IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-0481

STATE OF IOWA,
Plaintiff- Appellee
vs.

TIMOTHY DOUGLAS SEILS
Defendant- Appellant

APPEAL FROM THE DISTRICT COURT FOR WARREN COUNTY
THE HONORABLE KEVIN PARKER, SUPPRESSION HEARING
THE HONORABLE RICHARD CLOGG, TRIAL & SENTENCING

APPELLANT'S FINAL BRIEF
AND
REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF FILING

I, Robert G. Rehkemper, hereby certify that I filed the attached Brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on October 19, 2018, by filing it with the Court's electronic document management system.

Robert G. Rehkemper

October 19, 2018
Date

CERTIFICATE OF SERVICE

I, Robert G. Rehkemper, hereby certify that on October 19, 2018, I served a copy of the attached brief on all other parties to this appeal by filing it with the Court's electronic document management system.

Robert G. Rehkemper

October 19, 2018
Date

CERTIFICATE OF SERVICE UPON THE DEFENDANT

I, Robert G. Rehkemper, hereby certify that on October 19, 2018, I served a copy of Defendant's Proof Brief, upon the Defendant-Appellant via electronic mail at timseils@gmail.com, pursuant to his previously provided written authorization to receive documents and/or court notifications via electronic mail.

Robert G. Rehkemper

October 19, 2018
Date

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STATEMENT OF THE CASE

Nature of the Case

This case raises two issues: 1) whether law enforcement may search a vehicle that is parked inside of a garage, as a matter of right, after the individual who had previously driven the vehicle is arrested on his front door-step, and is sitting handcuffed in a squad car at the time the vehicle is searched; and 2) whether the State meets its burden of proving that the statutory condition precedent of a lawful arrest for violation of 321J.2 existed prior to the invocation of implied consent when the invoking officer has previously, unequivocally, and repeatedly testified under oath that he did not arrest the defendant for operating while intoxicated prior to invoking implied consent, and none of the other remaining statutory conditions of 321J.6(1) are met.

Course of Proceedings

Appellant, Timothy Seils, was charged by way of Trial Information filed on February 6, 2017, with the offense of: Count I – Operating While Intoxicated, Third Offense, in violation of Iowa Code section 321J.2. Trial Information; App. P5-6. Seils filed a motion to suppress evidence on March 23, 2017, alleging that the investigating officers illegally searched his vehicle parked within his garage and further did not have the required legal basis to invoke implied consent. Motion to Suppress; App. P7-15. Hearing was held on April 5, 2017, before district

associate judge Kevin Parker, and the matter was taken under advisement. Six months later, on October 19, 2017, Judge Parker entered a Ruling denying Seils' motion to suppress evidence in its entirety. Ruling; App. 45-49.

The case proceeded to jury trial on November 16, 2017. Prior to trial, Seils provided the trial judge with an opportunity to revisit Judge Parker's ruling, as to the search of Seils' vehicle but the trial court declined. Motion in Limine p. 1; App. P50, Tr. Vol. 1, p. 19. The case was submitted to the jury and the jury returned a verdict of guilty on November 20, 2017. Verdict Form; App. 54. Seils was sentenced to five years imprisonment on March 19, 2018. Judgment and Sentence; App. P54-60. Notice of Appeal was filed that same day. Notice of Appeal; App. P61-62.

Statement of Facts

On January 28, 2017, Trooper John Salesberry of the Iowa State Patrol, received a reckless or impaired driver dispatch regarding a white Chevy pickup traveling southbound on Interstate-35. Sup. Tr. 12-13. Salesberry located a vehicle matching the description provided by dispatch as it was exiting southbound Interstate-35 at the St. Charles exit. Sup. Tr. 13. Salesberry began following the vehicle as it approached the stop sign at the top of the off-ramp. Sup. Tr. 13; Tr. Vol.1, p. 190. After stopping appropriately at the stop sign, the vehicle made a wide right-hand turn, and after approximately ten seconds, activated its turn signal

to pull into a driveway. Sup. Tr. 13; Tr. Vol.1, p. 190. Immediately after observing the turn-signal Salesberry activated his overhead lights. Tr. Vol. 1, p. 191. The vehicle completed its turn, proceeded down the driveway, approximately 100 feet, and pulled into the unattached garage. Sup. Tr. 14: Tr. Vol. 1, pp. 191-92. When Salesberry's lights were activated, the vehicle did not accelerate or pick up speed. Sup. Tr. 23; Tr. Vol. 1, p. 218. In fact, the vehicle brake lights came on and the vehicle began to slow down. Sup. Tr. 23; Tr. Vol. 1, p. 218.

Once parked in the garage, there was no attempt by the driver of the vehicle to close the door behind the vehicle nor was there any attempt by the driver to flee or avoid Salesberry. Sup. Tr. 23-24; Tr. Vol. 1, p. 219-20. Salesberry stopped his vehicle in front of the open garage and exited his squad car as the driver exited the pickup truck. Sup. Tr. 15. Salesberry instructed the driver to come out of the garage and the driver complied. Sup. Tr. 15, 17. The driver of the pickup was identified as Appellant Timothy Seils. Sup. Tr. 17; Tr. Vol. 1, p. 199.

