IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JEFFREY JOHN MYERS, Defendant-Appellant.	)	S.CT. NO. 16-2177

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR FLOYD COUNTY
HONORABLE PETER B. NEWELL, JUDGE (MOTION TO SUPPRESS, TRIAL ON THE MINUTES, & SENTENCING)

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED JANUARY 24, 2018

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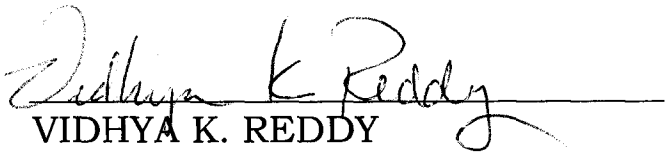
CERTIFICATE OF SERVICE

On February 12, 2018 the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jeffrey Myers, 901 Vermont, Waterloo, IA 50701.

STATE APPELLATE DEFENDER



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QUESTIONS PRESENTED FOR REVIEW

I. WAS THE EVIDENCE INSUFFICIENT TO ESTABLISH THAT DEFENDANT HAD ANY CONTROLLED SUBSTANCE PRESENT IN HIS SYSTEM, AS MEASURED IN HIS URINE?

II. DID THE DISTRICT COURT ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS WHERE THE STOP WAS NOT SUPPORTED BY PROBABLE CAUSE FOR A TRAFFIC VIOLATION?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

1. State v. Childs, 898 N.W.2d 177 (Iowa 2017) is not dispositive on the sufficiency issue in the present case because Childs did not involve the issue raised herein. The Defendant in Childs argued only that a non-impairing metabolite does not qualify as a controlled substance – he did not contest the *presence* of such metabolite in his urine. In contrast, Myers does not here argue that the presence of a metabolite would not suffice under the statute; rather, he urges that the existing record does not establish that any such metabolite (or controlled substance) was actually *present* in his urine. The minutes herein explicitly state that a positive urine screen indicates only "the *possible* presence of a substance and/or its metabolites". (Min: DCI Laboratory Report) (Conf. App. pp. 8-9) (emphasis added). Thus, the minutes, by their terms, establish only the "*possible* presence" of a controlled substance in Myers's urine. '[P]ossible presence' does not establish actual presence as is required under the OWI statute. Any conclusion that controlled substances (or their

metabolites) were *actually* present in Myers's urine would be based only on speculation, suspicion, or conjecture, which cannot sustain a guilty verdict. See e.g., Brubaker, 805 N.W.2d at 172–73 (simply being "consistent in appearance with" an illegal substance is insufficient).

2. Where only one statutory alternative is marshalled to the fact-finder, that alternative controls for purposes of evaluating the sufficiency of the evidence. See e.g., Canal, 773 N.W.2d at 530; Smithson, 594 N.W.2d at 3. In reciting the elements of the offense for purposes of the trial on the minutes herein, the State relied only on the 'in the person' alternative and not the 'under the influence' alternative. (Trial p.6 L.9-18). In evaluating Myers' guilt, the trial court mirrored the elements as asserted by the State. The court stated "The second element is at the time you were operating a motor vehicle, you had a detectible level of controlled substance in your blood stream." The court noted the State could also have elected to proceeded on the 'under the influence' alternative, but then continued "*In this case*" Myers's urine sample tested

positive for marijuana and amphetamines, satisfying the second element of the offense. (Trial p.6 L.25-p.7 L.9). It thus appears that the State proceeded and the court relied only on the 'in the person' alternative and not on the 'under the influence' alternative. That alternative thus controls for purposes of evaluating the sufficiency of the evidence to sustain the conviction. Because the evidence was insufficient to establish that any amount of a controlled substance was present as measured in Myers's urine, Myers's conviction must be reversed.

3. Additionally, on its de novo review of the suppression issue, this Appellate Court should hold that no traffic violation was committed as Myers's taillights were in fact illuminated. The motion to suppress was therefore improperly denied.

WHEREFORE, Defendant-Appellant Jeffrey John Myers respectfully requests that this Court grant further review of the Court of Appeals' January 24, 2018 decision.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant, Jeffrey John Myers, from his conviction, sentence, and judgment following a bench trial on the minutes for First Offense Operating While Intoxicated, a Serious Misdemeanor in violation of Iowa Code section 321J.2 (2015).

