No. 21-1319
Polk County No. 05771 FECR340733

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,

v.

DAVID DWIGHT JACKSON,
Defendant-Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE SCOTT BEATTIE (Suppression Motion)
HONORABLE DAVID PORTER (Trial)

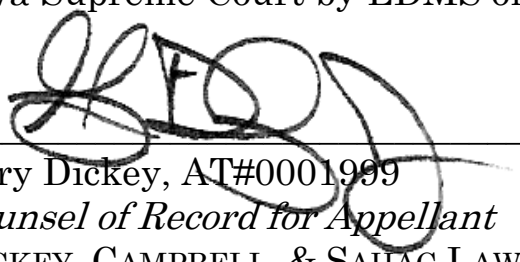
FINAL REPLY BRIEF FOR APPELLANT

Gary Dickey
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com
Counsel for Appellant

PROOF OF SERVICE & CERTIFICATE OF FILING

On April 24, 2023, I served this brief on all other parties by EDMS to their respective counsel, and I mailed a copy of this brief to my client at Fort Dodge Correctional Facility.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on April 24, 2023.



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

I. WHETHER THE TRIAL COURT ERRED IN DENYING JACKSON'S MOTION TO SUPPRESS BASED ON FALSE STATEMENTS CONTAINED IN THE SEARCH WARRANT APPLICATION

CASES

Wong Sun v. United States, 371 U.S. 471 (1963)
Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823 (Iowa 2007)
United States v. Bourseau, 531 F.3d 1159 (9th Cir. 2008)
United States v. Johnson, 171 F.3d 601 (8th Cir. 1999)
United States v. McClellan, 165 F.3d 535 (7th Cir. 1999)
Wong Sun v. United States, 371 U.S. 471 (1963)

II. WHETHER THE DISTRICT COURT ERRED IN ALLOWING TESTIMONY ABOUT INFORMATION CONTAINED IN JACKSON'S MEDICAL RECORDS

CASES

Chung v. Legacy Corp., 548 N.W.2d 147 (Iowa 1996)
In re Estate of Poulos, 229 N.W.2d 721 (Iowa 1975)
Office of Consumer Advocate v. Iowa State Commerce Comm'n, 465 N.W.2d 280 (Iowa 1991)
State v. Buelow, 951 N.W.2d 879 (Iowa 2020)
State v. Dudley, 856 N.W.2d 668 (Iowa 2014)
State v. Fiems, 2020 Iowa App. LEXIS 358 (Iowa Ct. App. Apr. 15, 2020)
State v. Reynolds, 746 N.W.2d 837 (Iowa 2008)
State v. Roling, 2001 Iowa App. LEXIS 101 (Iowa Ct. App. Feb. 7, 2001)
Squealer Feeds v. Pickering, 530 N.W.2d 678 (Iowa 1995)
Summy v. City of Des Moines, 708 N.W.2d 333 (Iowa 2006)
United States v. Resnick, 835 F.3d 658 (7th Cir. 2016)

OTHER AUTHORITIES

Iowa R. Evid. 5.803(6)

Thomas Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39 (Fall 2006)

REPLY ARGUMENT

I. OFFICER NEMMERS' FAILURE TO REVIEW THE SEARCH WARRANT AFFIDAVIT IS RECKLESS DISREGARD OF THE TRUTH

A. Officer Nemmers acted recklessly when he submitted a sworn affidavit to the court containing false information without first reading it

The State attempts to downplay the significance of Officer Nathan Nemmers' material misstatements on the warrant affidavit by likening them to "minor scrivener's errors" or "clerical inadvertence." (State's Proof Br. at 35). A scrivener's error occurs when an officer transposes numbers in an address. *United States v. McClellan*, 165 F.3d 535, 545 (7th Cir. 1999) (concluding no *Franks* hearing was required for a simple transposition of numbers in an address"). The falsehood in Officer Nemmers' affidavit is several standard deviations away from a scrivener's error. It involved the inclusion of substantive facts that were the product of his failure to read the application before submitting it to the court. (01/26/21 Motion to Suppress Hr'g Tr. at 21:2 to 22:1). In other areas of the law, "reckless disregard" has been held to cover the "ostrich type situation" where an individual has

