IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. BION BLAKE INGRAM, Defendant–Appellant.	)	S.CT. NO. 16–0736

APPEAL FROM THE IOWA DISTRICT COURT
FOR JASPER COUNTY
THE HONORABLE STEVEN J. HOLWERDA, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 26th day of January, 2017, 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 Mr. Bion Blake Ingram, 639 S. 8th Street, Apt. #5, Chariton, IA 50049.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS?

Authorities

DeVoss v. State, 648 N.W.2d 56, 63 (Iowa 2002)

State v. Bingham, 715 N.W.2d 267, 271 (Iowa Ct. App. 2006)

Fencl v. City of Harpers Ferry, 620 N.W.2d 808, 818–19 (Iowa 2000)

State v. Gaskins, 866 N.W.2d 1, 4 (Iowa 2015)

State v. Baldon, 829 N.W.2d 785, 789 (Iowa 2013)

State v. Ochoa, 792 N.W.2d 260, 291 (Iowa 2010)

State v. Webber, 885 N.W.2d 829, 2016 WL 4035239, at *8 (Iowa Ct. App. 2016) (unpublished table decision)

State v. Lane, 726 N.W.2d 371, 377 (Iowa 2007)

II. WHETHER THE DISTRICT COURT ERRED IN FINDING SUFFICIENT EVIDENCE THAT THE DEFENDANT KNOWINGLY POSSESSED A CONTROLLED SUBSTANCE?

This issue is not addressed in the reply brief.

III. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO CHALLENGE THE ADMISSIBILITY OF THE RESULTS OF THE FIELD TEST?

This issue is not addressed in the reply brief.

STATEMENT OF THE CASE

COMES NOW the Defendant–Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about January 6, 2017. While the Defendant–Appellant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. WHETHER THE COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS?

In response to Ingram's argument that the opening of a closed container is unlawful under both the federal and state constitutions, the State contends the record does not support the container, a bag, was closed. (State's Br. p.19–20). The rules concerning error preservation apply equally to the State on appeal as they do to the defendant. DeVoss v. State, 648 N.W.2d 56, 63 (Iowa 2002). The Court may "reverse the district court's suppression ruling on [a] ground only if the State sufficiently presented it to the district court." State v.

Bingham, 715 N.W.2d 267, 271 (Iowa Ct. App. 2006) (citing Fencl v. City of Harpers Ferry, 620 N.W.2d 808, 818–19 (Iowa 2000)) (declining to adopt the State's argument that the defendant's motion to suppress framed the issues, and consequently, the State's resistance); State v. Gaskins, 866 N.W.2d 1, 4 (Iowa 2015) ("The State did not assert any other theory or exception to the warrant requirement justified the warrantless search the officers performed.").

In this case, the State did not file a written resistance to Ingram's motion to suppress. The State never asserted the bag was open and its illegal contents were in plain view of the officer in district court. The State did not argue any other exception to the warrant requirement justified the search in this case.

It was clear in district court that Ingram's argument was the officer lacked the authority to open the bag during an inventory search. (Suppress. Ruling) (App. pp. 31–32). At the hearing, defense counsel argued:

> You can take an inventory search with the black bag. You say, "Here's the black bag. I found this bag." . . . [T]hat's all you need to do. It was not an open black

> bag. It was closed, so we would ask the Court to sustain our motion to suppress."

(Suppress. Hr'g Tr. p.38 L.6–11). The motion to suppress stated, "The search of the black bag and other portions of the vehicle not open to view was in violation of the defendant's constitutional rights . . . and all evidence resulting from that search should be suppressed." (Mot. Suppress.) (App. p. 23).

Both during the suppression hearing and after in its filing, the State simply argued that the inventory of containers was permissible as within the purview of an inventory of a vehicle. (Suppress. Hr'g Tr. p.33 L.25–p.34 L.6) (Resp. to Def.'s Mem. ¶1) (App. p. 30). The prosecutor argued, "The officer testified that the bag was such it could have possibly concealed a weapon, could have possibly concealed something valuable, so above and beyond just simply inventorying the bag, *the officer was justified in going into the container itself.*" (Suppress. Hr'g Tr. p.34 L.11–16). Thus, the State's conceded the bag was a closed container.

