ELECTRONICALLY FILED FEB 08, 2017 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-0563

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIELLE BROWN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE MARY PAT GUNDERSON
AND WILLIAM A. PRICE, JUDGES

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Because a Purse Is a Container Which Can Hold Drugs or Firearms, a Police Search of the Purse Found on a Bedroom Floor was within the Scope of the Search Warrant to Search the Home in this Case Despite Defendant's Ownership of the Purse, and so Neither the Federal nor State Constitution was Violated, and the Search was also Proper under Iowa Statutory Law.

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ROUTING STATEMENT

Defendant's purse was searched during execution of a search warrant at another person's house after police officers found her using drugs with other occupants of the home. She argues the search was improper as beyond the scope of the warrant. Defendant contends this question raises a substantial issue of first impression in Iowa, requiring a decision by the Iowa Supreme Court.

The State disagrees. The Iowa Court of Appeals has twice considered purse searches in cases which have similarities with this case. *See State v. Smith,* 476 N.W. 2d 86 (Iowa Ct. App. 1991); *State v. Barbosa-Quinones,* No. 08-1830, 2009 WL 4111127 (Iowa Ct. App. 2009). Significantly, the United States Supreme Court has held in a case involving a car search that police acted lawfully in searching a front seat passenger's purse which was not in her actual possession, as it was lying on the back seat. *Wyoming v. Houghton,* 526 U.S. 295, 119 S.Ct. 1287, 143 L.Ed. 2d 408 (1999). The purse in this case also was not in the defendant's actual possession when searched. *Houghton* provides the appropriate analysis for deciding this case.

Consequently, because this case involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, defendant-appellant Danielle Brown was convicted and sentenced for the crime of possession of a controlled substance (marijuana), second offense, an aggravated misdemeanor, in violation of Iowa Code section 124.401 (5) (2015). In this appeal she first challenges the district court's refusal to suppress the fruits of the police search of her purse. For her second claim, defendant asserts the court's assessment of court costs for another charge, which had been dismissed, is an illegal sentence.

The Honorable Mary Pat Gunderson presided at the suppression proceedings and the Honorable William A. Price presided at trial and sentencing.

Course of Proceedings

The State charged defendant on November 5, 2015, with possession of a controlled substance (marijuana), a serious misdemeanor, in violation of Iowa Code section 124.401 (5) (2015). Trial Information; App. 8-10. Subsequently, the prosecution filed an amended trial information which enhanced the charge from a serious misdemeanor to an aggravated misdemeanor, due to a prior drug conviction. Amended Trial Information; App. 93.

Defendant filed a motion to suppress on December 23, 2015, asserting police unlawfully had searched her purse while executing a search warrant at a particular Des Moines residence. As she was neither a search target nor a resident of the home, defendant claimed the purse search was improper under the Fourth Amendment to the United States Constitution, as well as article I, section 8 of the Iowa Constitution, as it was outside the scope of the search warrant. The motion failed to cite any reason or ground for interpreting and applying the Iowa Constitution's search protection different from the Fourth Amendment. Motion to Suppress; App. 38-40.

The State filed a resistance to the suppression motion. Resistance to Motion to Suppress; App. 43-45.

The district court held a hearing on the motion to suppress on January 26, 2016. Testimony and the search warrant were presented to the court at that time. The court later issued its ruling on February 9, 2016, denying suppression. Ruling Denying Defendant's Motion to Suppress; App. 78-82; Transcript of Proceedings – Motion to Suppress (hereafter Supp. Tr.) p. 2, lines 1 – 10.

Defendant's trial by a jury began on March 7, 2016, and the next day the jury found her guilty of possession of a controlled substance. Verdict; App. 105; Transcript of Jury Trial (hereafter Trial Tr.) p. 1, lines 1 – 11. After rendition of the jury's verdict, defendant stipulated that she had a prior drug conviction. Trial Tr. p. 318, line 5 – p. 319, line 9.

Following denial of defense posttrial motions, the court sentenced defendant on March 25, 2016 to 90 days in jail and a fine, which was suspended. Court costs were assessed. Sentencing Order; App. 116-19; Transcript of Sentencing Proceedings (hereafter Sent. Tr.) p. 4, line 13 – p. 6, line 20.

Defendant later filed a timely notice of appeal. Notice of Appeal; App. 121.

Facts

Des Moines police officer Mike Fong testified that he had applied for a search warrant to search a Des Moines residence at 6106 SW. 2nd Street. That residence is a two-story, single-family residence apparently rented by Jeffrey Sickles. The warrant was sought because a police investigation showed that methamphetamine "was being trafficked from that location." Police "also had good information that there were firearms in [the home]." Supp. Tr. p. 22, line 4 – p. 23, line 1; p. 24, lines 15 –20; Trial Tr. p. 173, line 24 – p. 174, line 3; Suppression Exhibit 1 (Search Warrant and attachments – hereafter referred to as Search Warrant); App. 50-54. The search warrant authorized searching the home for methamphetamine, as well as other drugs, including heroin and marijuana. Additionally, the warrant allowed police to search for evidence of drug trafficking such as address and/or telephone books, paper and electronic records relating to drug trafficking, as well as specifying numerous other items of evidence of drug trafficking. Finally, police were authorized to search for firearms and ammunition, including but not limited to, handguns, such as pistols and revolvers, and long guns, such as rifles and shotguns. Search Warrant; App. 50-54. Many of the items

subject to search were small and could easily be concealed. Supp. Tr. p. 35, lines 7 – 21.