Seils was not belligerent or argumentative with Salesberry, was not threatening or combative and was responsive to Salesberry's commands. Sup. Tr. 24; Tr. Vol. 1, p. 222. The vehicle, house, driveway and garage were Seils' property. Sup. Tr. 23; Tr. Vol. 1, p. 218. As Salesberry was ordering Seils to exit his garage, Troopers Flaherty and Stine arrived on scene to assist. Sup. Tr. 40; Tr. Vol. 1, p. 201. Once Seils exited the garage, Salesberry walked him approximately

50 feet back to Trooper Flaherty's vehicle and handed him over to Flaherty for purposes of an operating while intoxicated investigation. Sup. Tr. 17; 24. Flaherty took over the investigation from that point forward because he was more familiar with the practices of the jurisdictions that would be involved. Sup. Tr. 19, 41. Flaherty was in charge of the operating while intoxicated investigation. Sup. Tr. 28.

During his personal contact with Seils, Flaherty claimed to have observed the tale-tale signs of a person who may have consumed alcohol. Sup. Tr. 41. Flaherty asked for Seils' driver's license which he provided without any difficulty. Sup. Tr. 42. Flaherty also asked Seils about where he was coming from and whether or not he had consumed any alcohol. The only information Seils would give him was that he had been at that East Village. Sup. Tr. 43.

Toward the end of their initial conversation Flaherty requested Seils perform field sobriety exercises which Seils declined. Sup. Tr. 43. Flaherty did not explain each individual test that comprised the field sobriety exercises and also testified that Seils was not placed under arrest at that point. Sup. Tr. 44. A preliminary breath test was never offered nor refused. Sup. Tr. 44. In response to Seils' declination of field sobriety testing, Flaherty informed him that they would then go to Madison County to do a breath test. Tr. Vol. 2, p. 65. Seils responded that he was not going to submit to that test either. Tr. Vol. 2, p. 65. As Flaherty continued

to confront and question Seils, he requested to call an attorney. Tr. Vol. 2, p. 66. Flaherty responded by advising Seils that he could not call an attorney because he was not yet under arrest. Sup. Tr. 68; Tr. Vol. 2, p. 66. Flaherty's precise words were "you're not even remotely under arrest yet." Tr. Vol. 2, p. 66. Seils frustratingly inquired of Flaherty whether he intended to take him to jail or not and told Flaherty "do what you got to do." Tr. Vol. 2, p. 67. Flaherty still did not arrest Seils and left Seils standing in the middle of his driveway as he returned to his squad car. Tr. Vol. 2, p. 67.

While Flaherty was speaking with Seils, Flaherty requested Salesberry to check Seils' truck to make sure it did not contain any illegal contraband. Sup. Tr. 18, 25. Seils was not yet under arrest for any offense and Flaherty was speaking with him approximately 50 feet away from the garage. Sup. Tr. 26. The truck was parked inside of the detached garage, with the driver's side pointed at the back wall and the rear-end closest to the entrance. Sup. Tr. 25-26. Both Salesberry and Stine walked by Seils on their way to search the vehicle, during the time Flaherty returned to his squad car. Tr. Vol. 2, p. 68.

Once Salesberry and Stine passed him, Seils began walking toward his house. Tr. Vol. 2, p. 69. As Seils walked toward his house, Flaherty yelled at him not to go inside. Sup. Tr. 44. Seils broke into a jog and Flaherty ran after him, catching him as he attempted to enter the front door. Sup. Tr. 44-45; Tr. Vol. 2, p.

69. During this time Salesberry was just opening the door of Seils' truck as it sat parked inside of the garage. Sup. Tr. 19-20. Salesberry and Stine did not have a search warrant, Seils had not yet been arrested, and consent had not been granted. Sup. Tr. 26; Tr. Vol. 1, p. 227. Salesburry heard Flaherty shout "Don't go inside. Don't go inside." Sup. Tr. 19-20. At that moment, without making any substantive observations regarding the interior of the vehicle, Salesberry and Stine exited the garage to assist Flaherty. Sup. Tr. 25-26, 84; Tr. Vol. 1, p. 228.

Seils was taken to the ground by all three Troopers and handcuffed in the grass just off his front porch. Tr. Vol. 1, p. 229. As Seils was apprehended and on the ground, Salesberry heard a statement being made "Now, you're going for interference." Sup. Tr. 20. According to Salesberry, at that point in time, Flaherty specifically informed Seils that he was being arrested for "interference." Sup. Tr. 27. Saleberry never overheard Flaherty advise Seils that he was arrested for operating while intoxicated. Sup. Tr. 27; Tr. Vol. 1, p. 231. In fact, according to Salesberry, Seils was not under arrest for operating while intoxicated at that time. Sup. Tr. 22.

