IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0622

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN ANDRE BAKER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE JOEL A. DALRYMPLE AND THE HONORABLE
GEORGE L. STIGLER, JUDGES

APPELLEE'S BRIEF

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ROUTING STATEMENT

Because this case does not meet the criteria of Iowa Rule of Appellate Procedure 6.1101(2) for retention by the Supreme Court, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case

Defendant Justin Andre Baker ("Defendant") appeals his conviction and sentence following a jury trial in which the jury found him guilty of one count of Possession of Marijuana with Intent to Deliver, in violation of Iowa Code section 124.401(d), a class D felony, and one count of Drug Tax Stamp Violation, in violation of Iowa Code section 453B.12, a class D felony. On appeal, Defendant argues that the district court should have granted his motion to suppress because he was seized in violation of the Fourth Amendment to the United States Constitution and article I, section 8 to the Iowa Constitution. In addition, Defendant argues that the warrant used to search his residence lacked sufficient probable cause. Defendant also claims his trial counsel was ineffective for failing to file a motion to suppress in AGCR212970, in which he pleaded guilty to one count of Driving While Barred in violation of Iowa Code section 321.561, an aggravated

misdemeanor, and one count of Possession of Marijuana—Second Offense, in violation of Iowa Code section 124.401(5), a serious misdemeanor. Finally, Defendant argues that the district court abused its discretion when it sentenced him.

Course of Proceedings

The State accepts Defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On August 30, 2015, Investigator Michael Girsch of the Waterloo Police Department received a phone call from a Nevada state trooper. Motion Tr. 20:20–21:20. At the time, Investigator Girsch was assigned to the work on the Tri-County Drug Enforcement Task Force. *Id.* at 19:17–20:19. The Nevada state trooper told Investigator Girsch that that they

> had stopped a vehicle and identified three occupants in the vehicle that were from Waterloo, Iowa. And during the stop of the vehicle they ended up searching the vehicle and located a large distribution quantity of marijuana along with edibles and other items during the traffic stop, and the three occupants were eventually placed under arrest....

Id. at 21:11–20. Defendant was one of the three individuals arrested in Nevada. *Id.* at 21:21–22:23.

In early April 2016, Investigator Girsch was conducting undercover surveillance in an unrelated investigation, when he spotted Defendant's car near the 700 block of Ricker Street. *Id.* at 22:8–23:4, 45:5–47:2. Investigator Girsch stated that it "appeared he was going to pull into a driveway and then observed me sitting…and to me it looked like he saw me and may have gotten scared or something, continued to drive past a residence, which I thought it looked like he was going to pull into." *Id.* at 22:8–23:4, 36:25–37:23. Because Investigator Girsch believed Defendant was trying to evade him, he moved to a different position but continued to watch Defendant. *Id.* After Investigator Girsch moved, Defendant circled back around and pulled into the driveway at 702 Ricker Street. *Id.* 702 Ricker Street was the residence of Shana Caldwell, Defendant's niece and co-defendant, and Defendant stayed there on occasion. *Id.* at 50:20–51:7.

On April 18, 2016, Investigator Matthew Isley of the Black Hawk County Sheriff's office and the Tri-County Drug Enforcement

Task Force, received an anonymous phone call. *Id.* at 60:8–61:5, 61:16–62:5. The caller told Investigator Isley

> that they had been over at 702 Ricker where they stated that [Defendant] and Shana [Caldwell] were living. In the past couple of days they had been over there and saw that there was a distribution amount of marijuana inside the house, and they had called, and while speaking with them they said that they had just supposedly got back into town with a shipment of more marijuana.

Id. at 62:3–14. The caller also told Investigator Isley that both Defendant and Caldwell were at the house at the time they saw the marijuana, and the caller suspected they were dealing drugs. *Id.* at 81:4–83:10.

On the same day, Investigator Isley informed Investigator Girsch about the anonymous call and based on the information from the caller—along with the information they previously received from the Nevada state trooper—decided to conduct surveillance on Defendant and Caldwell at their 702 Ricker Street house. *Id.* at 24:15–25:8, 62:15–63:4. While conducting surveillance, the investigators saw Defendant enter the house, then leave in his vehicle 20 minutes later. *Id.* at 62:25–63:10.