The search warrant also authorized a search of Jeffrey Sickles. Search Warrant; App. 50. An attachment to the warrant mentioned other people associated with the residence in various ways, including Ileen Sickles, the sister of Jeffrey Sickles. Search Warrant; App. 59-60. Police had information that Ms. Sickles, or other persons in the home, may be in possession of firearms. Supp. Tr. p. 36, lines 22 – 25. The defendant in this case was not identified in any portion of the search warrant and its attachments, and police had no information about her before the warrant was executed. Supp. Tr. p. 25, lines 1 – 11; Search Warrant; App. 50-68.

The search warrant was executed at approximately 5:45 a.m. on October 2, 2015. Supp. Tr. p. 25, lines 12 – 16. Because of the information police had about firearms in the home, the SWAT team first entered the residence, while a team of narcotics detectives stood by until the house and its occupants were secured. The SWAT team apparently had 10 officers, whereas the narcotics team had six or seven members. Trial Tr.p.173, lines 12 – 23. The SWAT team's job was to make the initial entry to the premises and then “secure the

scene" by locating all occupants of the home and handcuffing them behind their backs. Trial Tr.p.174, line 22 –p. 175, line 10; Supp. Tr. p. 33, lines 11 – 15. When asked why this procedure was followed, an officer testified: “Just to ensure that there are no loose persons hiding in the house that may have access to a weapon, that may be able to destroy drug evidence or other evidence we may be searching for with our search warrant." Trial Tr. p. 175, lines 11 – 16.

Consistent with the above procedure, the SWAT team made the initial entry to the target residence and secured all occupants by handcuffing them behind their backs. Trial Tr. p. 175, lines 1 – 10. The SWAT team found Jeffrey Sickles in an upstairs bedroom. Supp. Tr. p. 27, lines 7 – 12. Six people were found by members of the SWAT team in a downstairs bedroom. Those people consisted of four other men, and two women – Ileen Sickles and the defendant in this case. Supp. Tr. p. 26, line 25 – p. 27, line 12.

Officer Fong was a narcotics officer and not a member of the SWAT team, and so he entered the home after SWAT had secured it. Supp. Tr. p. 22, line 24 – p. 24, line 3; p. 25, lines 17 – 19; p. 26, lines 8 – 12; Trial Tr.p. 238, lines 3 – 4. Fong testified at the suppression hearing that when the SWAT team members first encountered the

group in the downstairs bedroom, which included defendant, all of them were smoking methamphetamine. Supp. Tr. p. 27, lines 7 – 12. Although one member of the SWAT team testified at the suppression hearing, he had not been among those SWAT members who first encountered the people in the downstairs bedroom. Supp. Tr. p. 5, line 20 – p.6, line 4; Trial Tr. p. 225, line 20 – p. 226, line 8; p. 238, line 3 – p. 239, line 5.

SWAT members handcuffed the people they found in the first-floor bedroom, including defendant. Once all occupants were handcuffed, SWAT turned the premises over to the narcotics team for searching. Supp. Tr. p. 8, lines 2 – 9; Trial Tr. p. 175, lines 1 – 10. Narcotics officers took the group from the bedroom to the nearby living room, where they could be monitored while the search warrant was executed. Supp. Tr. p. 9, lines 8 – 21. Before she was moved to the living room, however, defendant had been photographed kneeling on the bedroom floor, handcuffed behind her back. The photograph shows a purse lying on the floor, close to her knees. Trial Tr. p. 176, lines 13 – 22; p. 245, line 15 – p. 246, line 21; p. 247, lines 7 – 25; Exhibit 3 (photograph of handcuffed defendant); App. 99.

After the handcuffed defendant and the others were moved to the living room, officers searched the home. Officer John Scarlett entered the bedroom where defendant and the others previously had been smoking methamphetamine. He discovered two drug pipes lying in the open. The officer also saw a purse on the floor and searched it. Officer Scarlett found inside the purse identification for defendant, as well as a baggie which contained marijuana. Supp. Tr. p. 5, line 1 – p. 6, line 4; p. 8, line 2 – p. 9, line 21; p. 10, line 17 – p. 11, line 7; p. 12, lines 10 – 14; Trial Tr. p. 226, line 16 – p. 227, line 1.

Testimony was presented at the suppression hearing regarding the suitability of a purse for hiding firearms and drugs, all of which were subject to seizure under the warrant in this case. According to further testimony, searching for weapons is important to ensure officer safety. Supp. Tr. p. 18, line 12 – p. 19, line 13; Search Warrant; App. 52-53.

No evidence was presented in this case regarding the location of defendant's purse when SWAT officers first encountered her and the others in a downstairs bedroom smoking methamphetamine.

Further facts will be noted below when relevant to the State's argument.

ARGUMENT

I. Because a Purse Is a Container Which Can Hold Drugs or Firearms, a Police Search of the Purse Found on a Bedroom Floor was within the Scope of the Search Warrant to Search the Home in this Case Despite Defendant's Ownership of the Purse, and so Neither the Federal nor State Constitution was Violated, and the Search was also Proper under Iowa Statutory Law.