Course of Proceedings: On March 30, 2016, the State charged Myers with Operating While Intoxicated, First Offense, a Serious Misdemeanor in violation of Iowa Code section 321J.2 (2015). (Trial Information) (App. pp. 4-5). Myers pled not guilty and demanded his right to a speedy trial. (4/26/16 Record of Arraignment) (App. pp. 6-7).

On June 6, 2016, Myers filed a Motion to Suppress challenging the basis for the traffic stop underlying the instant prosecution. The Motion to Suppress noted that the claimed basis for the stop was that Myers did not have his taillights illuminated. Myers argued that the stop was unlawful because he actually did have his taillights illuminated, as

demonstrated by still images taken from the officer's dash cam video of the stop. (Mot. to Suppress) (App. pp. 8-13).

A suppression hearing was held on August 19, 2016. At that hearing, the State presented testimony from Officer Cody Van Horn, who conducted the traffic stop. (Suppr. Tr. p.1 L.1-p.15 L.18)[1]. The State also submitted, and the court received, a copy of the dash cam video from Officer Van Horn's vehicle. (Suppr. Tr. p.12 L.18-p.13 L.17; State's Exhibit 1). The State argued that a traffic violation was established in that Myers's taillights were not illuminated. Myers urged the court to conclude that his taillights were, in fact, illuminated, and that no traffic stop was therefore established. (Suppr. Tr. p.15 L.19-p.19 L.9).

On September 6, 2016, the district court issued a written ruling denying Myers's Motion to Suppress. The court concluded that Myers's taillights were not illuminated, and

[1] The transcripts in the instant case were electronically filed and are thus excluded from the appendix. See Iowa R. App. P. 6.905(7).

that the stop of his vehicle was justified by a traffic violation. (9/6/16 Order Denying Suppression) (App. pp. 14-16).

Myers subsequently waived his right to a jury trial and submitted to a bench trial on the minutes.[2] The bench trial on the minutes was held on November 29, 2016, and the court entered a verdict of guilty on the charged offense at that time. (10/10/16 Motion; 10/12/16 Order) (App. pp. 17-19); (Trial p.1 L.1-25, p. 4 L.16-p.7 L.12); (11/29/16 Waiver of Jury; 11/30/16 Order Re: Verdict) (App. pp. 20-23).

A sentencing hearing was held on December 16, 2016. At that time, the district court entered judgment against Myers for Operating While Intoxicated (First Offense), a Serious Misdemeanor in violation of Iowa Code sections 321J.2(1)(c)[3] and 321J.2(2)(a) (2015). The court imposed two days in jail, to

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[2] Myers's submission to a bench trial on the minutes was also based on an agreement pursuant to which the State would dismiss two related simple misdemeanor charges at Myers's costs. (Sent. Tr. p.7 L.3-8, p.8 L.1-4).

[3] Though the sentencing order specifies subsections (a)-(b) of section 321J.2(1), the charge and verdict were actually under subsection (c) of that statute. Compare (Judgment and Sentence) (App. pp. 24-27), with (Trial Information) (App. pp. 4-5), and (Trial p.6 L.12-18, p.6 L.25-p.7 L.7). See also Iowa Code § 321J.2(1)(a)-(c) (2015).

be served in a hotel program. The court also imposed a $1,250 fine plus statutory surcharge and a $10 DARE surcharge. The court also ordered Myers to follow any recommendations contained in his substance abuse evaluation, ordered fingerprinting, ordered his driving privileges be revoked, and ordered that he complete a course for drinking drivers. The court found Myers did not have the ability to pay his attorney fees. (Sent. Tr. p.9 L.2-23, p.10 L.1-3); (Judgment and Sentence) (App. pp. 24-27).

Myers filed a Notice of Appeal on December 22, 2016. (12/28/16 Certified Notice of Appeal) (App. pp. 28-29).

Facts:

a. Trial on the Minutes:.

Based on the stipulated minutes of evidence, the district court could have found the following facts:

Shortly before 1:00 a.m. on March 12, 2016, Officer Cody Van Horn conducted a traffic stop on a vehicle. The stop culminated with the Officer's arrest of the driver, Jeffrey Myers, for Operating While Intoxicated. Upon inquiry by the

officer, Myers denied being under the influence of any narcotic, marijuana, or alcohol. He stated that he had been taking over-the-counter cold medicine and was also really tired. (Min: Officer Van Horn 3/12/16 Report, p.1-2) (Conf. App. pp. 4-5).