Once Seils was handcuffed, the Troopers stood him up, walked him to Flaherty's vehicle and placed him in the patrol car. Sup. Tr. 20-21; Tr. Vol. 1, p. 231. As Seils sat handcuffed in the squad car, Salesberry and Stine re-entered the garage to conduct a search of Seils' vehicle. Sup. Tr. 28-29, 84; Tr. Vol. 1, pp.

231-32. The purpose of this search was to "look for additional evidence." Sup. Tr. 70; Tr. Vol. 1, p. 232. As conceded by the Troopers, it was an evidence-gathering attempt. Sup. Tr. 70, 86-87. They still did not have a warrant, nor consent, nor probable cause to believe the vehicle contained evidence or contraband. Sup. Tr. 29, 85; Tr. Vol. 1, pp. 231-32. The vehicle was never impounded nor inventoried. Sup. Tr. 30. As the Troopers entered his garage, Seils protested that they did not have a right to go in there. Sup. Tr. 69; Tr. Vol. 2, pp. 10-11; Tr. Vol. 2, p. 82.

During the search of Seils' vehicle, Saleberry and Stine discovered a six-pack of Budweiser beer in the vehicle. Tr. Vol. 2, p. 119. According to Salesberry the beer was on the floorboard behind the passenger seat of Seils' vehicle. Tr. Vol. 1, p. 206-07; Tr. Vol. 2, pp. 13-14. Trooper Stine claimed that the beer was located in the front of the cab. Tr. Vol. 2, pp. 121-122. Regardless, the beer was retrieved from Seils' vehicle and Trooper Stine brought the six-pack up, sat it on the hood of Flaherty's squad car, and dumped out a portion of an open container on camera. Tr. Vol. 2, p. 14.

Seils was ultimately transported to the Madison County Sheriff's Office where implied consent was invoked by Flaherty. Sup. Tr. 70. Following the invocation of implied consent and prior to Seils making a decision regarding chemical testing, Flaherty informed him: "If you take the test and pass, you're only getting interference, and I'll give you a ride home." Sup. Exhibit 5 @ 23:11; Sup.

Tr. 64. Seils declined to submit to chemical testing and was subsequently transported to the Warren County Jail to be housed for the night. Tr. Vol. 2, p. 24.

Whether or not Flaherty had arrested Seils for operating while intoxicated prior to invoking implied consent is an issue of much contention at the district court level and now on appeal. In resolving this dispute, the following timeline is imperative. On March 22, 2017, the administrative hearing was held regarding whether Seils driving privileges could be disqualified for the test refusal occurring on January 28, 2017. Sup. Ex. A.; App. P21-44 The issue at that hearing was whether or not the Department of Transportation could disqualify Seils' driving privileges under chapter 321J for refusing chemical testing. Sup. Ex. A, p. 22; App. P42. Flaherty testified repeatedly and consistently under oath at this hearing that he did not place Seils under arrest for operating while intoxicated prior to invoking implied consent. His specific testimony was as follows:

Q. If somebody in that situation doesn't agree to perform field sobriety tests and demonstrate their sobriety to you though, you simply have to make a decision based upon the information you have at that point in time?
A. Correct.
Q. Alright, and so, what course of action did you choose at that point?
A. I chose to take him into the Madison County Jail to process him for OWI based on the smell of alcohol coming from him, his unsteady balance and his bloodshot and watery eyes.
Q. Did you formally place him under arrest at that point?
A. *I did not.*
Q. Why not?

A. *Because I still had to do – my investigation wasn't complete yet. I was detaining him to take him to Madison County for further testing*.
Q. Would it be a fair description to say that you wanted to obtain additional information that would either confirm or dispel your suspicion of him operating while intoxicated?
A. Yeah.

(emphasis added) Sup. Ex. A, pp. 11-12; App. P31-32. Flaherty's testimony continued:

Q. So was a preliminary breath test ever specifically declined?
A. Nope.
Q. And you didn't formally place him under arrest out in the field, correct?
A. *Correct.*
Q. So walk me through how that conversation went.
A. The conversation –
Q. As far as – okay, you don't want to do field sobriety tests. I gotta go based upon observations I'm making right no – what do you tell him? How do you inform him what's going on or what you're next step is gonna be?
A. We never really got to that point because, as I walked back to my patrol car to put my field sobriety books back in my car, I noticed that he tried walking – he was walking towards his house. I made a verbal command to not go inside the house. He continued to walk towards the house. I made another command not go go inside. As I did that one, he started to run towards the residence. I ran after him. He made it inside the porch. I grabbed him around the storm door or front door *– pulled him back outside the residence and placed him under arrest for interfering at that point. So at that point, I told him that we were gonna go to Madison County for the other test and for the interference charge*.

(emphasis added) Sup. Ex. A. pp. 13-14; App. P33-34. In case Flaherty's testimony was not entirely clear, counsel followed up with another series of questions regarding whether Seils was arrested for OWI.