Preservation of Error

Defendant argues on appeal that the search of her purse violated the Fourth and 14th Amendments to the United States Constitution, as well as article I, section 8 of the Iowa Constitution. She contends the search was outside the scope of the search warrant because she was a mere visitor to the home, being neither a target of the search warrant nor a person known to police before the search. Defendant identifies three alternative general tests which have been applied by some state and federal courts when faced with such a claim; some of these tests have variations or extensions which have been applied by some courts. Application of these tests may lead a court to conclude the search was an improper personal search of the visitor or of his or her effects, not authorized by the search warrant. Defendant' Brief at 26 – 34.

One of the tests identified by defendant is referred to as the "possession test," with some courts requiring actual or physical

possession by the visitor, while others provide protection when the property is found in close proximity to the visitor - essentially a rule of constructive possession. Under a possession test a woman's purse may be treated as an "extension of her person," at least when she is in actual possession of that item. Defendant's Brief at 29 – 30. *See United States v. Teller,* 397 F. 2d 494, 497 (7th Cir. 1968), *cert. denied,* 393 U.S. 937, 89 S.Ct. 299, 21 L.Ed.2d 272 (1969). The second test is denominated the "relationship test," which considers if the alleged visitor nevertheless had some type of relationship with the premises which warranted a search of their property. Defendant's Brief at 29, 31 – 32. Finally, there is a third approach which focuses on whether police had notice that the property at issue was owned by the visitor, with some courts requiring actual notice while others consider whether the police "should have known" that the visitor owned the property. Defendant's Brief at 29 – 34. *See State v. Gilstrap,* 235 Ariz. 296, 332 P.3d 43, 44 – 46 (2014) (discussing tests); *State v. Light,* 306 P.3d 534, 540 – 43 (N.M. App. 2013) (same). Finally, defendant cites decisions of some courts which she contends have applied a hybrid test based on the above rules. Defendant's Brief at 34 – 35. *See Light,* 306 P.3d at 542. Defendant

argues in her brief that the search in this case violates all of these tests. Defendant's Brief at 35 – 40.

Although the defense never expressly articulated in the trial court the theories at issue, a review of the record in the district court indicates that it was raising claims under the Fourth Amendment consistent with the tests of possession, relationship, and notice. The defense also presented a claim that the search was not authorized under Iowa Code section 808.7 (2015). Thus, these claims appear to be preserved for appeal. Motion to Suppress; Defendant's Brief in Support of Motion for Summary Judgment and Memorandum of Authorities (a misnomer, as it is actually a Brief in Support of Motion to Suppress); App. 69-77; Supp. Tr. p. 3, line 22 – p. 4, line 3; p. 38, line 5 – p. 39, line 18.

The defense did not, however, urge in the trial court that any one particular test should be adopted under the Iowa Constitution. Therefore, she has waived her request that this Court adopt under the Iowa Constitution the notice test to analyze search of a visitor's property. *State v. Prusha,* 874 N. W. 2d 627, 629 – 30 (Iowa 2016).

Finally, defendant argues that if any of the claims on appeal have not been preserved, then she received ineffective assistance of

counsel. Defendant's Brief at 22. Of course, a claim of ineffective assistance of trial counsel may be raised for the first time on appeal. *State v. Fountain,* 780 N. W.2d 260, 263 (Iowa 2010).

Standard of Review

Search and seizure claims are reviewed de novo. *State v. Shanahan,* 712 N. W.2d 121, 131 (Iowa 2006). Search warrants are to be construed "'in a common sense, rather than a hypertechnical, manner.'" *Id.* at 132, *quoting State v. Gogg,* 561 N. W. 2d 360 (Iowa 1997). Although the appellate court is not bound by the trial court's factual findings in a suppression case, it nevertheless gives deference to those findings because of the trial court's ability to assess witness credibility. *Shanahan,* 712 N.W. 2d at 131. Because of the preference for search warrants, reviewing courts will resolve any doubts in favor of the warrant's validity. *State v. Weir,* 414 N.W. 2d 327, 330 (Iowa 1987).

Ineffective assistance of counsel claims are also reviewed de novo. *State v. Straw,* 709 N. W. 2d 133 (Iowa 2006). And, review of a trial court's ruling that a search was authorized by Iowa Code section 808.7 is for errors of law. *See State v. Sullins,* 509 N.W. 2d 483 (Iowa

1993) (statutory questions are reviewed for correction of errors of law).

Merits

A. Federal Constitution

A proper search warrant authorizes police to search any container discovered on the premises subject to search which could contain items subject to search and seizure under the warrant. *United States v. Ross,* 456 U. S. 798, 820 – 21, 102 S. Ct. 2157, 2170 – 71, 72 L. Ed. 2d 572 (1982); *State v. Sykes,* 412 N.W. 2d 578, 584 (Iowa 1987). For the reasons to follow, this Court should hold that the search of defendant's purse came within the scope of the search warrant, as drugs and firearms were among the items subject to search under the warrant, both of which could be concealed in a purse. *See In Interest of S. A.W.,* 499 N. W. 2d 739, 740 (Iowa Ct. App. 1993) (gun found in purse); *State v. Parish,* No. 02 – 0279, 2003 WL 21070979, at*1 (Iowa Ct. App. 2003) (drugs found in purse).