Myers consented to a urine test, and a urine sample was submitted to the Division of Criminal Investigations (DCI) Criminalistics Laboratory. Analysis of the urine sample indicated a "Positive Screen" for marijuana metabolites and amphetamines. According to the DCI laboratory report, "[a] positive screen indicates the *possible* presence of a substance and/or its metabolites...." (Min: DCI Lab Report) (Conf. App. pp. 8-9) (emphasis added). The lab report stated that additional "[r]eport(s) on positive screens to *confirm* the presence of specific drugs or metabolites will follow." (Min: DCI Lab Report) (Conf. App. pp. 8-9) (emphasis added). However, no additional lab reports were included in the minutes or submitted to the court at the trial on the minutes.

The minutes do not indicate that any such confirmatory testing was ever accomplished.

b. Suppression Hearing:

The Officer's claimed basis for the stop of Myers's vehicle was that the taillights were not illuminated. (Suppr. Tr. p.7 L.6-12). Myers disputed that claim, arguing that his taillights were in fact illuminated and that the stop was therefore unlawful. (Mot. to Suppress) (App. pp. 8-13); (Suppr. Tr. p.18 L.7-p.19 L.2).

Officer Van Horn testified at a hearing on Myers's Motion to Suppress. The Officer testified that, as Myers's vehicle passed in front of him traveling from the east to the west, the Officer saw that Myers's headlights were on but that the taillights were not illuminated. The officer turned left to get behind Myers's vehicle and then effected a stop on the vehicle. (Suppr. Tr. p.7 L.16-p.8 L.25). The officer testified that Myers's headlights, brake lights, and turn signal were all working and illuminated at appropriate times, but that his taillights were not illuminated. (Suppr. Tr. p.7 L.6-15, p.8

L.14-18, p.9 L.1-8). He testified that it is possible in some newer cars to have the headlights on without the taillights on, and that the taillights can be operated by a separate switch. (Suppr. Tr. p.14 L.14-22). He testified that after approaching Myers's car and telling him that his taillights weren't on, Myers reached down and flipped a switch, causing his taillights to "brighten up." (Suppr. Tr. p.11 L.7-13). On cross-examination, Officer Van Horn denied that the taillights were already on and merely brightened when Myers flipped the switch. He claimed the taillights were not on before Myers flipped the switch. (Suppr. Tr. p.14 L.3-6). The Officer acknowledged that he did not file any citation or issue any warnings regarding the taillights. (Suppr. Tr. p.14 L.8-10). Officer Van Horn also acknowledged that the video footage from his dash cam (Exhibit 1) makes it appear that Myers's taillights were actually illuminated even prior to the stop. However, he testified that was merely a distortion caused by the reflection of the Officer's headlights on Myers's taillights.

The Officer claimed that Myers's taillights were not actually on. (Suppr. Tr. p.10 L.1-18).

Myers argued that the video confirmed his taillights were in fact illuminated. Myers, through counsel, denied that the headlights and taillights of the vehicle operated on separate switches, and argued that the taillights would be on when the headlights are on. Myers urged the court to conclude from the video that the taillights were in fact on and that the stop was therefore improper. (Suppr. Tr. p.18 L.6-p.19 L.2).

Other relevant facts will be discussed below.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT DEFENDANT HAD ANY CONTROLLED SUBSTANCE PRESENT IN HIS SYSTEM, AS MEASURED IN HIS URINE.

A. Preservation of Error: A trial on the stipulated minutes of testimony is a bench trial, meaning "the decision of whether to convict remains with the fact finder...." State v. Sayre, 566 N.W.2d 193, 195 (Iowa 1997) (contrasting trial on stipulated minutes with guilty plea).

Unlike a jury trial, in a bench trial the defendant is not required to move for a judgment of acquittal to preserve error on a sufficiency of the evidence claim. State v. Abbas, 561 N.W.2d 72, 74 (Iowa 1997). This is because, in a bench trial, the court is the fact finder and its finding of guilt necessarily includes a finding that the evidence was sufficient to sustain a conviction. Id.

In the present case, the verdict of guilt was rendered by the judge rather than by a jury. The issue of the sufficiency of the evidence is thus preserved for appellate review despite the fact that no motion for judgment of acquittal was made.