When Defendant left the house, both investigators followed. *Id.* at 25:9–26:6, 63:11–24. Investigator Girsch observed Defendant as he pulled in, parked in an alley around the 200 block of Newell Street, and spoke with one or two individuals in the alley. *Id.* at 25:9–26:6. As Investigator Isley drove by the same alley, he observed—based on his experience in narcotics—what he believed to be a hand-to-hand drug transaction. *Id.* at 63:25–64:20.

After witnessing this hand-to-hand drug transaction, Investigator Isley contacted Sergeant Steven Bose of the Waterloo Police Department and asked him to stop Defendant's vehicle. *Id.* at 9:19–10:9, 64:21–65:5. Sergeant Bose initiated a traffic stop on Defendant's vehicle, but Defendant did not immediately come to a stop. *Id.* at 10:10–11:1. Before Defendant stopped his vehicle, he tossed a bag of marijuana out of his window, which was recovered by Sergeant Bose. *Id.* at 11:2–9, 16:23–17:3; State's Motion Ex. A-1, A-2. Sergeant Bose also found $200 in cash on Defendant. Trial Tr. 154:6–14.

Search Warrant Application and Affidavit

Immediately after Defendant was arrested, Investigator Isley drafted a search warrant application for 702 Ricker Street.

SWCR017510 04-20-2016 Search Warrant Application; Conf. App. 4–11. In his affidavit, Investigator Isley stated that on August 30, 2015, Investigator Girsch received information from the Nevada State Patrol that Defendant was arrested for felony narcotics trafficking. *Id.* at pg. 3; Conf. App. 6. Investigator Isley noted that in early April 2016, Investigator Girsch was conducting surveillance in an unrelated investigation when Defendant "looked over at Inv. Girsch as if concerned of his presence and slowly passed by 702 Ricker Street. Inv. Girsch believed [Defendant] was intended on going to 702 Ricker Street but passed by after seeing Inv. Girsch in the area." *Id.* at pgs. 3–4; Conf. App. 6–7.

The affidavit also asserted that "[i]n the past twenty four hours your affiant received an anonymous tip from a concerned citizen stating that he/she knew of drugs being stored at 702 Ricker Street in Waterloo, Iowa." *Id.* The concerned citizen stated that Defendant and Caldwell lived at this address and had "seen a distributional amount of marijuana inside this residence within the past forty eight hours." *Id.* at 4; Conf. App. 7.

Finally, Investigator Isley noted that "[i]n the past four hours" he conducted surveillance of 702 Ricker Street, noted that Defendant

left this address in his vehicle and conducted a hand-to-hand drug transaction in an alley. *Id.* Investigator Isley also stated that Sergeant Bose then initiated a traffic stop "and as the vehicle slow rolled to a stop," Defendant tossed a bag of marijuana out of the vehicle's window. *Id.* at pg. 5; Conf. App. 8. Sergeant Bose also found $200 in $20 bills in Defendant's pocket. *Id.* The warrant was signed and executed on the same day. SWCR017510 04-20-2016 Search Warrant and Search Warrant Executed; App. 5–6, Conf. App. 12.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE HE WAS NOT ILLEGALLY SEIZED AND THE WARRANT WAS SUPPORTED BY SUFFICIENT PROBABLE CAUSE.

Preservation of Error

This issue was preserved by the Defendant's motion to suppress, a hearing on the motion, and the district court's ruling on the issue. 08-09-2016 Motion to Suppress, 09-12-2016 Motion to Suppress Hearing Tr., 09-23-2016 Other Order; App. 16–17, 20–27.

Standard of Review

A challenge to the denial of a motion to suppress on federal or state constitutional grounds is reviewed de novo. *State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011). This review requires an independent

evaluation of the totality of the circumstances as shown by the entire record. *Id.* (citing *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)). While this Court gives deference to the district court's factual findings, it is not bound by them. *Id.* (citing *State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007)).

When determining whether there was sufficient probable cause for a warrant, appellate courts "do not make an independent determination of probable cause[.]" *State v. McNeal*, 867 N.W.2d 91, 99 (Iowa 2015) (citing *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997)). Instead—reviewing "only the information actually presented to the judge"—they determine "whether the issuing judge had a substantial basis for concluding probable cause existed." *Id.* (internal quotation marks and citation omitted). Because courts prefer warrants, they do not "strictly scrutinize the sufficiency of the underlying affidavit." *Id.* at 100 (citing *Illinois v. Gates*, 462 U.S. 213, 236 (1983)). Rather, they draw "all reasonable inferences" in favor of the probable cause finding and "give great deference" to that finding. *Id.* (citations omitted).