The decision in *Wyoming v. Houghton,* 526 U. S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999) provides the analysis for upholding the search in this case. In *Houghton,* a state police officer stopped a

vehicle for traffic violations. There were three people in the front seat – the male driver, his girlfriend, and Sandra Houghton, the respondent in the case. During initial questioning of the driver, the officer saw a hypodermic syringe in his shirt pocket. After instructing the driver to exit the car, the officer asked him why he had the syringe and the driver replied he used it to inject drugs. The two females were then ordered out of the car, asked for identification, and respondent lied about her name. Police searched the passenger compartment of the car for contraband. They found in the backseat a purse which respondent Houghton claimed as hers. An officer removed from the purse a wallet which contained her driver's license and asked why she had lied about her name. He then continued to search the purse and found drug paraphernalia and methamphetamine. *Id.* at 297 – 99, 119 S. Ct. at 1299.

In reversing the respondent's conviction for possession of methamphetamine, the state court had agreed there was probable cause to search the vehicle without a warrant. However, the court found the purse was outside the scope of that search, as police "knew or should have known" it belonged to a passenger and not the driver,

the only person suspected of criminal activity. *Id.* at 299, 1195 S. Ct. at 1300, *quoting Houghton v. State,* 956 P.2d 363 (Wyo. 1998).

The Supreme Court reversed, first noting that the proper scope of a search is defined by the objects of the search, and not by ownership of a particular container found in the place to be searched. The Court stated:

> When there is probable cause to search for contraband in a car, it is reasonable for police officers... to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are "in" the car, and the officer has probable cause to search for contraband in the car.

Wyoming v. Houghton, 526 U.S. at 302, 119 S Ct. at 1302.

The Wyoming Supreme Court had used the "notice" test when reversing the conviction, as it determined that the police knew or should have known that the purse did not belong to the driver. *Houghton v. State,* 950 P.2d 363, 369 (Wyo. 1998). In reversing the state court, the United States Supreme Court presented compelling reasons why such a rule is impractical and would unduly hinder police ability to find and seize contraband. As the Court stated:

> [O]nce a "passenger's property" exception to car searches became widely known, one would expect passenger-confederates to claim everything as their own. And one would anticipate a bog of litigation - in the form of both civil lawsuits and motions to suppress in criminal trials -involving such questions as whether the officer should believe a passenger's claim of ownership, whether he should have inferred ownership from various objective factors, whether he had probable cause to believe that the passenger was a confederate, or to believe that the driver might have introduced the contraband into the package with or without the passenger's knowledge.[footnote omitted].When balancing the competing interests, our determination of "reasonableness" under the Fourth Amendment must take account of these practical realities. We think they militate in favor of the needs of law enforcement, and against a personal privacy interest that is ordinarily weak.

Wyoming v. Houghton, Id. at 305 – 06, 119 S. Ct. at 1303.

The majority opinion in *Houghton* does not expressly state whether it is adopting an actual or physical possession test for deciding when an object such as a purse can be searched, and rejecting a broader rule of constructive possession. However, the concurring opinion and decisions of other courts indicate that, essentially, is the case. *Id.* at 307 – 08 (Breyer, J., concurring); *State v. Boyd,* 275 Kan. 271, 64 P.3d 419, 423 – 24 (2003); *State v. Leiper,*

145 N.H. 233, 761 A.2d 458, 461 (2000); *State v. Reid,* 190 Or. App. 49, 77 P. 3d 1134, 1140 – 43 (2003). Several courts have considered whether the rule in *Houghton* is applicable when property of a claimed visitor, such as a purse, is searched during execution of a premises search warrant. One court declined to do so, in part, because the defendant was wearing her purse when first confronted by officers. *United States v. Vogl,* 7 Fed. Appx. 810, 811, 2001 W L209440,*1, 3 – 4 (10th Cir. 2001). Another court rejected application of *Houghton* with little analysis. *State v. Light,* 306 P.3d 534, 540 – 43 (N.M. App. 2013).

The better reasoned decisions, however, follow *Houghton,* finding it persuasive (although not dispositive) when adopting the actual possession test. *State v. Gilstrap,* 332 P.3d at 46; *State v. Leiper,* 761 A.2d at 461; *State v. Reid,* 77 P.3d at 1141 – 42. As the Oregon court in *Reid* aptly stated: "Although *Houghton* is not dispositive because it involved the search of a vehicle, the thrust and tone of the Court's analysis leaves little doubt that, if faced with the question, the Court would endorse a 'physical possession' test for searches of premises." *Id.* at 1141.

Various state and lower federal courts have noted the strong reasons favoring the actual or physical possession test, while also pointing out the weaknesses of the relationship and notice tests. In *United States v. Teller,* the court adopted the actual possession test, rejecting an extension embracing constructive possession. As the court correctly noted, once a purse is put down or left somewhere, it is no longer "an extension of [the] person." 397 F. 2d at 497. It would be "contrary to the facts" to conclude otherwise, for once the female defendant in that case left her purse lying on the bed, "the purse was then no more a part of her person than would have been a dress which she had worn into the room and then removed for deposit in a clothes closet." *Id.* Other courts adopting the actual or physical possession test also note its virtues of clarity and relative ease of application by police officers. *State v. Gilstrap,* 332 P.2d at 46; *State v. Leiper,* 761 A.2d at 235; *State v. Reid,* 77 P.2d at 1140; *State v. Andrews,* 201 Wis. 2d 383, 542 N.W. 2d 210, 218 (1996). Such a test is especially needed in view of the volatility and safety risks very often attendant when police are searching a residence because of drug trafficking. As wisely observed by this Court: "Illegal drug trafficking is a catastrophic problem… and individuals present in a residence

used by drug traffickers raise serious concerns for police.... A drug house often has numerous people present, many who may be armed and dangerous." *State v. Prior,* 617 N. W.2d 260, 264 (Iowa 2000). The relationship and notice tests may undermine the ability of police to effectively search premises, as well as risk their safety. "Searches often occur in harried, dangerous circumstances and officers may not be readily able to identify the relationships between persons in the premises or to assess whether items might belong to someone not named in the warrant." *State v. Gilstrap,* 332 P.3d at 46. The Pennsylvania Supreme Court provides a cogent critique of the notice test:

> [I]t would be ineffective and unworkable to require police officers to make the distinction between which articles of clothing and personal property belong to the resident and which belong to the visitor before beginning the search. It would not be reasonable to require police officers executing a warrant to ask individuals located on the premises whether they own various items of personal property, nor would it be reasonable to expect an appropriate response were they required to do so.... [V]isitors to the premises could frustrate the efforts of police by placing contraband among their unworn personal effects and by announcing ownership of various articles of clothing containers in order to place those items beyond the scope of the warrant.

Commonwealth v. Reese, 520 Pa. 29, 549 A.2d 909, 911 (1988).

Not only is the actual or physical possession test the one that the United States Supreme Court likely will apply to premises searches when faced with the question, but it is the one that makes the most sense in terms of officer duties and safety. And, the possession test must be limited to actual or physical possession, for including constructive possession undermines those values. *State v. Gilstrap,* 332 P.3d at 46 (adding a constructive possession element would undermine the benefits of the actual possession test, as it would require police " to guess whether items in close proximity to a person not identified in the warrant would soon be used by that person").

Application of the actual or physical possession test leaves no doubt that the search of defendant's purse was within the scope of the search warrant. The record in this case fails to demonstrate the defendant had actual, physical possession of her purse when members of the SWAT team first entered the home to secure it before the search could commence. There is no evidence of where the purse was when SWAT entered the first-floor bedroom to find defendant and others using drugs. The purse was later found on the bedroom

floor after defendant and the others had been handcuffed and removed from the bedroom, at which time it was searched. Supp. Tr.p. 5, line 1 – p. 6, line 4; p. 8, line 2 – p. 9, line 21; p. 10, line 17 –p. 11, line 7; p.12, lines 10 – 14; p. 27, lines 7 – 12; Trial Tr.p. 225, line 20 –p. 227, line 1; p. 238, line 3 – p. 239, line 5.

The absence of any evidence showing the defendant was clutching or carrying her purse from the shoulder when SWAT entered the room defeats any claim of actual possession. *United States v. Teller,* 397 F.2d at 496 – 97 (upholding search of a purse defendant had left on the bed); *State v. Gilstrap,* 332 P.3d at 44, 46 – 47 (search of purse left in the bathroom valid where police initially encountered defendant as she was taking a shower). Because this is a challenge to a search warrant, lack of evidence on this point rests on defendant's shoulders. *See State v. Gogg,* 561 N.W. 2d 360, 364 (Iowa 1997) (in case were defendant challenged veracity of search warrant affiant, defendant bore the burden of proof).

Before defendant was moved to the living room following the entry of SWAT, she was photographed kneeling on the bedroom floor, handcuffed behind her back. The photograph shows a purse lying on the floor, close to her knees. This purse was later identified as

belonging to defendant. Trial Tr. p. 176, lines 13 – 22; p. 245, line 15 – p. 246, line 21; p. 247, lines 7 – 25; Exhibit 3 (photograph of handcuffed defendant); App. 99. Defendant points to this photograph as establishing possession of her purse, at least constructive possession. Defendant's brief at 36 – 37. Of course, the photograph establishes nothing of the sort. It is a posed photograph taken some time *after* SWAT officers first encountered the defendant. Trial Tr. p. 245, line 15 – p. 247, line 25. Thus, it provides no basis to conclude that at an earlier time defendant had actually (or even constructively) possessed the purse.

Consequently, application of the actual possession test demonstrates that the search of defendant's purse, as a possible repository for drugs and firearms, was within the scope of the search warrant. Defendant's conviction should be affirmed. And, this is true even under the alternative tests of notice and relationship (as well as hybrid tests based on them); there still is no basis to reverse this case.

The relationship test permits search of a purse, or similar property, of an alleged mere visitor, if the circumstances of the person's presence at the place to be searched are suspicious or if the person is connected to the premises by illegal activity. *See United*

States v. Gray, 814 F.2d 49, 50 – 52 (1st Cir. 1987) (search of defendant's jacket under search warrant upheld where defendant did not appear to be a casual visitor, as he was found inside target residence at the unusual hour of 3:45 a.m., fully clothed, and a second controlled buy of drugs had occurred immediately before police entered with the search warrant); *People v. Hughes,* 767 P.2d 1201, 1206 – 1207 (Colo. 1989) (cocaine found in film canister discovered on defendant during execution of a premises search warrant was admissible, as police reasonably believed he was the drug supplier for the resident of the apartment). Here, police found the defendant at the target residence at 5:45 a.m. – smoking methamphetamine. She was more than a mere innocent visitor. *See State v. Barbosa – Quinones,* No. 08 – 1830, 2009 WL 4111127, *6 – 7 (Iowa Ct. App. 2009) (upholding search of defendant's purse found while search warrant was executed as there was no evidence she was a "mere visitor" or that police knew the purse was hers).