B. Standard of Review: The Court reviews a trial court's verdict following a bench trial as it would review a jury verdict. State v. Weaver, 608 N.W.2d 797, 803 (Iowa 2000); City of Des Moines v. Huff, 232 N.W.2d 574, 576 (Iowa 1975). Challenges to the sufficiency of evidence to support a guilty verdict are reviewed for correction of errors at law. State v. Petithory, 702 N.W.2d 854, 856 (Iowa 2005).

C. Discussion: The burden is on the State to prove every fact necessary to constitute the offense with which a defendant has been charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976) (citing In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368, 375 (1970)).

To withstand a sufficiency of the evidence challenge, a verdict of guilt must be supported by substantial evidence. State v. Hopkins, 576 N.W.2d 374, 377 (Iowa 1998). Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Evidence must be viewed in the light most favorable to the State, and consideration must be given to all of the evidence, not just the evidence supporting the verdict, in determining if there is substantial evidence to support the charge. Petithory, 702 N.W.2d at 856-57; State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). To suffice, the evidence presented must raise a fair inference of guilt on every element and do more than create speculation, suspicion, or conjecture.

State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). "Evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt." State v. Brubaker, 805 N.W.2d 164, 172 (Iowa 2011).

1). Sufficiency must be judged against the 'in the person' alternative:

The language of the Trial Information charged the offense under section 321J.2(1)(a) ("while under the influence") as well as 321J.2(1)(c) ("[w]hile any amount...is present in the person, as measured in the... blood or urine"). But the same rules that apply to evaluating the sufficiency of the evidence following a jury trial apply when evaluating the sufficiency of the evidence following a bench trial. State v. McFadden, 320 N.W.2d 608, 614 (Iowa 1982). Where the State elects to marshal an offense to the factfinder on only one of multiple statutory alternatives, the marshalled alternative controls when evaluating the sufficiency of the evidence. See e.g., State v. Canal, 773 N.W.2d 528, 530 (Iowa 2009); State v. Smithson, 594 N.W.2d 1, 3 (Iowa 1999).

In reciting the elements of the offense for purposes of the trial on the minutes herein, the State relied only on the 'in the person' alternative and not the 'under the influence' alternative, stating:

> [...] The Minutes of Evidence... would show beyond a reasonable doubt *the elements of the crime involved in this matter; that* [1] the defendant was operating a motor vehicle within Floyd County, Iowa and *[2] at that point in time, he would have had basically an amount of, I believe, it was both marijuana metabolites and also amphetamines in his system as shown by the report from the DCI criminal logistics laboratory.*

(Trial p.6 L.9-18) (brackets and emphasis added).

In evaluating Myers' guilt, the trial court mirrored the elements as asserted by the State, relying only on the 'in the person' alternative and not the 'under the influence' alternative:

> All right. Mr. Myers, basically the State has two things that they have to prove in order to establish this offense. The first is that you were driving or operating a motor vehicle. Operating is a little different than driving, but in this case they observed you driving; that element has been established. *The second element is at the time you were operating a motor vehicle, you had a detectible level of controlled substance in your blood stream.* They could also

> prove you were under the influence of something. *In this case,* you did agree to provide a urine sample. The urine sample was positive for both marijuana and for amphetamines; *and so, those are the elements the State has to establish, and I believe that the State has established* those elements beyond a reasonable doubt.

(Trial p.6 L.19-p.7 L.9). The trial court noted that "The first [element] is that you were driving or operating a motor vehicle", and that the first element was established in that "in this case they observed you driving." (Trial p.6 L.21-24). The court then stated "The second element is at the time you were operating a motor vehicle, you had a detectible level of controlled substance in your blood stream." The court noted that the State could also have elected to proceeded on the 'under the influence' alternative, but then continued "*In this case*" Myers's urine sample tested positive for marijuana and amphetamines, satisfying the second element of the offense. (Trial p.6 L.25-p.7 L.9).

It thus appears that the State proceeded and the court relied only on the 'in the person' alternative and not on the 'under the influence' alternative. Where only one statutory

alternative is marshalled to the fact-finder, that alternative controls for purposes of evaluating the sufficiency of the evidence. See e.g., Canal, 773 N.W.2d at 530; Smithson, 594 N.W.2d at 3.