Merits

Defendant makes two separate, yet interrelated, challenges on appeal. First, Defendant argues that Sergeant Bose lacked reasonable suspicion to pull over his vehicle. Second, Defendant argues that the warrant to search the house at 702 Ricker lacked sufficient probable cause. Defendant believes all evidence obtained from both the stop of his vehicle and the search of the house should have been suppressed.

A. Sergeant Bose had Sufficient Reasonable Suspicion to Initiate a Traffic Stop of Defendant's Vehicle.

"The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect persons from unreasonable searches and seizures." *State v. Reinders*, 690 N.W.2d 78, 81 (Iowa 2004) (internal quotation marks and citation omitted). "Searches and seizures are unconstitutional if they are unreasonable and reasonableness depends on the facts of the particular case." *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001) (citing *State v. Roth*, 305 N.W.2d 501, 504 (Iowa 1981)).

"A traffic stop is permissible under our Iowa and Federal Constitutions when supported by probable cause or reasonable suspicion of a crime." *State v. McIver*, 858 N.W.2d 699, 702 (Iowa

2015) (internal citations omitted). "Probable cause of a crime supports an arrest, while reasonable suspicion of a crime allows a peace officer to stop and briefly detain a person to conduct further investigation." *Id.* (internal citation omitted).

The reasonable suspicion for Defendant's traffic stop was based on five separate incidents: 1) a few months before his Iowa arrest, state law enforcement in Nevada reported to the Tri-County Drug Enforcement Task Force that they arrested Defendant for trafficking marijuana through the state; 2) About two weeks prior to his arrest, Defendant acted suspiciously and evaded Investigator Girsch when he noticed that Girsch was parked near 702 Ricker Street; 3) an anonymous caller informed the Tri-County Drug Enforcement Task Force that they had recently been inside 702 Ricker Street, stated Defendant had a lot of marijuana, and believed he was selling it; 4) Investigator Isley witnessed a hand-to-hand drug transaction involving Defendant; and 5) After Sergeant Bose initiated the traffic stop but before Defendant acquiesced to the show of authority, Defendant threw a bag of marijuana out of his car window, which was recovered by Sergeant Bose.

In his brief, Defendant argues that these items should not be considered in their totality, but instead should only be considered individually. However, "[r]easonable suspicion to stop a vehicle for investigative purposes exists when articulable facts and all the circumstances confronting the officer at the time give rise to a reasonable belief that criminal activity is afoot." *Id.* (internal citation omitted). Because the Court looks at all of the circumstances, it does "not evaluate reasonable suspicion based on each circumstance individually, but determine[s] the existence of reasonable suspicion by considering all of the circumstances together." *Id.* (internal citations omitted).

Defendant spends a good portion of his brief arguing why each individual circumstance is insufficient to support reasonable suspicion. These arguments fail to recognize the proper legal standard for reasonable suspicion. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968) ("[The officer] had observed Terry, Chilton, and Katz go through a series of acts, *each of them perhaps innocent in itself*, but which taken together warranted further investigation." (emphasis added)). Each circumstance should not be looked at in isolation; rather, the law requires that the circumstances are considered together. *See*

United States v. Arvizu, 534 U.S. 266, 273 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." (internal quotation marks and citation omitted)).

When all the circumstances are considered together, reasonable suspicion was easily established. Defendant was arrested for drug trafficking in Nevada only a few months before he was stopped. After this arrest, Defendant used evasive maneuvers when he spotted an undercover officer parked near 702 Ricker Street, where he was staying. Not long after this evasion, an anonymous citizen called the Tri-County Drug Enforcement Task Force and stated that he or she had recently been in 702 Ricker Street, where they saw a large amount of marijuana. This caller stated they believed Defendant and Caldwell were drug dealers. After receiving this anonymous tip, officers conducted surveillance at 702 Ricker Street, saw Defendant drive away from the house and conduct what they believed, in their experience, was a hand-to-hand drug transaction. After seeing the hand-to-hand drug transaction, Sergeant Bose was directed to initiate