Relief also would be unwarranted under application of the notice test. Defendant argues the police "actually new" that the purse belonged to her. She cites Exhibit 3, the photograph taken of her at the scene, to support her position. Defendant's Brief at 38. As

previously noted, this photograph was taken before defendant was moved to the living room following the entry of SWAT to the residence. The photograph does not establish anything because it was posed and taken some time after SWAT members first entered the bedroom, and the record does not answer where defendant or this purse were located at that earlier time. See Supra at 24 - 25. Defendant also appears to suggest that the officer who searched the purse knew it was her purse because he had seen identification in it. Defendant's Brief at 38 – 39. The record reflects that he only saw identification for defendant *after* he commenced search of her purse. Supp. Tr. p. 12, lines 1 – p. 13, line 25; p. 16, line -- p. 17, line 25.

Aside from actual notice, defendant also urges the police "should have known" that the purse belonged to her, as it obviously did not belong to the male target of the search because men do not typically carry purses. Defendant's Brief at 39. This argument is not persuasive. First, defendant was not the only woman in the first-floor bedroom, as police also found Ileen Sickles there smoking methamphetamine along with the defendant. Not only is she the sister of the search target, but the police also had prior information that she may be in possession of a firearm. Search Warrant; App. 60;

Supp.Tr. p. 26, line 25 –p. 27, line 12; p. 36, lines 22 – 25. Obviously, she was not a “mere visitor" deserving of special protection, and police could have believed the purse might be hers – there is no evidence this defendant ever asserted ownership of the purse before the search. *See State v. Waters,* 924 P.2d 437, 440 (Alaska App. 1996) (finding police neither knew nor reasonably should have known a coin purse was owned by defendant, where it was not found on her person and she failed to claim ownership until after the search); *People v. McCabe,* 144 Cal. App.3d 827, 192 Cal. Rptr. 635, 637 (Cal. App. 1st Dist. 1983) (finding police had no reason to believe purse belonged to nonresident female where defendant had not been in physical possession of it, she never claimed ownership and police could have believed it belonged to another female who lived at the residence).Finally, the State disputes the argument that the purse could not have been connected to Jeffrey Sickles due to his gender, as one may not necessarily assume purses are solely the domain of women. *See State v. Thomas,* 847 N.W. 2d 438, 440 – 41, 443 (Iowa 2014) (evidence showed male defendant was in constructive possession of drugs found on top of a row purses, which in fact belonged to another male resident of the home); *United States v.*

Walker, 529 Fed. Appx. 256, 264, 271 n. 2 (3d Cir.) (although court observes "[m]en, typically, do not carry purses," it also notes that "this general statement may no longer be a certainty"), *cert. denied,* __ *U.S.* __, 134 S. Ct. 536, 187 L.Ed. 2d 34 (2013); and __ U.S. __, 134 S. Ct. 1048, 188 L.Ed. 2d 137 (2014).

None of the matters defendant points to was sufficient to give police either actual or constructive notice before the search that the purse was owned by defendant. Under the notice test, "without notice of some sort of the ownership of a belonging, the police are entitled to assume that all objects within premises lawfully subject to search under a warrant are part of those premises for the purpose of executing the warrant." *State v. Nabarro,* 525 P.2d 573, 577 (Haw. 1974). That is true here.

In sum, this Court should apply the actual possession test and determine that there is no evidence defendant had possessed the purse when police first encountered her, and so the search of the purse was proper under the search warrant in this case. Even under the other tests urged by defendant, there still is no basis to find the search unlawful. Defendant's Fourth Amendment rights were not violated.

B. State Constitution

Defendant urges this Court to adopt a notice test under the Iowa Constitution, asserting it properly balances privacy interests of suspects with the needs of law enforcement. She contends the notice test “provides a workable rule for law enforcement, without any undue burden." Defendant’s Brief at 43 – 44.

As previously noted, defendant failed to urge in the trial court a particular search and seizure rule to be applied under the Iowa Constitution. Therefore, the present claim is waived and need not be addressed. Withholding consideration is also supported by the fact that, as argued above in this brief, defendant’s suppression claim fails the notice test. *Cf. State v. Dahl,* 874 N.W. 2d 348, 351 (Iowa 2016) ("The doctrine of constitutional avoidance counsels us to construe statutes to avoid constitutional issues when possible.”); *McGulpin v. Bessmer,* 241 Iowa 1119, 1128 – 1131, 43 N.W. 2d 121 (1950) (although Court in medical malpractice case noted strong objections to “locality rule" limiting physician liability to the standard of care practiced in similar communities, it did not abrogate the rule, as the medical expert was competent to testify to the relevant standard of care under that rule). However, if the Court reaches defendant’s request, it

should reject the notice test and instead accept the actual possession test.

The text of article I, section 8 of the Iowa Constitution is "*nearly* identical" to the Fourth Amendment. *State v. Short,* 851 N.W. 2d 474, 500 (Iowa 2014) (emphasis in original). Although this Court is free to interpret the Iowa Constitution more stringently in favor of personal rights, that authority does not relegate decisions of the United States Supreme Court to an inferior status. *Nguyen v. State,* 878 N.W. 2d 744, 755 (Iowa 2016). Indeed, the Iowa Supreme Court has noted: "[O]ur independent authority to construe the Iowa Constitution does not mean we generally refuse to follow the United States Supreme Court decisions." *State v. Short,* 851 N.W. 2d at 490. The approach of the United States Spring Court will be followed when it is supported by "the most persuasive reasoning." *Id.* "[A]doption of appropriate federal precedents that 'illuminate open textured provisions' of a state constitution is not a compromise of the court's obligation to independently construe the provision." *Id., quoting State v. Lamme,* 216 Conn. 172, 579 A.2d 484, 490 (1990). In deciding a question of state constitutional application, decisions from other jurisdictions may be considered when persuasive. *State v.*

Young, 863 N.W. 2d 249, 272 (Iowa 2015); *State v. Short,* 851 N.W. 2d at 481.