Q. Okay, and once you got him back out of the house, you said you took him into custody at that point, simply just for the interference with official acts?
A. *Correct.*
Q. And that would be based upon him disregarding your order to stay there or to not go in the house as he's starting to walk towards it?
A. Yes.
Q. ***Okay, and as far as the OWI went through, he wasn't yet under arrest for OWI, correct?***
A. ***Correct.***

(emphasis and extra emphasis added) Sup. Ex. P. 14-15; App. P34-35. Because the time implied consent is invoked is the crucial moment, counsel further clarified:

Q. Prior to him – prior to asking him to submit to chemical testing and formally invoking implied consent, did you ever inform him that he was being arrested and charged with operating while intoxicated?
A. No.

Sup. Ex. A, p. 16; App. P36. Since once is good, twice is better, counsel asked the question again.

Q. Um, and prior to him making – and this is kind of redundant – but prior to him making his decision to refuse chemical testing, was he ever advised or formally placed under arrest for OWI?
A. Before he took the test?
Q. Before he refused the test.
A. *No.*
Q. And so at what point did you advise him that he was formally arrested and being charged with OWI?
A. Um, as I transported him to the Warren County Jail.
Q. So that would be after the proceedings in Madison County and on your way to Warren County which is where he was going to be housed for the night?
A. Correct.

Q. Okay, that would be after implied consent was all wrapped up, correct?
A. *Yes.*

Sup. Ex. A, pp. 17-18; App. P37-38.

Probably a little confounded with Flaherty's answers regarding his failure to arrest Seils for operating while intoxicated prior to invoking implied consent, the representative for the Attorney General's Office followed up on cross-examination.

Q. Did you read him Miranda at all, prior to invoking implied consent?
A. I did not.
Q. Okay. Why not? Just trying to find your reasoning behind some of your actions here.
A. Because I don't ever read anybody implied consent if I don't know if they're – if I don't have their DataMaster test or their urine test or anything like that because at that point, *he wasn't under arrest, when I took him to jail for OWI.*
Q. Okay. So you said at that point, he wasn't under arrest – so what – we talked earlier about when he was formally placed under arrest. It sounds like you told him that he was under arrest for OWI while going en route to the jail, after implied consent, right?
A. *Correct, it was sometime after implied consent.*
Q. When you say he was – when he was not under arrest when you were going to the jail for implied consent, what was – what was your hold up to make that decision? What were you waiting on?
A. His chemical test.
Q. Okay, so it really hinged – your decision to arrest him or not hinged upon the DataMaster result?
A. *Well, I mean, he was gonna be under arrest for the interference but for the OWI charge, yes.*

Sup. Ex. A. pp. 20-21; App. P40-41.

Not surprisingly, Seils' driving privileges were not revoked following the administrative hearing. Sup. Tr. 65. Notice of Additional Authority, Attachment,

App. P16, P17-20. In a decision entered on March 24, 2017, the administrative law judge concluded that the statutory conditions set forth in section 321J.6 were not met as Flaherty had not lawfully placed Seils under arrest for a violation of 321J.2 prior to invoking implied consent. Notice of Additional Authority, Attachment; App. P16, P17-20.

Defendant's suppression hearing came before the district associate court on April 5, 2017. Prior to Flaherty testifying at that hearing he met with the prosecutor, Assistant Warren County Attorney Justin Rogers. Sup. Tr. 64. The morning of the suppression hearing, Rogers informed Flaherty that Seils' driving privileges were not disqualified for the test refusal because Flaherty had not placed Seils under arrest for operating while intoxicated prior to invoking implied consent. Sup. Tr. 65. Prior to testifying at the suppression hearing Flaherty learned that it was a mistake for him not to place Seils under arrest for operating while intoxicated. Sup. Tr. 66. In what can only be described as a perjurious about-face, Flaherty claimed at the suppression hearing that he had indeed arrested Seils for operating while intoxicated prior to invoking implied consent. Sup. Tr. 47, 67. The district associate court did not make a credibility finding as to which version of Flaherty's sworn testimony it found more credible.

Routing Statement

Transfer to the Iowa Court of Appeals is appropriate as resolution of the issues raised in this appeal require the application of existing legal precedent Iowa R. App. P. 6.1101(3)(a).

LEGAL ARGUMENT

I. ARTICLE 1 SECTION 8 OF THE IOWA CONSTITUTION WAS VIOLATED WHEN TROOPERS SEARCHED THE INTERIOR OF SEILS' VEHICLE WHICH WAS PARKED INSIDE HIS DETACHED GARAGE, AS HE SAT HANDCUFFED IN THE REAR OF THE SQUAD CAR, ARRESTED FOR INTERFERENCE WITH OFFICIAL ACTS.

Preservation of Error: Error was preserved by Seils filing his motion to suppress evidence, receiving an adverse ruling, proceeding to jury trial, being found guilty of the charged offenses, and timely filing his notice of appeal.