a traffic stop of Defendant. All of these circumstances are related to the trafficking and sale of marijuana and together they provide "specific and articulable cause to reasonably believe criminal activity is afoot." *State v. Heminover*, 619 N.W.2d 353, 358 (Iowa 2000) *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601 (Iowa 2001)). Defendant makes much of the fact that Investigator Isley did not see any drugs during the hand-to-hand transaction. However, "[t]he fact [Investigator Isley] did not see drugs as a part of the hand to hand exchange is not of consequence. [Investigator Isley's] experience as a narcotics detective caused him to conclude the hand to hand exchange was another drug transaction." *State v. Roberts*, No. 09-0590, 2010 WL1050078, at *4 (Iowa Ct. App. March 24, 2010).

Even if these circumstances did not amount to reasonable suspicion, when Defendant threw a bag of marijuana out of his window, Sergeant Bose not only had reasonable suspicion to stop his vehicle; he had probable cause to arrest Defendant. Defendant attempts to minimize this behavior and states that he "was seized when Bose turned on his squad car emergency lights to effectuate a stop." App. Br. pg. 45. This is incorrect. In the absence of physical

force, in order for a seizure to occur, not only must a police officer's actions constitute a show of authority—here, turning on the emergency lights to signal to Defendant he should pull-over—Defendant must acquiesce to that authority. *See California v. Hodari D*, 499 U.S. 621, 628–29 (1991); *see also U.S. v. Mendenhall*, 446 U.S. 544, 554–55 (1980) (finding that in order for a seizure without physical force to have been effected, submission to a show of authority is required); *State v. Johnson-Hugi*, 484 N.W.2d 599, 601 (Iowa 1992) ("In any event, merely because a reasonable person in the same or similar circumstances would have believed he or she was not free to leave does not necessarily mean that there was, in fact, a 'seizure' or an 'arrest.' It has been said that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes arrest." (internal quotation marks and citation omitted)).

After Sergeant Bose turned on his emergency lights, Defendant did not immediately pullover. Instead, he "slow-rolled" for several blocks. During this time, Defendant tossed a bag containing marijuana—later retrieved by Sergeant Bose—from the window of his vehicle. Because Defendant tossed the marijuana from his car prior to his acquiescence to Sergeant Bose's show of authority, Defendant was

not yet seized. Sergeant Bose was permitted to rely on Defendant's discarding of evidence when he determined whether he had reasonable suspicion to seize Defendant and probable cause to arrest him.

B. The Warrant was Supported by Sufficient Probable Cause.

Defendant's next argument is a bit convoluted. In Defendant's August 8, 2016 motion to suppress he argued that "the application for the warrant included stale information relating to an August 2015 investigation in the State of Nevada."[1] 08-09-2016 Motion to Suppress; App. 16–17. Defendant never argued that the search warrant included material false information, or that the affiant acted with reckless disregard for the truth. *Id.* Defendant never invoked the *Franks* procedure, nor did he ask the district court for a *Franks* hearing.

A *Franks* hearing—so called for *Franks v. Delaware*, 438 U.S. 154 (1978)—tests the truthfulness of an affiant. *State v. Niehaus*, 452 N.W.2d 184, 186 (Iowa 1990) (citing *Franks*, 438 U.S. 154). If a defendant shows an affiant knowingly included material false information in an affidavit or acted with reckless disregard for the

[1] Defendant does not renew this argument on appeal.

truth, such information is struck from the warrant affidavit. *Id.* at 186–87 (citing *Franks*, 438 U.S. 171–72). To receive a hearing, a defendant must make a non-conclusory preliminary showing "regarding the integrity of the affidavit." *State v. Groff*, 323 N.W.2d 204, 209 (Iowa 1982).

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 155–56.