Because state and lower federal courts have employed a variety of tests – actual possession alone, actual possession supplemented with constructive possession, relationship, notice (actual and constructive), as well as hybrid formulations relying on more than one test – there does not appear to be any one test which commands a clear or strong majority. *See generally* 51 A.L.R. 5th 375 (1997). Be that as it may, consideration of the persuasive force of the cases applying the actual possession test shows that it, and not the notice test, should be adopted under the state constitution if that question is reached.

As argued earlier in this brief, the most efficacious test is the actual possession test. It apparently is the test that was applied in *Wyoming v. Houghton,* and persuasive state court decisions support the conclusion that the Supreme Court would extend that rule to search warrants for premises when presented with that question. *State v. Gilstrap,* 330 P.3d at 46; *State v. Leiper,* 761 A.2d at 461: *State v. Reid,* 77 P.3d at 1121 – 42.

Importantly, that test provides a functional, bright-line rule for law enforcement officers involved in work which is often volatile and dangerous. *State v. Prior,* 617 N.W. 2d at 264; *State v. Gilstrap,* 332 P.3d at 46. The Supreme Court in *Houghton* cogently explained how effective law enforcement would be frustrated if officers had to inquire about ownership of property not possessed by a particular person, or if they were required to assess the surrounding circumstances and infer who owned property otherwise subject to search. *Wyoming v. Houghton,* 526 U.S. at 305 – 06, 119 S. Ct. at 1303.

It is not too extreme to envision a scenario where a police officer is shot by a gun concealed in a purse, while officers are trying to find out who owns an unattached purse found on premises subject to search under warrant. Such a risk far outweighs the interests of one who leaves a purse lying around in a drug house while she ingests drugs.

Thus, if a specific rule under the Iowa Constitution is to be adopted, it should be the actual possession test. Not only is it consistent with the apparent view of the United States Supreme Court, but it also is the most effective rule to promote the interests of

law enforcement, without undermining any legitimate interests of those who are truly visitors to the scene of a premises search, as opposed to criminals.

C. Section 808.7

Defendant asserts the trial court erred when it found the purse search was authorized by Iowa Code section 808.7 (2015). Section 808.7 provides:

> In the execution of a search warrant the person executing the same may reasonably detain and search any person or thing in the place at the time for any of the following reasons:
>
> 1. To protect the searcher from attack.
>
> 2. To prevent the disposal or concealment of any property subject to seizure described in the warrant.
>
> 3. To remove any item which is capable of causing bodily harm that the person may use to resist arrest or effect an escape.

Iowa Code section 808.7 (2015). Defendant argues there is no basis under this statute to search the purse for officer safety. She concedes there was officer testimony in this case that a weapon could have been concealed in the purse and that even handcuffed suspects could pose a risk, as they could run to the nearby bedroom to withdraw a weapon from the purse. Although a police officer indicated such a scenario

possibly was “farfetched," he also insisted it was possible. Defendant asserts the evidence is insufficient to permit the purse search under section 808.7. Defendant’s Brief at 50 – 52.

Initially, the State asserts that search of the purse for weapons and drugs was within the scope of the search warrant, as earlier argued in this brief. However, defendant’s claim under section 808.7 also must fail.

All of the suspects found in the first-floor bedroom were initially handcuffed behind their backs. However, after they were moved to the adjacent living room the handcuffs were moved to the front apparently for all except one of the men. Supp. Tr. p. 32, line 14 – p. 33, line 15. When asked whether officer safety supported search of defendant’s purse, an officer testified it was important to search it for a possible weapon because there were multiple people in the home. As the officer testified: “I have seen individuals, whether they are handcuffed, still get up and try to fight with officers, try to run to different areas of [a] residence.” Supp. Tr. p. 18, lines 12 – 21. Although stating that might seem “farfetched,” the officer nevertheless maintained it was not “out of the realm of possibility” that one of the suspects might run to the nearby bedroom and draw a

weapon from the purse. Supp. Tr. p. 18, line 22 – p. 19, line 5. Defendant questions the police testimony regarding the purse as possibly concealing a weapon. She notes that the minutes of testimony indicated that before the search police had information that Jeffrey Sickles might have access to a rifle or shotgun, which could not be concealed in a purse. Defendant's Brief at 53. This is of no importance. The search warrant authorized police to search for handguns, and one was discovered in a car parked at the residence. Search Warrant; Minutes of Testimony; App. 19,57.

This testimony was sufficient to uphold search of the purse under section 808.7 for officer safety, as found by the trial court. Ruling Denying Defendant's Motion to Suppress; App. 80-81. Defendant's complaint that the testimony was insufficient because an officer indicated it might be "farfetched" to fear a weapon could be obtained does not undermine the court's ruling. First, actions of police in searching are judged by an objective standard, and not by an officer's subjective beliefs. *State v. Naujoks,* 637 N.W. 2d 101, 109 (Iowa 2001). Second, the possibility, even if not likelihood, of a threat in this case is evident under an objective standard. *See Los Angeles County v. Rettele,* 550 U. S. 609, 614, 127 S. Ct. 1989, 1993, 167 L. Ed. 2d 974

(2007) (officers acted reasonably during execution of search warrant when they ordered naked residents out of their bed and held them at gunpoint to check the bedding, as "the possibility" existed a suspect might sleep with a weapon nearby); *Michigan v. Summers,* 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981) (upholding detention of residents during search warrant execution even without evidence of any special danger, as execution of a search warrant for drugs "may give rise to sudden violence").