Standard of Review: Seils argues the search of his garage and vehicle violated article I, section 8 of the Iowa Constitution. As such, the standard of review is de novo. *State v. Kurth*, 813 N.W.2d 270, 272 (Iowa 2012).

Argument: Law enforcement did not have a warrant; they did not have consent; they did not have probable cause to believe the vehicle contained evidence nor contraband; and they were not acting pursuant to an impound or inventory procedure when they entered Seils' garage and searched his vehicle. At the time his garage and vehicle were searched, Seils was handcuffed, sitting in the

rear of a squad car, unable to access the interior of his vehicle. This search violated article I, section 8 of the Iowa Constitution.

As an initial matter, Seils had an expectation of privacy in the interior of his garage, see *State v. Legg*, 633 N.W.2d 763, 767 (Iowa 2001) (recognizing expectation of privacy within person's garage), and within the vehicle parked inside of that garage. This is not a situation where the evidence was visible to law enforcement in plain view standing on the side of a public street. Consequently, the State was required to prove that an exception to the warrant requirement justified the Trooper's conduct. *State v. Breuer*, 577 N.W.2d 41, 45 (Iowa, 1998).

The district associate court justified the search of Seils' garage and vehicle under the search-incident-to-arrest exception. Ruling, p. 3; App. P47. This justification was contrary to the Iowa Supreme Court's decision in *State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015) and the United States Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332 (2009).

The search-incident-to-arrest exception to the warrant requirement is narrowly construed and limited to accommodating only those interests it was created to serve. *Gaskins*, 866 N.W.2d at 8; quoting *State v. McGrane*, 733 N.W.2d 671, 677 (Iowa 2007). The limited application of this exception allows law enforcement to search incident to arrest, only the space within an arrestee's immediate control. *Arizona v. Gant* 556 U.S. 332, 335 (2009). "Immediate

control" means "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* quoting *Chimel v. California*, 395 U.S. 752, 763 (1969). Search-incident-to-arrest does not authorize a vehicle search, incident to a recent occupant's arrest, after the arrestee has been secured and cannot access the interior of the vehicle. *Gant*, 556 U.S. at 335. "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search," the "justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.* at 339.

Here, Seils was handcuffed and secured in a squad car at the time the search was performed. He was under arrest and was going to be transported from the scene to a law enforcement center on the offense of interference with official acts and for additional testing for operating while intoxicated. It was no longer possible for Seils to access his vehicle or any component of the vehicle. As such, based upon the United States Supreme Court decision in *Gant*, entry into Seils' garage to search the interior of his vehicle was unconstitutional.

In additional to violating the clear rule set forth in *Gant*, the search of Seils' vehicle parked within his garage, for generalized "evidence gathering" purposes, also violated article I, section 8, based upon the Iowa Supreme Court decision in *Gaskins*, 866 N.W.2d at 13. In *Gaskins*, the Iowa Supreme Court approved *Gant's* "reaching distance" rationale as an appropriate limitation on the scope of searches

incident to arrest under article I, section 8 of the Iowa Constitution. However, the Court also importantly declined to adopt *Gant's* alternative evidence-gathering rationale under an independent application article I, section 8 of the Iowa Constitution. The Iowa Supreme Court was concerned that permitting a search incident arrest of a vehicle simply because there may be a reason to believe the vehicle contained evidence of the crime of arrest, would impermissibly transform an exception to the warrant requirement into a "police entitlement." *Id.* According to the Court, "[p]olice entitlements are incompatible with Iowans' robust privacy rights." *Id.* The Iowa Supreme Court was concerned with the precise types of searches occurring as is at issue in the instant case.

Here, the Troopers readily admitted that they entered Seils garage with the intent to search his vehicle for potential evidence and contraband. Sup. Tr. 70. They testified unabashedly, as if the mere fact that Seils was arrested for any offense entitled them to search the vehicle as a matter of right, regardless of where it may be located. Sup. Tr. 70. Such a search simply does not comport with the individual privacy protections provided to Iowa citizens by article I, section 8 of the Iowa Constitution. This was clearly an evidence-gathering search that is specifically prohibited under the Iowa Constitution as explained in *Gaskins*.

As noted by the Iowa Supreme Court in *Gaskins:* "The word 'automobile' is not a talisman in whose presence the constitutional protections against warrantless

searches and seizures fades away and disappears." *Id*. at 16; quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971). "That sentiment applies with equal force to article I, section 8 of the Iowa Constitution." *Id.* As was the case in *Gaskins* "[t]he officers' safety was not endangered, and [Seils] could only have reached the vehicle to destroy evidence if he had 'the skill of Houdini and the strength of Hercules.'" *Id.*, quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part). Seils had already demonstrated that he possessed neither mythical quality, given his failed attempt to merely get from the sidewalk to his front door. Because this was a blatant evidence-gathering search and because Seils could not access anything inside of the garage or vehicle when the search occurred, the search was not a valid search incident to arrest under article I, section 8. "Accordingly, the State was required to obtain a warrant before searching the [garage and the vehicle.]" *Gaskins*, 866 N.W.2d at 16.