The proper procedure is to request a *Franks* hearing prior to filing a motion to suppress. In the *Franks* hearing request, a defendant is required to make a preliminary showing that material information in the search warrant's affidavit is false and made either

knowingly and intentionally or with reckless disregard for the truth. "Mere allegations of deliberate falsehood or of reckless disregard for the truth are insufficient to mandate an evidentiary hearing; they must be accompanied by an offer of proof. Claims of negligent or innocent mistakes are insufficient." *State v. Robertson*, 494 N.W.2d 718, 724–25 (Iowa 1993) (citing *Franks*, 438 U.S. at 171). This is a difficult threshold to cross, and if a defendant does not make this preliminary showing, he is not entitled to an evidentiary hearing. *Id.* at 725–26. Only if a defendant can make this preliminary showing should the district court hold an evidentiary hearing. *Id.* If at this hearing the district court is persuaded that a material statement in the affidavit is a deliberate falsehood or is made with reckless disregard for the truth, the district court excises the statement from the affidavit. Only then does the district court proceed to entertain a motion to suppress and determine whether a warrant has sufficient probable cause. Defendant wholly failed to follow this procedure.

Instead, for the first time at the hearing on the motion to suppress, Defendant presented argument that Investigator Isley omitted "material facts" from the search warrant application. Motion Hearing Tr. 4:9–19, 6:10–21, 101:12–107:8. Defendant cited to *State*

v. Green, 540 N.W.2d 649, which discusses the *Franks* legal standard. *Id.* at 102:14–24. In its September 23, 2016 order on Defendant's motion to suppress, the district court interpreted Defendant's argument as one of whether Detective Isley's affidavit was deceptive and disagreed that it was, without legal citation. 09-23-2016 Other Order pgs. 6–7; App.25–26.

On appeal, Defendant explicitly asserts a *Franks* violation. App. Br. pgs. 50–62. He also argues that the warrant generally lacked probable cause. App. Br. pgs. 46–62. While these two arguments require distinct legal analyses, Defendant conflates them to make one overall argument that the warrant was deficient, lacked probable cause, and should not have been issued.[2]

Because Defendant did not follow the proper *Franks* procedure, it is questionable whether Defendant has preserved a *Franks* argument for appeal. *See State v. Thornton*, No. 02-1273, 2003 WL 21697013, at * 2 (Iowa Ct. App. July 23, 2003) (finding defendant did not preserve his *Franks* argument because he failed to request a

[2] On page 50 of his proof brief, Defendant has a heading entitled "*Franks* hearing evidence." The district court never conducted a *Franks* hearing, and this heading further conflates the issues presented in Defendant's brief.

Franks hearing at the district court). To the extent that he has not preserved this argument, it should not be considered.

Even if Defendant had preserved a *Franks* challenge, he has not shown it would have been successful. Defendant argues that Investigatory Isley omitted material facts when he: 1) stated in his affidavit that Defendant was arrest for narcotics trafficking in Nevada, but did not say he was not convicted of this crime; 2) stated that Defendant evaded Investigator Girsch when he saw him conducting surveillance, but did not state Investigator Girsch was undercover at the time, so was not in uniform or in a marked police car; and 3) "failed to include any information in the warrant application to demonstrate the reliability of the anonymous informant." App. Br. pg. 59.

Defendant bears the burden of showing that Investigator Isley made materially false statements in the affidavit either deliberately or with a reckless disregard for the truth. *Green*, 540 N.W.2d at 656–57. "Although the court 'is limited to considering the facts presented to the issuing judicial officer in determining whether probable cause existed,…in determining whether misrepresentation was intentional or material the surrounding facts are relevant and may be

considered.'" *Id.* (quoting *State v. Paterno*, 309 N.W.2d 420, 424 (Iowa 1981)).

In the warrant affidavit, Investigator Isley stated Defendant was arrested in Nevada for drug trafficking, but he never said that Defendant was charged and convicted. This is the truth. "[A]n officer applying for a search warrant is not required to present all inculpatory and exculpatory evidence to the magistrate, only that evidence which would support a finding of probable cause. Omissions of fact constitute misrepresentations only if the omitted facts cast doubt on the existence of probable cause." *Id.* at 657 (internal quotation marks and citations omitted). Here, there was no omission. Defendant would like to assign error because Investigator Isley did not go further and affirmatively state he was not convicted in Nevada. However, by stating Defendant was merely arrested, Investigator Isley did exactly that.