The State never argued the bag was not a closed container. It did not present any evidence with regard to the bag's status of being open at the suppression hearing, nor did it challenge the district court's factual finding that the bag was closed. Therefore, the claim that the State now makes on appeal that the bag may have been open has been waived. See State v. Baldon, 829 N.W.2d 785, 789 (Iowa 2013) (citing State v. Ochoa, 792 N.W.2d 260, 291 (Iowa 2010)) ("We find the State waived the . . . argument by not presenting it to the district court . . . ."); State v. Webber, 885 N.W.2d 829, 2016 WL 4035239, at *8 (Iowa Ct. App. 2016) (unpublished table decision) (finding the State did not preserve an argument that was not made in district court).

Furthermore, the record in this case does support the conclusion the bag was closed. On appeal, the Court is not bound by the district court's factual findings, but does give deference to them. See State v. Lane, 726 N.W.2d 371, 377 (Iowa 2007). In this case, the district court found that Officer Eckert *opened* the black bag; therefore it was closed. See

(Suppress. Ruling) (App. p. 31) ("Officer Eckert *opened the black bag* and found methamphetamine and drug paraphernalia inside the bag."); (Guilty Verdict) (App. pp. 36–37) ("During the inventory, Officer Eckert saw a black cloth bag lying on the driver's side floorboard next to the gas pedal. He *opened the bag* . . . .").

The only evidence presented at the suppression hearing supported the district court's conclusions. At the hearing, the State did not present any testimony from the officer who actually discovered the bag. (Suppress. Hr'g Tr. p.13 L.2–p.14 L.21). The only evidence in the record was that the bag's contents were not in plain view and Officer Eckert had to open the bag to view the contents, as evidenced by this exchange between defense counsel and Deputy Burdt:

> Q. . . . to your knowledge, the methamphetamine and the methamphetamine pipe were not in plain view; is that correct?
>
> A. I was just advised that they were in that black bag on the driver's side floorboard by the gas pedal. I do not know if you could see that from the window or not.
>
> Q. You mean the black bag?
>
> A. Yes.

Q. But it's obvious, is it not, that Officer Eckert looked in the black bag?

A. Yes. As he knows the contents of the black bag, I would say you're correct.

(Suppress. Hr'g Tr. p.20 L.17–p.21 L.3).

The State also argues the photographs of the bag suggest it was open, not closed when the officer discovered it. (State's Br. p.19). However, it is unclear from the record when the photographs were taken. Moreover, the bag and its contents appear to be laid out on a table, not the inside of a vehicle or on the hood of the police car. See (Ex. 1 & 2) (App. pp. 24–25). A more logical conclusion is the evidence was also photographed at the Newton Police Station when the officer photographed arguably the most important evidence to the State's case—the crystal substance itself. See (Mins. Test.) (App. p. 14). If not taken directly before the officer's discovery of the bag's contents, then the fact that the top of the bag appears to be open in the photographs is inconsequential.

In addition, the minutes of testimony indicate that the officer did not discover the alleged controlled substance until he

opened the bag further and emptied out the contents of the bag. (Mins. Test) (App. p. 14) ("I picked up the bag and observed a glass pipe with white residue. I emptied the contents of the bag and observed an Icebreakers container with several plastic bags. One of the plastic bags contained a crystal substance."). To the extent the State now attempts to argue that probable cause justified the officer's opening of the bag further and emptying the contents after the discovery of a pipe, the State never advanced that argument in district court, and therefore, failed to preserve it. See Baldon, 829 N.W.2d at 789 (citing Ochoa, 792 N.W.2d at 291).

The State never argued the bag was opened in the district court, nor did it challenge the district court's factual findings in either the suppression ruling or the trial ruling that the bag was closed. Thus, the rules of error preservation prevent the claim the State now makes on appeal that the bag was open. Furthermore, the record does support the district court's factual finding that the bag was closed. Therefore, for the reasons stated in the brief, Ingram asks the Court to find the

search of the closed bag during an inventory search violated his rights under both the state and federal constitutions.

II. WHETHER THE DISTRICT COURT ERRED IN FINDING SUFFICIENT EVIDENCE THAT THE DEFENDANT KNOWINGLY POSSESSED A CONTROLLED SUBSTANCE?

This issue is not addressed in the reply brief.

III. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO CHALLENGE THE ADMISSIBILITY OF THE RESULTS OF THE FIELD TEST?

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CONCLUSION

Defendant–Appellant Bion Blake Ingram respectfully requests the Court reverse his conviction for Possession of a Controlled Substance (Methamphetamine), Second Offense, and remand to the district court for dismissal. Alternatively, Ingram requests the Court reverse his conviction and remand for a new trial.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $1.60, and that amount has been paid in full by the Office of the Appellate Defender.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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Dated: 1/25/17

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