2). The evidence was insufficient to establish the 'in the person' alternative:

In the present case, the evidence contained in the minutes was insufficient to establish that any amount of controlled substance was actually present in Myers's person as measured in his urine. See Iowa Code § 321J.2(1)(c) (2015).

The State pointed to a March 22, 2016 lab report by DCI Criminalist Traci Murano contained in the minutes as establishing that Myers had marijuana metabolites and amphetamines in his system. (Trial p.5 L.12-21, p.6 L.14-18). See also (Min: DCI Lab Report) (Conf. App. pp. 8-9). The court, relying on that report, found that "[t]he urine sample was positive" for those substances, and that Myers's guilt was

therefore established beyond a reasonable doubt. (Trial p.7 L.4-9).

The referenced lab report, however, stated only that the urine analysis indicated a "Positive Screen" for the substances, and that "[a] positive screen indicates the *possible* presence of a substance and/or its metabolites". The report stated that additional "[r]eport(s) on positive screens to *confirm* the presence of specific drugs or metabolites will follow." (Min: DCI Report, p.1) (Conf. App. p. 8) (emphasis added). However, no further DCI reports are attached, and the minutes do not indicate that any such confirmatory testing was ever accomplished. The minutes thus establish only the *possible* presence of a controlled substance, not the *actual* presence of a controlled substance.

Urine Drug Testing is performed by the DCI Laboratory in two steps. First, an initial screening test is performed on the urine sample. Then, if the initial screening test indicates a positive result, a second confirmatory test is performed to confirm the presence of a controlled substance. See Dep't of

Public Safety, Div. of Criminal Investigation, Criminalistics Laboratory, *Toxicology: Urine Drug Analysis*, at http://www.dps.state.ia.us/DCI/lab/toxicology/Urine_Drug_Analysis.shtml (last accessed April 5, 2017); State v. Comried, 693 N.W.2d 773, 774 (Iowa 2005).

Iowa's initial test requirements are based on nationally accepted federal standards set forth in the Substance Abuse and Mental Health Services Administration's "Mandatory Guidelines for Federal Workplace Drug Testing Programs."[4] See Iowa Code § 321J.2(12)(c) (2015); IOWA ADMIN. CODE r. 661-157.7 (3/2/2016); Comried, 693 N.W.2d at 777. According to those federal guidelines, an "Initial Drug Test" is a "test used to differentiate a negative specimen from *one that requires further testing* for drugs or drug metabolites." 73 Fed. Reg. 71858, at 71878 § 1.5 (November 25, 2008). A "Confirmatory Drug Test", on the other hand, is a "second analytical procedure performed on... the... specimen to identify and

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[4] The federal guidelines are available at: https://www.gpo.gov/fdsys/pkg/FR-2008-11-25/pdf/E8-26726.pdf (last accessed April 5, 2017).

quantify the presence of a specific drug or drug metabolite." Id.

While a *negative* initial screening test would establish the *absence* of drugs in the sample, a *positive* initial screening test does not prove the *presence* of drugs in the sample – only the second confirmatory test can do that. Even a sample that initially screens positive may ultimately be found to test negative (and therefore not actually contain any drug) when subjected to the second confirmatory test. Thus the federal regulations specify that a positive *confirmatory* test is necessary to conclude that drugs are present – a positive *initial screening* test is not sufficient to generate that conclusion. See 73 Fed. Reg. 71858, at 71894 § 11.19(b) (November 25, 2008) (A specimen is "reported negative when each initial drug test is negative or it is negative on a confirmatory drug test...."); Id. at § 11.19(c) (A "specimen is reported positive for a specific drug when the initial drug test is positive *and* the confirmatory drug test is positive....") (emphasis added). See also Id. at 71898 § 12.15(b) (An initial testing facility is to

report a specimen "negative when each drug test is negative"; but if the specimen tested positive in the initial testing, then the initial testing facility must send the remaining specimen to a laboratory for further testing – not report it positive). Here, the minutes do not indicate that any confirmatory testing was ever accomplished.

State v. Childs, 898 N.W.2d 177 (Iowa 2017) is inapposite as that case did not involve the issue raised herein. The Defendant in Childs argued only that the presence of a non-impairing metabolite does not qualify as a controlled substance – he did not contest the *presence* of such metabolite in his urine. In contrast, Myers does not here argue that the presence of a metabolite would not suffice under the statute; rather, he urges that the existing record does not establish that any such metabolite (or controlled substance) was actually *present* in his urine.