II. THE STATE FAILED TO PROVE THAT THE STATUTORY CONDITIONS REQUIRED TO INVOKE IMPLIED CONSENT PURSUANT TO IOWA CODE § 321J.6 WERE MET. SPECIFICALLY, SEILS WAS NOT ARRESTED FOR OPERATING WHILE INTOXICATED PRIOR TO THE OFFICER'S REQUEST FOR CHEMICAL TESTING.

Preservation of Error: Error was preserved by Seils filing his motion to suppress evidence, receiving an adverse ruling, proceeding to jury trial, being found guilty of the charged offense, and timely filing his notice of appeal.

Standard of Review: Seils argues that the court improperly interpreted and applied Iowa's statutory implied consent provisions in denying his motion to suppress evidence. As such, the Court's review is for corrections of errors at law. *State v. Madison*, 785 N.W.2d 706, 708 (Iowa 2010).

Argument: To affirm the district associate court's denial of Seils motion to suppress evidence on this issue is to condone perjury by law enforcement. Prior to being informed by the prosecution of his mistake, Flaherty consistently and repeatedly testified under oath that he did not arrest Seils for operating while intoxicated prior to the invocation of implied consent. After being educated on his mistake by the prosecutor, Flaherty attempted to change his testimony. The district associate court did not make a credibility finding and consequently, this court is free to make its own assessment of the witnesses' credibility and reasonable conclusions to be drawn from their testimony. The only reasonable conclusion to be made from this record is that Flaherty failed to lawfully place Seils under arrest for operating while intoxicated prior to invoking implied consent.

The withdrawal of bodily fluids for chemical testing invades the integrity of an individual's person which is a cherished value of our society. *Schmerber v.*

California, 384 U.S. 757, 772 (1966). The Iowa Legislature was sensitive to these concerns when it enacted Iowa Code section 321J.6, Iowa's implied consent statute, imposing limitations on the State's ability to conduct searches of suspected drunk drivers. *State v. Palmer*, 554 N.W.2d 859, 862 (Iowa 1996). While the laudable goal of Iowa's implied consent statutory scheme is to reduce deaths caused by drunk driving, "the legislature has, nevertheless, placed limitations on the circumstances under which section 321J.6 applies." *Id.* at 861. "*Only* when the requirements of section 321J.6 have been met may the State make a suspected drunk driver choose between chemical testing … or the loss of his or her driver's license." (emphasis added) *Id.*

Iowa Code section 321J.6(1) requires a minimum of two conditions be met before the government induced coercion by way of threat of license suspension may be brought to bear upon a motorist pursuant to the implied consent process.[1] First, the officer must have "reasonable grounds" to believe the individual is in violation of Iowa Code sections 321J.2 or 321J.2A. Iowa Code § 321J.6(1). Second, one or more of the conditions listed under subsection 321J.6(1)(a) through (g) must also exist. Iowa Code § 321J.6(1). These are separate and distinct

[1] Iowa Code § 321J.8 mandates that law enforcement advise an individual that refusal to consent to provide a bodily substance for chemical testing will result in a driver's license suspension twice as long as if the individual consents to testing and fails. See Iowa Code §§ 321J.9 and 321J.12.

requirements, both of which must be met before implied consent may lawfully be invoked. *State v. Braun*, 495 N.W.2d 735, 738 (Iowa 1993).

The statutory prerequisites that must be established in addition to "reasonable grounds" to lawfully invoke implied consent are set forth in Iowa Code section 321J.6(1):

> (a) A peace officer has lawfully placed the person under arrest for violation of section 321J.2.
>
> (b) The person was involved in a motor vehicle accident or collision resulting in personal injury or death.
>
> (c) The person refused to submit to a PBT under Iowa Code Section 321J.5.
>
> (d) The preliminary breath screening test was administered and it indicated an alcohol concentration equal to or in excess of the level prohibited by section 321J.2.
>
> (e) The preliminary breath screening test was administered to a person operating a commercial motor vehicle as defined in section 321.1 and it indicated an alcohol concentration of 0.04 or more.
>
> (f) The preliminary breath screening test was administered, and it indicated an alcohol concentration of less than eight hundredths (0.08) and the peace officer had reasonable grounds to believe that the person was under the influence of a drug other than alcohol or a combination of alcohol and another drug.
>
> (g) The preliminary breath screening test was administered and it indicated an alcohol concentration of .02 or more but less than .08 and the person is under the age of twenty-one.

Iowa Code section 321J.6(1). The instant case involves subsection (a) requiring – "A peace officer has lawfully *placed the person under arrest* for violation of section 321J.2." (emphasis added) Iowa Code § 321J.6(a).