"buried his head in the sand" and failed to make simple inquires" which would alert him to the falsities. *United States v. Bourseau*, 531 F.3d 1159, 1168 (9th Cir. 2008); *see also Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 831 (Iowa 2007), (explaining that "purposeful avoidance" is sufficient to establish reckless disregard of the truth). To hold otherwise would create the perverse incentive to turn in warrant affidavits without first reading them thereby granting law enforcement complete immunity from *Franks*.

B. The remainder of the search warrant does not establish probable cause to believe Jackson operated his vehicle while under the influence

None of the remaining facts in the warrant affidavit is inherently incriminatory and "can be readily characterized as conduct typical of a broad category of innocent people." *United States v. Johnson*, 171 F.3d 601, 605 (8th Cir. 1999). More importantly, the warrant affidavit does not explain why the litany of facts are indicative of an individual under the influence of narcotics. "Law enforcement officers are permitted to draw inference and deductions that might well elude an untrained

person." *Id.* at 604. "Nevertheless, those inferences and deductions must be *explained*." *Id.* "Specifically, the Fourth Amendment requires an officer to explain *why* the officer's knowledge of particular criminal practices gives special significance to the apparently innocent facts observed." *Id.*

Here, the warrant affidavit sets out Officer Nemmers' training. Likewise, it sets out his observations. But, there is no explanation given to tie the observations to a conclusion that Jackson was under the influence of narcotics. In short, "the record does not contain any particularized assessment of their significance for purposes of determining reasonable suspicion." *Id.* The warrant, therefore, was invalid, and all evidence seized during the search, as well as all fruits from the search, must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963).

II. TESTIMONY ABOUT INFORMATION FROM JACKSON'S HOSPITAL DISCHARGE RECORDS SHOULD HAVE BEEN EXCLUDED ON BOTH PHYSICIAN-PATIENT PRIVILEGE AND HEARSAY GROUNDS

A. Jackson did not waive confidentiality of his Broadlawns medical records

The State argues that Jackson failed to preserve error as to Dale Peterson's testimony about his medical records because trial counsel objected only on the basis of HIPAA and never specifically mentioned Iowa Code section 622.10 at trial. (State's Proof Br. at 40-41). While true, the State's error preservation "argument elevates form over substance." *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 283 (Iowa 1991). Jackson's trial counsel unambiguously objected to testimony about confidential information contained in his medical records:

> MS. HART LUNDE: I would just raise the same concern the Court has that Mr. Jackson has not waived his HIPAA rights, by any means. Those protect his medical records, especially in regards to the Broadlawns medical records.
>
> Mr. Peterson was not a treating doctor from Broadlawns. He is not a representative of Broadlawns, that I know of. He has -- he works for the Polk County Jail, and he had nothing to do with any treatment Mr. Jackson received prior to being housed at the Polk

> County Jail, so, yes, those would be my concerns with the HIPAA violations of Mr. Jackson.

(04/08/21 Trial Tr. Vol. IV at 50:12-23). The State cannot seriously argue that anything other than the physician-patient privilege was raised by Jackson's objection. *Compare Office of Consumer Advocate*, 465 N.W.2d at 284 (holding that error was preserved when party cited to the Fourteenth Amendment but never specifically cited the due process clause). The "pivotal consideration" in error preservation is "whether counsel sufficiently articulated an argument so that (1) the district court could review counsel's argument; and (2) the appellate court could review counsel's argument and the district court's decision." *See* Thomas Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 54 (Fall 2006). Clearly, trial counsel's objection was sufficient to alert the district court to the problem of admitting testimony about privileged medical testimony. *Compare Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006) (finding error preserved even though the City did not identify the two statutes that prohibited exclusion of jurors from the jury panel).