With regard to Investigator Girsch's undercover surveillance, Defendant has made no showing that omitting this information was intentional or made with reckless disregard for the truth. Investigator Girsch testified at the motion to suppress hearing that, based on his experience, he "strongly believed" Defendant recognized him as a

police officer and was evading him for that reason. Motion Hearing Tr. 46:3–25. This information is also not in the warrant affidavit. There is no material difference between whether Defendant recognized Investigator Girsch because he was wearing a uniform or whether Investigator Girsch, based on his extensive experience as an undercover narcotics officer in the area, determined that Defendant recognized him and avoided pulling into 702 Ricker Street. These facts do not "cast doubt on the existence of probable cause." *Green*, 540 N.W.2d at 657 (internal quotation marks and citation omitted).

Finally, Defendant argues that Investigator Isley "failed to include any information in the warrant application to demonstrate the reliability of the anonymous informant." App. Br. pg. 59. Defendant overlooks the rest of the warrant affidavit. In the warrant affidavit, directly after the information about the anonymous concerned citizen, Investigator Isley states that he determined that both Defendant and Caldwell list 702 Ricker Street as their current residence, as was stated by the caller. Investigator Isley goes on to detail the surveillance conducted on the house, the hand-to-hand drug transaction conducted by Defendant, and the traffic stop in which Defendant discarded a bag of marijuana. All of these

circumstances corroborate the caller's information, making it reliable. Because Investigatory Isley did not omit any material information from the warrant, it was proper for the district court to rely on this information when determining whether there was sufficient probable cause to support the search warrant.

When the information in the warrant application is evaluated, sufficient probable cause existed for the issuance of the warrant. "The test for probable cause is well established: 'whether a person of reasonable prudence would believe a crime was committed on the premises to be search or evidence of a crime could be located there.'" *Gogg*, 561 N.W.2d at 363 (quoting *State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987). "Probable cause to search requires a probability determination that '(1) the items sought are connected to criminal activity and (2) the items sought will be found in the place to be searched.'" *Id.* "The issuing judge is 'simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information,' probable cause exists." *Id.* (quoting *Gates*, 462 U.S. at 238). "In doing so, the judge may rely on 'reasonable, common sense inferences' from the

information presented." *Id.* (internal citation omitted). "The reviewing Court has a duty to give deference to the magistrate's finding." *Weir*, 414 N.W.2d at 330. "Due to the preference for warrants, doubts are resolved in favor of their validity." *Id.* (internal citation omitted).

Defendant argues that the warrant application improperly includes information that he tossed a bag of marijuana out of his car window because this information was obtained as the result of an illegal seizure. He asks that this information be stricken and for the validity of the warrant application to be evaluated without it. However, as argued above, Defendant's vehicle was lawfully stopped, and there was nothing improper about including the bag of marijuana in the warrant application.

The warrant application states that a few months prior to the application, investigators were informed that Defendant was arrested for narcotics trafficking in the State of Nevada. This information put Defendant on the Tri-County Drug Enforcement Task Force's radar. Then, a couple of weeks prior to his arrest, Defendant was about to pull into the driveway of 702 Ricker Street when he noticed Investigator Girsch parked on the street. When he noticed

Investigator Girsch he continued driving until Girsch moved his car, then Defendant returned to 702 Ricker Street and pulled into the driveway.

Twenty-four hours prior to Defendant's arrest, an anonymous citizen called the Tri-County Drug Enforcement Task Force and stated they had been in 702 Ricker Street within in the last 48 hours, that Defendant and Caldwell lived there, that there was a lot of marijuana in the house, and the caller believed Defendant and Caldwell were selling this marijuana. The Task Force confirmed both Defendant and Caldwell lived at 702 Ricker Street and immediately began surveillance on house. This surveillance discovered Defendant entering the house at 702 Ricker, leaving not long after, driving into an alley where he conducted a hand-to-hand drug transaction, and then, while slow-rolling to a stop after Sergeant Bose initiated a traffic stop, tossing a bag of marijuana out of the window.

This information would lead a reasonable person to believe that evidence of a crime could be found at 702 Ricker Street. Therefore, the warrant application contains sufficient probable cause to justify the search of 702 Ricker Street. The magistrate properly issued this

warrant, and accordingly, this Court should affirm the denial of Defendant's motion to suppress.

II. DEFENDANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT FILING A MOTION TO SUPPRESS IN AGCR212970.

Preservation of Error

Defendant did not file a motion in arrest of judgment, so he did not preserve his claim. However, Defendant asks this Court to consider his claims under the rubric of ineffective assistance of counsel because such a claim is an exception to the normal error preservation rules. *State v. Begey*, 672 N.W.2d 747, 749 (Iowa 2003).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Ineffective assistance claims are typically preserved for post-conviction relief actions to allow full development of the facts surrounding trial counsel's acts. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). The Court may decide that the record is sufficient to rule on the merits, or it may choose to preserve the claim for post-conviction proceedings. If Defendant "wishes to have an ineffective-assistance claim resolved on direct appeal," he has the burden to "establish an adequate record

to allow the appellate court to address the issue." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

To prove ineffective assistance, it is the defendant's burden to show that "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice." *Straw*, 709 N.W.2d at 133 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). In the guilty plea context, the result at issue is typically whether the defendant would not have pleaded guilty and would instead have proceeded to trial. *State v. Carroll*, 767 N.W.2d 638, 641, 644 (Iowa 2009). In other words, the decision to plead guilty must have rested on counsel's alleged error.

Merits

Defendant argues that his trial counsel failed to file a motion to suppress in AGCR212970, a companion case to the felony counts in FECR213018. Defendant asserts that such a motion would have been successful, so his trial counsel breached a duty by failing to file it. Defendant additionally argues that he would not have pleaded guilty if his trial counsel had filed the motion to suppress, because the motion would have resulted in the suppression of all evidence against him, obviating any reason to plead guilty.

As Defendant correctly notes in his brief, his original trial counsel in AGCR212970 was different than his trial counsel in FECR213018. After the district court denied Defendant's motion to suppress in FECR213018, trial counsel in the felony case took over the representation of Defendant in AGCR212970. Defendant fails to specify which trial counsel he believes should have filed the motion to suppress or whether he believes they both had the duty to do so.

To the extent he argues that his second trial counsel should have filed the motion to suppress, his argument has no merit. Second trial counsel filed a motion to suppress in FECR213018, and it was unsuccessful. Trial counsel would have had no reason to believe that another motion to suppress, which raised the same issues as the first motion to suppress, would be more successful in the companion case.

Regardless of whether Defendant asserts one or both of his trial counsel were ineffective, as argued in Section I of this brief, *supra*, a motion to suppress in this case would not have been successful. Thus, even if either or both trial counsel breached a duty by failing to file such a motion, Defendant cannot show he was prejudiced by this failure because the motion would not have been successful.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED DEFENDANT.

Preservation of Error

Defendant "is not required to raise an alleged sentencing defect in the trial court in order to preserve claimed error on that ground." *State v. Barry*, 2004 WL 1252706, at *1 (Iowa Ct. App. June 9, 2004) (citing *State v. Wilson*, 294 N.W.2d 824, 825–26 (Iowa 1980)). As such, the State does not contest error preservation.

Standard of Review

Where a challenged sentence falls within the statutory parameters, this Court "presume[s] it is valid and only overturn[s] for an abuse of discretion or reliance on inappropriate factors." *State v. Hopkins*, 860 N.W.2d 550, 554 (Iowa 2015) (citing *State v. Washington*, 832 N.W.2d 650, 660 (Iowa 2013)).

Merits

Iowa Code section 901.5 provides that, "[a]fter receiving and examining all pertinent information," the district court shall consider among a number of sentencing options, including a term of confinement or a suspended sentence or probation. Iowa Code § 901.5; *see also State v. Thomas*, 659 N.W.2d 217, 221 (Iowa 2003) (internal citation omitted) ("Following a plea or verdict of guilty, a

court may, subject to exceptions, defer judgment, defer sentence, or suspend sentence."). The sentencing court determines which of the statutory options "is authorized by law for the offense," and "which of them or which combination of them, in the discretion of the court, will provide maximum opportunity for rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." Iowa Code § 901.5.

In addition to considering "the societal goal of sentencing criminal offenders," the court must also consider "the nature of the offense, the attending circumstances, the age, character and propensity of the offender, and the chances of reform." *State v. Formaro*, 638 N.W.2d 720, 724–25 (Iowa 2002) (internal citations omitted). The district court must apply these sentencing factors "appropriately…." *State v. Jones*, No. 02-0959, 2003 WL 122368, at *1 (Iowa Ct. App. Jan. 15, 2003). "The application of these goals and factors to an individual case, of course, will not always lead to the same sentence." *Formaro*, 638 N.W.2d at 725. "Yet, this does not mean the choice of one particular sentencing option over another constitutes error." *Id.*; *see also State v. Wright*, 340 N.W.2d 590, 593 (Iowa 1983) ("The right of an individual judge to balance the relevant

factors in determining an appropriate sentence inheres in the discretionary standard").