In construing a statute, the court is bound by the definition of terms made use of by the Legislature." *Cowman v. Hansen*, 250 Iowa 358, 362, 92 N.W.2d 682, 684 (Iowa 1958). "It is not for the court to speculate as to the probable legislative intent apart from the wording used in the statute." *LeMars Mutual Insurance Company of Iowa v. Bonnecroy*, 304 N.W.2d 422, 424 (Iowa 1981). "The court must look at what the legislature said rather than what it should or might have said." *Id.* See also Iowa Code § 4.1(38).

Iowa Code section 321J.6(a) uses very specific language unequivocally requiring a peace officer to have "lawfully **placed** the person under arrest for violation of 321J.2." "Placed" is used in the past tense meaning that the arrest must precede the invocation of implied consent. Further, the code section uses the phrase "arrest for violation of 321J.2" as opposed to "arrest for any violation" or "arrest" in general. In the implied consent context, if a statute requires an arrest for operating while intoxicated as a condition precedent to law enforcement's action, a formal arrest for that specific violation is required. See *State v. LaForge*, 2009 WL 1708843, *5 (Iowa Ct. App.).

Here, Seils was formally arrested for interference with official acts NOT a violation of Iowa Code section 321J.2, prior to the invocation of implied consent. In determining whether a peace officer has arrested an individual for one offense as opposed to another, Iowa Code section 804.14(1) is instructive. *State v. Penn-Kennedy*, 862 N.W.2d 384, 387 (Iowa 2015). "A person making an arrest *must* inform the person to be arrested of the intention to arrest the person, *the reason for arrest*, and that the person making the arrest is a peace officer …" (emphasis added) Iowa Code § 804.14(1).

In *Penn-Kennedy*, the defendant was investigated for operating while intoxicated, performed field sobriety tests, was handcuffed and transported to the police station, was read Miranda, and ultimately provided a sample pursuant to implied consent. However, the Court still concluded that the defendant was only arrested for public intoxication, not operating while intoxicated. Similarly, in *State v. Dennison*, 571 N.W.2d 492, 497 (Iowa 1997) the Iowa Supreme Court concluded that the limited detention necessary to transport the defendant to the police station and to conduct the tests to determine whether he was under the influence of drugs was incidental to the investigation and did not constitute an arrest for operating while intoxicated where the officer only advised the defendant that he was being arrested for driving while revoked and open container. *Id.*

In settling the instant dispute, the court must review the totality of the circumstances of the defendant's interaction with the police and take into account the defendant's actions, as well as the officers' responses. *State v. Miller*, 818 N.W.2d 267, 275 (Iowa Ct. App. 2012) (A reasonable person in the defendant's position would have recognized that he was arrested for interference and not OWI). Here, the objective facts establish that Seils was not lawfully arrested for operating while intoxicated prior to the invocation of implied consent.

First and foremost, Flaherty's prior sworn testimony on this precise issue clearly establishes that Seils was not arrested for operating while intoxicated until after implied consent was completed and Seils was being transported to Warren County Jail for the night. A prior statement under oath is admissible as substantive evidence as if the prior statement was made at the hearing or trial. *State v. Thompson*, 397 N.W.2d 679 n. 2 (Iowa 1986); Iowa R. Evid. 5.801(d)(1)(A); Iowa Model Criminal Jury Instruction 200.43 – Prior inconsistent statement under oath. Flaherty clearly and unequivocally testified under oath at the administrative hearing that Seils was not arrested for operating while intoxicated prior to the invocation of implied consent nor prior to Seils' making a decision regarding chemical testing.

Q. Did you formally place him under arrest at that point?
A. *I did not.*
Q. Why not?

A. Because I still had to do – my investigation wasn't complete yet. I was detaining him to take him to Madison County for further testing.
Q. Would it be a fair description to say that you wanted to obtain additional information that would either confirm or dispel your suspicion of him operating while intoxicated?
A. Yeah.

(emphasis added) Sup. Ex. A, pp. 11-12; App. P31-32.

Q. And you didn't formally place him under arrest out in the field, correct?
A. *Correct.*

(emphasis added) Sup. Ex. A., p 13; App. P33

A. …..I grabbed him around the storm door or front door – pulled him back outside the residence and placed him under arrest for interfering at that point. So at that point, I told him that we were gonna go to Madison County for the other test and for the interference charge.

Sup. Ex. A. pp. 13-14; App. P33-34.

Q. Okay, and once you got him back out of the house, you said you took him into custody at that point, simply just for the interference with official acts?
A. *Correct.*
Q. And that would be based upon him disregarding your order to stay there or to not go in the house as he's starting to walk towards it?
A. Yes.
Q. ***Okay, and as far as the OWI went through, he wasn't yet under arrest for OWI, correct?***
A. ***Correct.***

(emphasis and extra emphasis added) Sup. Ex. P. 14-15; App. P34-35.

Q. Prior to him – prior to asking him to submit to chemical testing and formally invoking implied consent, did you ever inform him that he was being arrested and charged with operating while intoxicated?
A. No.