This is especially true considering that Jackson's trial counsel did cite to section 622.10 in the motion for new trial. (App. at 28-30). Equally as important, the district court specifically cited chapter 22 in denying Jackson's motion. (09/07/21 Sentencing Hr'g Tr. at 5:4-10).

As to the merits, the State offers a jumble of contradictory rationales. On appeal, it contends that Jackson "waived the protection of the privilege by testifying about his medical condition at the time that he was admitted to the hospital and testifying about the course of his treatment at the hospital." (State's Proof Br. at 53). At trial, however, the State expressly argued that Jackson had not waived the privilege:

> MS. LIVINGSTON: Well, part of the problem, Judge, is that because the defendant put his health into the record, *but has not waived any of his rights and has not given us access to any information*, Mr. Peterson can't tell me exactly what's in the records, so I don't know, but the defendant has made his health that day his primary -- his sole defense without any evidence whatsoever. I should have an opportunity to rebut that.

(04/08/21 Trial Tr. Vol. IV at 54:15-22). In any event, the privilege afforded by section 622.10 is not "waived whenever the defendant puts his medical condition at issue as a defense to a charged

crime." *State v. Roling*, 2001 Iowa App. LEXIS 101 at *8 (Iowa Ct. App. Feb. 7, 2001). Nor does the denial of an element of the State's case place the defendant's medical condition in issue. *Chung v. Legacy Corp.*, 548 N.W.2d 147, 149 (Iowa 1996).

There is also a ships-passing-in-the-night problem with the State's argument. Its waiver claim rests on the following testimony:

> Q. Okay. You said, then, your memory kind of goes out, and you remember being in the hospital?
> A. Yes.
>
> Q. Then, do you remember receiving treatment in the hospital?
> A. Some. I had more due to what people have told me now, but I don't really remember, recall, much of anything from when I got there.
>
> Q. Okay. Were you admitted to the hospital?
> A. I was admitted to the ICU.
>
> Q. Do you remember what for?
> A. My heart rate had dropped, was at 34, and, you know, I -- I don't know. They said they were waiting to see if my heart was going to stop again.
>
> Q. So you were admitted to the hospital, and you received treatment throughout the next day?
> A. Yes.

(04/07/21 Trial Tr. Vol. III at 153:16 to 154:7). Thus, even if this could be deemed a waiver – which it is not – the waiver would be limited to "communications on the matter disclosed or at issue." *Squealer Feeds v. Pickering*, 530 N.W.2d 678 (Iowa 1995). The best case for the State is that Jackson waived privilege concerning the treatment he received in the ICU – specifically his vitals.[1] But, the State did not offer testimony about medical records pertaining to treatment. Instead, it solicited evidence from his discharge instructions:

> Q. What information do you receive specifically? I think you said discharge instructions. What kind of information does that entail?
>
> A. So the discharge instructions are going to, A, show the -- what they were treated for at the hospital. It will also show follow-up appointments that are necessary. It will also show any current medications prescribed from that appointment.
>
> Q. Are those records that were received from Broadlawns Medical Center for David Jackson on August 10, 2020, when he was admitted into the jail?

---

[1] Jackson also testified that he previously received treatment at Broadlawns Medical Center for several episodes of "blackouts." (04/07/21 Trial Tr. Vol. III at 165:7 to 166:15). That testimony, however, was elicited by the State during Jackson's cross-examination. Of course, an adversary's claim or position in litigation does not affect whether a waiver under section 622.10 has occurred. *Chung*, 548 N.W.2d at 149.

A. Yes, those records are present in his electronic medical record.

Q. Can you tell us, please, if the defendant – if his discharge instructions reflected any concerns about his breathing?

A. No, ma'am, they did not.

Q. I didn't ask you very well. I asked you if you could tell us and you said no. Did his records reflect that the defendant had any difficulty with his breathing?