The minutes herein explicitly state that a positive urine screen indicates only "the *possible* presence of a substance and/or its metabolites". (Min: DCI Laboratory Report) (Conf.

App. pp. 8-9) (emphasis added). Thus, the minutes, by their terms, establish only the "*possible* presence" of a controlled substance in Myers's urine. '[P]ossible presence' does not establish actual presence as is required under the OWI statute. Any conclusion that controlled substances (or their metabolites) were *actually* present in Myers's urine would be based only on speculation, suspicion, or conjecture, which cannot sustain a guilty verdict. See e.g., Brubaker, 805 N.W.2d at 172–73 (simply being "consistent in appearance with" an illegal substance is insufficient).

The evidence contained in the minutes is insufficient to establish Myers's guilt beyond a reasonable doubt. Accordingly, Myers's conviction should now be reversed and remanded to the district court for dismissal of the charge.

D. Conclusion: Defendant-Appellant Jeffrey John Myers respectfully requests this Court to reverse his conviction for Operating While Intoxicated and to remand this matter to the district court for dismissal of the charge.

II. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS. BECAUSE DEFENDANT'S TAILLIGHTS WERE ILLUMINATED, THE STOP WAS NOT SUPPORTED BY PROBABLE CAUSE FOR A TRAFFIC VIOLATION.

A. Preservation of Error: Error was preserved by Myers's motion to suppress arguing that vehicle stop was improper, and by the district court's denial thereof. (Mot. to Suppress; 9/6/16 Order Denying Suppression) (App. pp. 8-16). See State v. Wright, 441 N.W.2d 364, 366 (Iowa 1989) (Adverse ruling on pretrial suppression motion suffices to preserve error for appellate review, though defendant stipulates to trial based on minutes of testimony).

B. Standard of Review: The challenge on appeal arises from a violation of constitutional rights. Review is therefore de novo. State v. Countryman, 572 N.W.2d 553, 557 (Iowa 1997) (review of district court's denial of motion to suppress is de novo).

On de novo review, this Court makes an "independent evaluation of the totality of the circumstances as shown by the entire record." State v. Turner, 630 N.W.2d 601, 606 (Iowa

2001). The Court may give deference to the trial court's findings regarding the credibility of the witnesses, but is not bound by the district court's findings. Id; State v. Harriman, 737 N.W.2d 318, 319 (Iowa App. 2007).

C. Discussion: The Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Iowa Constitution protect individuals from unreasonable searches and seizures. State v. Hoskins, 711 N.W.2d 720, 725-26 (Iowa 2006). "When the police stop a car and temporarily detain an individual, the temporary detention is a 'seizure'" which is subject to the requirement of constitutional reasonableness. State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996) (citing Whren v. United States, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89, 95 (1996)).

Warrantless searches and seizures are per se unreasonable unless an exception to the warrant requirement exists. Hoskins, 711 N.W.2d at 726. The State bears the burden of proving by a preponderance of the evidence that such an exception applies. Id. One exception to the warrant

requirement arises where a driver commits a traffic offense. A police officer's observation of a traffic law violation, however minor, gives rise to probable cause to stop a motorist. State v. Mitchell, 498 N.W.2d 691, 693 (Iowa 1993).

In the instant case, the district court concluded that probable cause for the stop was created by Myers's commission of a traffic offense in that he failed to have his taillights illuminated. (9/6/16 Order Denying Suppression) (App. pp. 14-16). On its de novo review of the record below, including the video of the stop, this Appellate Court should hold that no traffic violation was committed as Myers's taillights were in fact illuminated. The vehicle stop was improper, and the Motion to Suppress should therefore have been granted.

The dash cam video from Officer Van Horn's vehicle indicates that Myers's taillights were in fact illuminated. (Exhibit 1, at 00:49:01-00:49:33). Officer Van Horn testified that the glow emitting from Myers's taillights on the video is actually just a distortion caused by the reflection of the

Officer's headlights on Myers's taillights. (Suppr. Tr. p.10 L.1-18). However, the video appears to depict that Myers's taillights glowing even at the time Myers passed the officer's vehicle at the intersection of Cottage Court and 16th Avenue, prior to the time the officer pulled behind Myers's vehicle. (Exhibit 1, at 00:49:01-00:49:07).