Paragraph (2) of section 808.7 authorizes a search for property subject to seizure under a search warrant. Police testified in this case that the purse search was also done for that purpose. Supp. Tr. p. 19, lines 6 – 13. Drugs and firearms can be concealed in a purse. Supp. Tr. p. 18, lines 12 – 16; p. 19, lines 6 – 13. The search was proper for this reason. *See State v. Smith,* 476 N.W. 2d 86, 90 (Iowa Ct. App. 1991) (search of defendant's purse was proper under section 808.7 even though the search warrant for hotel room did not list her as a person to be searched, where police suspected her of criminal activity and she was "associated with the subjects of the search warrant"). Here, the defendant was not a mere innocent visitor, but was a drug user who came to the target residence during the early morning hours

to use drugs. And, the purse at issue was a likely repository of drugs. *State v. Parish,* 2003 WL 21070979,*1.

Defendant does not challenge section 808.7 as unconstitutional, but she does assert it cannot be used to validate a search which is unconstitutional under federal and state constitutions. Defendant's Brief at 56-57. Given the fact that the search here, as argued earlier in this brief, was indeed constitutional, application of the statute is not improper.

Based on the foregoing, there was probable cause to search defendant's purse, the search was within the scope of the search warrant and was authorized by Iowa Code section 808.7.

D. Ineffective Assistance of Counsel

Finally, defendant argues that if any of her claims are deemed waived, then her trial counsel was ineffective. As previously argued in this brief, defendant has waived her request that a particular rule – the notice test – be adopted under the Iowa Constitution for assessing whether the purse at issue could be searched pursuant to the search warrant. Defendant's Brief at 61 – 62. No finding of ineffective assistance of counsel may be made if that request is found to be waived. Because application of the notice test does not support

suppression in this case there would be neither a breach of duty nor prejudice. *See State v. Brubaker,* 805 N.W. 2d 164, 171 (Iowa 2011) (counsel not ineffective for failing to raise a meritless issue).

For all the foregoing reasons, defendant's conviction should be affirmed.

II. This Court should Remand for Determination of the Correct Costs in this Case, as the District Court Not Only Assessed Costs in the Present Case but also Improperly Assessed Costs in a Dismissed Case.

Preservation of Error

Besides the charge in this case, defendant was also charged with a simple misdemeanor in Case No. SMAC357205, possession of drug paraphernalia. Sent. Tr. p. 7, lines 5 – 19; County Attorney Preliminary Complaint Review with attached complaint; App. 6-8. When making a sentencing recommendation in this case, the prosecutor also requested the simple misdemeanor case be dismissed at defendant's cost. The defense made no reply, and the court dismissed the case at the sentencing hearing without referring to assessment of costs regarding the dismissed case. Sent. Tr. p. 7, lines 5 – 19; p. 8, line 21 – p. 9, line 21; p. 12, line 8 - p. 15, line 5. However, in the later sentencing order filed by the court, costs were assessed for the dismissed charge. Sentencing Order; App. 116-19.

The State disputes that defendant may challenge as part of this appeal the assessment of costs in the dismissed case, as it disagrees with the decision in *State v. Jenkins-Wells,* 2015 WL 3623642 (Iowa Ct.App. 2015). Nevertheless, the State does not resist treating the notice of appeal in this case as an application for discretionary review in the other case, and so does not resist reaching the merits of defendant's claim.

The State agrees that a claim of an illegal sentence need not be preserved in the district court. *State v. Thomas,* 520 N.W. 2d 311, 313 (Iowa Ct. App. 1994). The illegal sentence doctrine includes a claim that assessment of court costs was not authorized by statute. *See State v. Johnson,* 887 N.W. 2d 178 (Iowa Ct. App. 2016)

Standard of Review

A claim of an illegal sentence is reviewed for errors of law. *State v. Sisk,* 577 N.W. 2d 414, 416 (Iowa 1998).

Merits

In the absence of an agreement, such as a guilty plea, the district court may not assess court costs in a dismissed case. *State v. Petrie,* 478 N.W. 2d 620, 622 (Iowa Ct. App. 1991), *superseded by statute on another point*, *State v. Foth,* No. 14 – 1250, 2016 WL

719044, at*7 (Iowa Ct. App. 2016). Thus, assessment of court costs for the dismissed charge in this case was illegal. However, the correct allocation or separation of costs for the two cases is unclear; nor is it apparent what costs, if any, are shared by the two cases and so must be divided between them.

Therefore, this case should be remanded for determination of the appropriate amount of costs for the possession of a controlled substance (marijuana) conviction in this case.

CONCLUSION

The State respectfully requests this Court affirm the defendant's drug conviction. However, it agrees the case should be remanded for determination of the correct amount of costs to be assessed.

REQUEST FOR NONORAL SUBMISSION

The defendant has requested oral submission. The State does not believe oral argument is necessary, as the issues are fully addressed in the briefs and can be decided without further elaboration. In the event the Court grants the defendant oral argument, the State asks to be heard as well.

Respectfully submitted,

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