A. No, ma'am.

Q. Did the records reflect the defendant's vitals?

A. We take our own vitals when he arrives. So the initial discharge instructions do not have his vitals from the time of discharge from the hospital.

* * *

Q. Right. So you cannot testify today that Mr. Jackson at some point did not have a heart rate that was low; correct?

A. No.

(04/08/21 Trial Tr. Vol. IV at 60:15 to 61:15, 67:14-17). In other words, the State argues Jackson waived privilege by testifying about his heart rate in the ICU, but the records about which Peterson testified had nothing to do with his heart rate. Under no circumstance did Jackson's testimony waive his privilege over

information from his medical records at the jail indicating that he was in an alcohol and opioid detox protocol:

> Q. While the defendant was being admitted, then, into jail, were there any precautionary measures taken for his health?
> A. Yes.
>
> Q. What?
> A. After the initial medical screening by jail staff or Wellpath staff working under contract with the jail, the patient was placed on precautions for what we call CIWA in house. That is an alcohol and opioid detox program.

(04/08/21 Trial Tr. Vol. IV at 63:18 to 64:2). Consequently, "the district court erred in allowing the admission [information from] his medical records." *Roling*, 2001 Iowa Appl LEXIS 101 at *10.

B. Peterson's testimony about the information contained in Jackson's medical records constitutes hearsay

The district court admitted Peterson's testimony about the contents of Jackson's medical records over defense counsel's hearsay under the following premise:

> THE COURT: As I understand it, Ms. Livingston's argument is that the statements in the Broadlawns reports are being -- or the statements this witness is going to testify to regarding the Broadlawns reports are not being offered for the truth of the matter asserted, but rather subsequent course of conduct.
> Is that right, Ms. Livingston?

MS. LIVINGSTON: Yes.

(04/08/21 Trial Tr. Vol. IV at 53:10-18). Implicitly raising the white flag, the State makes no attempt to defend the district court's clearly erroneous analysis. Instead, the State pivots to a new theory of admissibility – "the hearsay exception for business records." (State's Proof Br. at 62)(citing Iowa R. Evid. 5.803(6)). But, medical records are admissible under Rule 5.803(6) only upon proper foundation. *State v. Buelow*, 951 N.W.2d 879, 885 (Iowa 2020) (citing *In re Estate of Poulos*, 229 N.W.2d 721, 727 (Iowa 1975)). And, the foundation must be "shown by the testimony of the custodian or another qualified witness." Iowa R. Evid. 5.803(6)(D). The State "did not offer testimony from the doctor or other party involved in creating or keeping the record, a certification from a custodian of the proffered record, or a stipulation to the document's admission." *State v. Fiems*, 2020 Iowa App. LEXIS 358 at *10 (Iowa Ct. App. Apr. 15, 2020). "Without the required foundation, the [testimony] did not qualify for the business-records exception." *Id.* It is true that Peterson testified that the Polk County Jail received Jackson's records from

Broadlawns and maintained them in the regular course of its business. (04/08/21 Trial Tr. Vol. IV at 65:5-14). There was no testimony from anyone with knowledge of how Broadlawns generates and maintains its records. "Although the specific person who created the record in the course of business need not testify to lay the foundation for the business records exception, the party offering the evidence must demonstrate the evidence was made in the course of the [business], at or reasonably near the time, using standard procedures that reasonably indicate the trustworthiness of the information." *State v. Reynolds*, 746 N.W.2d 837, 843 (Iowa 2008) (citations omitted). That evidence is lacking from this record.

The same result is required for the testimony concerning Jackson's placement alcohol and opioid detox protocol. While that information came from Jackson's records at the Polk County Jail, Peterson did little more than lay foundation that the records were "kept in the regular course of business." (04/08/21 Trial Tr. Vol. IV at 65:5-14). He established none of the other perquisites for Rule 5.803(6) such as (1) the record was made at or near the time

of the act; (2) the information was transmitted by a person with knowledge; or (3) that it was regular practice of the Polk County Jail to make such a record. *Reynolds*, 746 N.W.2d at 843 (identifying five "foundational elements" to admit a record containing hearsay under Rule 5.803(6). The district court therefore erred in admitting Peterson's testimony – even under the State's newfound theory of admissibility.