Because Myers's taillights were in fact illuminated, there was no traffic violation and, thus, no probable cause for the stop. The stop therefore violated Myers's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Iowa Constitution. Consequently, any evidence flowing from the stop should have been suppressed.

D. Conclusion: Defendant-Appellant Jeffrey John Myers respectfully requests that this Court reverse his conviction and judgment for Operating While Intoxicated, First Offense, and remand for suppression of all evidence flowing from the stop.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $ 11.24, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

VIDHYA K. REDDY
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 4,485 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Vidhya K. Reddy

Dated: 2/12/18

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IN THE COURT OF APPEALS OF IOWA

No. 16-2177
Filed January 24, 2018

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY JOHN MYERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Floyd County, Peter B. Newell, District Associate Judge.

Jeffrey John Myers appeals his conviction for operating while intoxicated, first offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Linda J. Hines, Assistant Attorney General, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and McDonald, JJ.

VAITHESWARAN, Presiding Judge.

A Charles City police officer stopped a vehicle for having unilluminated taillights. He observed signs of intoxication in driver Jeffrey John Myers. After administering field sobriety tests, the officer arrested Myers for operating a motor vehicle while under the influence. Myers consented to a urine test, which screened positive for marijuana metabolites and amphetamine.

The State charged Myers with operating a motor vehicle while intoxicated (first offense) in violation of Iowa Code section 321J.2(1)(a) and (c) (2016).[1] Myers moved to suppress the evidence on the ground that his taillights were actually illuminated. He asserted the stop violated his constitutional rights against unreasonable searches and seizures. *See State v. Pettijohn*, 899 N.W.2d 1, 14 (Iowa 2017) (citing the guarantees of the Fourth Amendment to the United States Constitution and Article I, section 8 of the Iowa Constitution to be secure from "unreasonable searches and seizures"). Following an evidentiary hearing, the district court denied the motion.

Myers stipulated to a bench trial on the minutes of testimony. The district court found him guilty of "all the elements of operating under the influence, first offense." In its judgment and sentence, the court convicted Myers under Iowa Code section 321J.2(1)(a) and (b), but oral comments during the trial on the minutes of evidence clarified the conviction was based on section 321J.(1)(a) and (c).

[1] Although the State did not identify these code provisions, the language in the trial information tracked the language of these provisions.

On appeal, Myers contends (1) the district court should have denied his motion to suppress evidence gained following the stop and (2) the evidence was insufficient to establish the presence of a controlled substance in his system.

I. Suppression Ruling

"When a peace officer observes a traffic offense, however minor, the officer has probable cause to stop the driver of the vehicle." *State v. Harrison*, 846 N.W.2d 362, 365 (Iowa 2014) (quoting *State v. Mitchell*, 498 N.W.2d 691, 693 (Iowa 1993)). The police officer observed Myers driving after dark with unilluminated taillights. *See* Iowa Code § 321.387.[2] He approached Myers' vehicle and "explained he didn't have any taillights." According to the officer, Myers "was like, oh, and then reached down and turned them on." When the officer was asked if "they [were] on to begin with and then brightened," he responded, "No, they weren't on." The officer explained that on some "newer cars," "you actually have to adjust [the taillights]."

A dash camera video corroborated the officer's observation. Although headlights of the law enforcement vehicle initially obscured the visibility of Myers' taillights, the taillights noticeably illuminated after the officer informed Myers of the infraction. The illumination coincided with a movement by Myers to the right. On our de novo review of this constitutional issue, we agree with the district court that the officer had probable cause to stop the vehicle. We affirm the court's denial of Myers' suppression motion.

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[2] Section 321.387 states: "Every motor vehicle and every vehicle which is being drawn at the end of a train of vehicles shall be equipped with a lighted rear lamp or lamps, exhibiting a red light plainly visible from a distance of five hundred feet to the rear."

II. Sufficiency of the Evidence

As noted, Myers stipulated to a trial on the minutes of evidence. The minutes included a toxicology report, which stated:

> A positive screen indicates the *possible* presence of a substance and/or metabolites at a level that meets or exceeds the levels established by the Iowa Administrative Code 661-157.7 (321J).
>
> . . . .
>
> Report(s) on positive screens to confirm the presence of specific drugs or metabolites will follow.