There is nothing in the record to support Defendant's assertion that the district court abused its discretion when it sentenced him. At the hearing, the State asked the district court to impose a five-year prison sentence on both count I and II in FECR213018 and to run these sentences consecutive to each other. Sent. Tr. 4:16–5:1. In AGCR212970, the State asked for a two-year sentence on count I and a one-year sentence on count II. *Id.* at 5:1–14. And in AGCR215793, the State asked for a two-year sentence on the only count. *Id.* The State asked the district court to run the aggravated misdemeanor sentences concurrent to each other and to the sentence in FECR213018 for a total prison term of ten years. *Id.* at 5:15–7:6. Defendant asked for the district court to run all of the sentences concurrently, but to suspend the sentences and place him at a residential facility. *Id.* at 7:8–8:14. The district court compromised between these two positions and ran all of Defendant's sentences

concurrently—for a total of five years in prison—but did not suspend the sentences. *Id.* at 11:17–14:10.[3]

Prior to imposing this sentence, Defendant allocuted and denied telling the writer of the pre-sentence investigation report that he "does not believe these charges." *Id.* at 10:7–11:8. In its sentencing colloquy, the district court explained why it chose the sentence and why it chose to run the sentences concurrently:

> I have chosen to run these matters concurrent because as I said they are serious matters. I don't know if you said it or didn't say it but the PSI writer at least believes you said it. They are serious matters no matter how we look at it, but I don't think they're so serious as to warrant a stacking of these matters five plus five plus one plus one plus two. I just don't see it as being that critical. I have chosen not to go with the recommendation by your attorney to place you at the residential facility because as I have said, you have been to prison once and here it is six years later and you're still doing this. You're still doing drugs or at least you were doing drugs, so apparently all of the treatment modalities that your attorney pointed out a short while ago didn't work because here you are.

Id. at 13:18–14:8.

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[3] The district court sentenced Defendant to five years on each count in FECR213018, and one year on each count in AGCR212970 and AGCR215793. *See* FECR213018 04-17-2017 Order of Disposition, AGCR212970 04-17-2017 Order of Disposition, AGCR215793 04-17-2017 Order of Disposition; App. 43–54.

Defendant argues that the district court "failed to consider the minimum sentencing factors and relied only on the prior criminal history." App. Br. pg. 72. However, the above statement from the district court belies this assertion. In fashioning his sentence, the district court relied on Defendant's statements in the PSI, the fact that Defendant's previous prison time did not deter his current criminal conduct, nor did it deter his continued drug use, and while the district court considered the convictions "serious," the court did not believe they were so serious as to warrant consecutive sentences. While the district court did not specifically state each sentencing factor, it is not required to do so. *See State v. Boltz*, 542 N.W.2d 9, 11 (Iowa 1995) ("[T]he failure to acknowledge a particular sentencing circumstance does not necessarily mean it was not considered."); *see also State v. Siders*, No. 15-1394, 2016 WL 3002784, at *2 (Iowa Ct. App. 2016) ("…a court is not required to specifically acknowledge each claim of mitigation."). Thus, the district court appropriately applied its discretion when it sentenced Defendant.

CONCLUSION

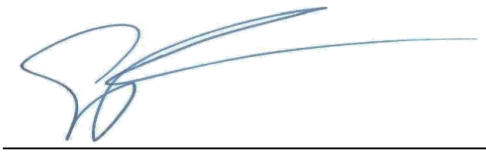
For all the reasons stated above, the State respectfully requests that this Court affirm Defendant's conviction and sentence and deny all claims on the merits.

REQUEST FOR NONORAL SUBMISSION

The State requests that this case be submitted without oral argument.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



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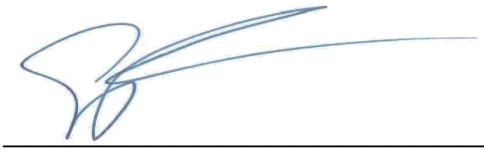

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