Sup. Ex. A, p. 16; App. P36.

Q. Um, and prior to him making – and this is kind of redundant – but prior to him making his decision to refuse chemical testing, was he ever advised or formally placed under arrest for OWI?
A. Before he took the test?
Q. Before he refused the test.
A. No.
Q. And so at what point did you advise him that he was formally arrested and being charged with OWI?
A. Um, as I transported him to the Warren County Jail.
Q. So that would be after the proceedings in Madison County and on your way to Warren County which is where he was going to be housed for the night?
A. Correct.
Q. Okay, that would be after implied consent was all wrapped up, correct?
A. Yes.

Sup. Ex. A, pp. 17-18; App. P37-38.

Q. Okay. Why not? Just trying to find your reasoning behind some of your actions here.
A. Because I don't ever read anybody implied consent if I don't know if they're – if I don't have their DataMaster test or their urine test or anything like that because at that point, *he wasn't under arrest, when I took him to jail for OWI.*
Q. Okay. So you said at that point, he wasn't under arrest – so what – we talked earlier about when he was formally placed under arrest. It sounds like you told him that he was under arrest for OWI while going en route to the jail, after implied consent, right?
A. *Correct, it was sometime after implied consent.*
Q. When you say he was – when he was not under arrest when you were going to the jail for implied consent, what was – what was your hold up to make that decision? What were you waiting on?
A. His chemical test.
Q. Okay, so it really hinged – your decision to arrest him or not hinged upon the DataMaster result?

A. *Well, I mean, he was gonna be under arrest for the interference but for the OWI charge, yes.*

(emphasis added) Sup. Ex. A. pp. 20-21; App. P40-41.

Flaherty's sworn testimony, prior to being coached up by the prosecution, could not be clearer. Seils was not under arrest for a violation of Iowa Code section 321J.2 at the time implied consent was invoked and his decision regarding chemical testing was made. Seils was only arrested for interference with official acts. By Flaherty's own prior sworn testimony, as was the case in *Dennison* and *Miller*, Seils was simply being detained for additional testing on the operating while intoxicated offense.

Second, the objective facts establish Flaherty's prior sworn testimony that Seils was not arrested for operating while intoxicated prior to invocation of implied consent. The relevant portions of the objective evidence by way of the video recordings is as follows:

- **State's Exhibit 1 @ 9:22 (Video Play Time)** - prior to Seils attempting to enter his house)

  Seils: Can I call my attorney at least? If I'm arrested can I call?
  Flaherty: You aren't arrested yet.

- **State's Exhibit 1 @ 13:42 (Video Play Time) -** as Seils is being cuffed near his front door.

  Seils: Are you seriously arresting me?
  Flaherty: Yes, yes I am.

- **State's Exhibit 1 @ 1:22:30 (Video Play Time) 23:11:23 (Time Stamp); State's Exhibit 5 @ 11:11:19**

  Flaherty: "If you take the test and pass it, I'll just charge you with the Interference and I'll probably drive you home."

- **State's Exhibit 5 @ 11:15:55**

  Seils: If you are going to take me to Warren County, why did you bring me here in the first place?

  Flaherty: "To process you, for OWI."

The video clips are further supported by Trooper Salesberry's testimony that Flaherty merely advised Seils he was arrested for interference and that from what he understood, Seils was not placed under arrest for operating while intoxicated. Sup. Tr. 22, 27; Tr. Vol. 1, p. 231.

Finally, the requirements of a lawful arrest for operating while intoxicated were not met. Flaherty never testified that he advised Seils that he was arrested for operating while intoxicated at any time prior to the invocation of implied consent. Even at the suppression hearing Flaherty conceded that he never specifically advised Seils he was under arrest for operating while intoxicated prior to invoking implied consent. Sup. Tr. 67. Although use of formal words is not required to effectuate an arrest, it is a factor to be considered by the court. *Dennison*, 571 N.W.2d at 495. This fact, coupled with the video recordings, Salesberry's testimony, and Flaherty's prior sworn testimony, leads to no other credible

conclusion but that Seils was not lawfully placed under arrest for a violation of Iowa Code section 321J.2 at the time implied consent was invoked. As such, the statutory condition precedents to the invocation of implied consent did not exist and the district associate court erred in denying Seils' motion to suppress evidence.

Conclusion

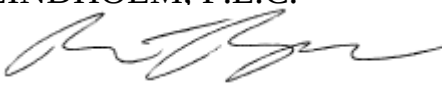
For the reasons set forth above, Appellant respectfully requests that this court reverse the district associate court's decision denying his motion to suppress evidence and remand the case for a new trial without the improperly obtained evidence.

Request for Oral Argument

Request is hereby made that upon submission of this case, counsel for Appellant requests to be heard in oral argument.

Respectfully Submitted,

GOURLEY, REHKEMPER &
LINDHOLM, P.L.C.



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