(Emphasis added.) No confirming reports followed.

Myers argues the evidence was insufficient to support his conviction under section 321J.2(1)(c). Myers focuses on section (1)(c) alone because, in his view, the State chose "to marshal an offense only under section 321J.2(1)(c) and this alternative "controls when evaluating the sufficiency of the evidence."

The district court did not view the State's presentation so narrowly. The court entered judgment on two alternatives and, at the trial on the minutes, recited the State's burden under both section 321J.2(1)(c) and (a). Specifically, the court said the State would have to prove Myers "had a detectable level of a controlled substance in [his] blood stream" [321J.2(1)(c)] and the State "could also prove [he was] under the influence of something" [321J.2(1)(a)]. *Cf. State v. Lukins*, 846 N.W.2d 902, 912 (Iowa 2014) (reversing a conviction following a bench trial on the minutes of testimony where the district court's order was "devoid of fact findings" and "unclear"). Because the court considered both provisions, we will address both.

Iowa Code section 321J.2(1)(c) states, "A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state . . . [w]hile any amount of a controlled substance is present in the person, as measured in the person's blood or urine." Myers admits he screened positive for marijuana metabolites and amphetamine in an initial screening test but argues confirmatory testing was required before the amounts could truly be deemed positive. In his view, "possible presence [of drugs] does not establish actual presence."

Myers' argument is appealing at first blush. But the Iowa Supreme Court recently considered a "drug screen detect[ing] a nonimpairing metabolite" and reaffirmed that the statutory "any amount" language "means any amount greater than zero." *State v. Childs*, 898 N.W.2d 177, 178-79 (Iowa 2017) (quoting *State v. Comried*, 693 N.W.2d 773, 778 (Iowa 2005)). The court made no mention of a confirmatory test, noting only that the defendant "consented to a urine test, which revealed the presence of sixty-two nanograms per milliliter of a nonimpairing metabolit of marijuana." *Id.* at 179. By all indications, then, the test in *Childs* was an initial screening test.

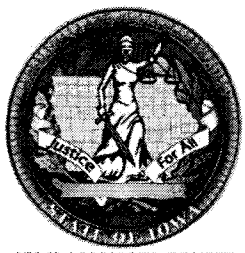
As in *Childs*, the amounts detected in Myers' initial screening results exceeded the standards adopted by the Iowa Department of Public Safety "for determining detectable levels of controlled substances in the division of criminal investigation criminalistics laboratory initial screening." *See* Iowa Admin. Code r. 661-157.7; *cf. Comried*, 693 N.W.2d at 777 (rejecting the defendant's argument that a regulation "setting cutoff levels for initial screening tests for drugs in urine samples" modified the definition of "any" in Iowa Code section 321J.2(1)(c) because "the [department of public safety], by referring to the federal regulations,

only intended its regulation's cutoff levels to apply to initial testing of urine" and, "[i]n Comried's case, the test confirming the presence of methamphetamine was not an initial screening, but a confirmatory test"). The "positive" urine test amounted to substantial evidence in support of a finding of guilt under section 321J.2(1)(c). *See State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007) (reviewing sufficiency of the evidence challenge for substantial evidence and stating we are obligated to view the evidence in the light most favorable to the State).

We turn to section 321J.2(1)(a). This provision requires proof Myers was operating a motor vehicle "[w]hile under the influence of an alcoholic beverage or other drug." The minutes of evidence disclose circumstantial evidence of a controlled substance in Myers' body. The officer who stopped the vehicle opined, "I got the impression that he was under some type of controlled substance." He conveyed his impression to Myers, who acknowledged he had used narcotics in the past. The officer documented the following indicators of Myers' current substance use: (1) his voice was "very shaky"; (2) he was "sweating profusely"; (3) his eyes were "watery and bloodshot"; (4) his pupils dilated only slightly when the flashlight was near his eyes; (5) the rear of his tongue was brownish green; (6) he performed poorly on field sobriety tests; (7) he was sluggish; (8) he was uncoordinated; and (9) he was sensitive to light. The cited evidence constitutes substantial evidence in support of the district court's finding of guilt under section 321J.2(1)(a).

We affirm Myers' conviction for operating while intoxicated, first offense.

AFFIRMED.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-2177	State v. Myers

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