C. The admission of Peterson's testimony prejudiced Jackson's defense

In the end, the State is reduced to arguing that Peterson's testimony was harmless because "there was overwhelming evidence" of Jackson's guilt. (State's Proof Br. at 66). The implication is that if the prosecution "presents enough evidence of guilty it can then for measure top off that evidence with evidence that violates a constitutional right, ignores evidentiary rules, and tempts the jury to abdicate its role as a factfinder." *United States v. Resnick*, 835 F.3d 658, 660 (7th Cir. 2016) (Bauer, Posner, Flaum, and Kanne, J., dissenting). That is not how harmless error works in Iowa.

"In cases of nonconstitutional error, [the court must] start with the presumption that substantial rights of the defendant have been affected." *State v. Dudley*, 856 N.W.2d 668, 678 (Iowa 2014). "The State has the burden to affirmatively establish substantial rights of the defendant were not affected." *Id.* That burden is not satisfied, as the State suggests, by having the appeals court sit as a second jury to deliberate on what the outcome would have been in the absence of the evidence. "There is no evidentiary demarcation line that when traversed with enough damning evidence of guilt permits the government and the court to deny a criminal defendant the right to a fair jury trial." *Resnick*, 835 F.3d at 660 (Bauer, Posner, Flaum, and Kanne, J., dissenting).

The Court should not overlook the incongruence in the State's harmless error argument. Below, the prosecutor argued that Peterson's hearsay testimony was necessary to rebut Jackson's own testimony about what happened on the day of the accident. (04/08/21 Trial Tr. Vol. IV at 54:15-22). "If the State believes the evidence so clearly supports a finding of guilt, it is

difficult to discern why the prosecutor sought to introduce" the evidence in the first place. *Roling*, 2001 Iowa App. LEXIS 101 at *10.

The State's case was far from the proverbial slam dunk. Jackson's theory of defense was that he blacked out from a medical condition, which caused the accident. It bears repeating that the State's own eyewitness testified that he assumed the driver of the Prius was experiencing a medical emergency. (04/06/21 Trial Tr. Vol. II at 37:2-7). On top of that, information from the vehicle's event record established that Jackson suddenly accelerated and did not apply the brakes before or after the collision—which is also consistent with a medical event. (04/07/21 Trial Tr. Vol. III at 53:4-12, 54:4-9). Lastly, Jackson testified that he blacked out as he approached Prospect Road. (04/07/21 Trial Tr. Vol. III at 141:16 to 142:6). If believed, this evidence would create reasonable doubt as to the causation element of the homicide by vehicle charge. For this reason, the State used Peterson's testimony to undermine Jackson's defense.

CONCLUSION

For the reasons set forth above, David Jackson requests this Court to reverse his convictions and remand to the district court with instructions consistent with its opinion.

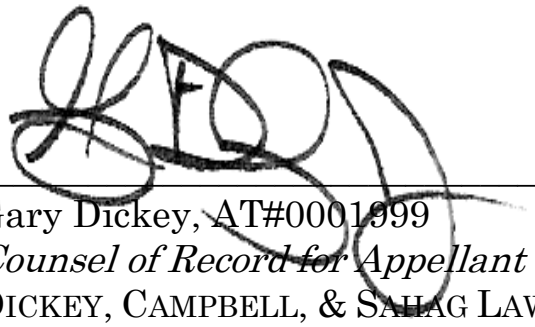
COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $ 9.75, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and the type-volume limitation of Iowa R. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because:

> [x] this brief has been prepared in a proportionally spaced typeface using Century in 14 point and contains 2,851 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com