutes p. 11: Office Thompson Report) (Conf. App. p. 14). However, this statement was not made in Stevens' presence and, like Stevens, there was no evidence that the driver had ingested the substance to verify whether or not it was methamphetamine.

drug house, sometime around midnight. (Minutes, p. 7: Officer Thompson narrative) (Conf. App. p. 10). However, this only establishes that Stevens *believed* the substance was methamphetamine. As discussed above, there was no evidence that Stevens had ingested the substance and actually *knew* whether it was methamphetamine. Thus, "the reasonable possibility remains that [Stevens] was mistaken" or that he had been given "a different controlled dangerous substance or a counterfeit substance." J.W., 597 So. 2d at 1059. Thus, evidence that a substance field tested positive as a controlled substance coupled with evidence that the defendant believed he possessed a controlled substance is not sufficient to prove that the substance was, in fact, a controlled substance beyond a reasonable doubt. See J.W., 597 So.2d at 1058-59.

d. Other circumstances. The district court also considered that the K9 indicated to the presence of a controlled substance in the car. However, the dog's signal was not enough to establish probable cause to search Stevens, nor is it sufficient to prove the presence of a controlled substance on his person. Further, the minutes contain no information that this K9 was sufficiently trained, reliable and accurate.[3] See Fla. v. Harris, 568 U.S. 237, 247 (2013) (recognizing that drug dogs are not inherently reliable and that even the reliability of "certified" dogs are subject to challenge by contesting the adequacy of a certification or training program, considering a dog's or handler's history in the field, and noting the circumstances surrounding a particular alert may undermine the dog's reliability, such as if the officer cued the dog or the team was working under unfamiliar conditions).

Even assuming the dog was appropriately trained and reliable, the dog indicated on the driver's side of the car. (Minutes of Testimony p. 13: Officer Simons narrative) (Conf. App. p. 16). Thus, the logical inference would be that the dog

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[3] Officer Simons testified at the suppression hearing that this K9 had been certified twice in the previous thirteen months. (Supp. Tr. p. 17 L. 11-22). However, the suppression transcript was not part of the agreed upon record to be considered by the district court to determine Stevens' guilt in the bench trial. (Trial Tr. p. 3 L. 18 – p. 4 L. 15).

was alerted to the substance found on the driver, not to anything found on Stevens who was in rear passenger seat.

D. <u>Conclusion</u>. Even viewing the evidence in the light most favorable to the prosecution, a reasonable trier of fact could not have found Stevens to have been in possession of methamphetamine beyond a reasonable doubt. Without additional evidence to confirm the field test or support a conclusion that the K9 was reliable, Stevens' inculpatory statements about his belief about the substance found in his pocket amount to mere "speculation, suspicion, [and] conjecture." Because, the evidence was insufficient to support Stevens' conviction for possession of methamphetamine, Stevens' conviction should be vacated and his case remanded for dismissal.

CONCLUSION

Because the evidence was insufficient to support this conviction, Defendant-Appellant Yale Edwin Stevens respectfully requests the Court reverse his conviction for Possession of a controlled substance (Methamphetamine), First Offense, and remand to the district court for dismissal of the charge. Alternatively, because the district court erred in denying his motion to suppress, Stevens requests the Court reverse his conviction and remand for a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard for oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.62, 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 BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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*/s/ Sonia M. Elossais*____________ Dated: *7/9/21*____

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