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 REPLY BRIEF

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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 Reply 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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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.

The State concedes error but contends that error in this case was harmless. (Appellee's Brief pp. 22-23).

When arguing constitutional error was harmless, the state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Kennedy*, 846 N.W.2d 517, 527 (Iowa 2014); quoting *Chapman v. California*, 386 U.S. 18, 23 (1967). This analysis requires a two-step analysis. *Id.* The first step of the analysis requires the court to ask what evidence the fact finder actually considered to reach its verdict. *Id.* The second step weighs the probative force of the evidence against the probative force of the erroneously admitted evidence standing alone. *Id.* On the second prong, harmless error is only established "when the effect of the incorrectly admitted evidence is comparatively minimal to this degree that it can be said … there is no reasonable probability that such evidence might have contributed to the conviction." *Id.* quoting *State v. Hensley*, 534 N.W.2d 379, 383 (Iowa 1995).

It is impossible to seriously argue that the jury would not have considered the illegally discovered alcohol containers in reaching their verdict. Seils was

convicted of operating a motor vehicle under the influence of alcohol. Seils denied consuming alcohol. Tr. Vol. I, p. 251. No tests were performed that established Seils consumed alcohol. Absent proof that "by consuming alcohol" the State could not convict Seils of the charge. Jury Instructions No. 16 & 17; App. 55. The requirement that the State prove beyond a reasonable doubt that "by" consuming alcohol, the under the influence factors are true, is the crucial pin that must be established before a conviction can be obtained. Jury Instruction No. 17; App. 55.

The alcohol illegally discovered in Seils' vehicle in violation of his constitutional rights, was the primary evidence that bridged the gap that the State was required to cross, connecting any alleged impairment to the consumption of alcohol. Understanding this, the prosecutor highlighted the illegally seized alcohol containers every chance he got. Tr. Vol. I, pp. 206-07, 211, Tr. Vol. II, pp. 13-14, 28-29 119-20; Tr. Vol. III, p. 27-29, 37. The jury certainly considered this illegally obtained evidence.

Regarding the second prong, it is similarly impossible to conclude that there was no reasonable probability that the alcohol containers might have contributed to Seils' conviction. Again, the alcohol illegally discovered in Seils' vehicle was the lynchpin to the State's case. The prosecutor repeatedly focused on the fruits of the illegal search in closing and also to Seils' response and admissions during and following the illegal search. The prosecutor replayed the video recording portion

of Seils' statements following the illegal search for the jury in closing arguments and then argued:

> More and more repetitive statements. Why were you in my garage? Why were you in my garage? Those were in the back seat. Those were in the back seat.
>
> So the defendant never says the alcohol is not his. Never says that officers planted it. Never says that it was just sitting in his garage. He says, it was in my back seat. Not only was it in his back seat, there was one open. The officer said it was in the back seat within reach of the driver.

Tr. Vol. III, p. 27. Later in his argument the prosecutor again highlighted:

> Trooper Stine - - we're not going to need to watch it again - - she found the alcohol in the truck. There was four bottles of the six-pack left. One was still opened with alcohol in it.

Tr. Vol. III, pp. 28-29. On rebuttal argument, the prosecutor reiterated these facts:

> He was drinking alcohol. He was in his truck. There was one open. He smelled of alcohol and he acted a person who had been drinking alcohol.

Tr. Vol. III, p. 37. He continued:

> And, remember, when these troopers were walking to that garage, that's when Mr. Seils got antsy. *He knew that the evidence that was going to put him away, evidence that you were going to need to find him guilty, was in his truck. So he ran.*

(emphasis added) Tr. Vol. III, p. 41.

Each Trooper provided testimony pertaining to the illegally discovered alcohol containers. Trooper Flaherty, based his opinion that Seils was "under the

influence of alcohol" in part, upon the open containers illegally discovered in Seils' vehicle. He testified on direct:

Q. Then after that, Trooper Salesberry and Trooper Stine found what in his truck?

A. Alcohol.

Q. Did the defendant say that isn't mine?

A. No.

Q. Did the defendant say that isn't mine?

A. No.

Q. In fact, what did he say?

A. That those were full and in the back seat.

Q. As you sit here today having testified in this case twice before, do you have any doubt that the defendant was impaired by alcohol?

A. No.

Tr. Vol. II, pp. 28-29.

When Stine was asked by the prosecutor:

Q. Is there any legitimate reason to have a partially consumed bottle of alcohol in a vehicle?

She answered:

A. I mean it could be many things. It could be that he'd been somewhere and consumed it. It could be that he was consuming it in the vehicle. And it could be that he was consuming it in the vehicle as he was driving.

Tr. Vol. II, pp 119-20. Any way Stein looked at the situation, the presence of alcohol in Seils' vehicle meant that he was consuming it and that is what she relayed to the jury.

Salesberry, the only Trooper who maintained any sort of credibility, initially testified that his observations of Seils simply lead him to conclude that "further investigation" was warranted. Tr. Vol. I, p. 200. However, following his illegal search of Seils' vehicle, Salseberry concluded that Seils was under the influence of alcohol based upon that discovery. His testimony on direct examination was as follows:

> Q. Do you believe the defendant was impaired by consuming alcohol?
>
> A. I do.
>
> Q. How do you come to that conclusion?
>
> A. Judging by the odor of alcoholic beverage coming from him *and also open containers in the vehicle.*

(emphasis added). Tr. Vol. I, pp. 213-214.

The State would have the court focus on their version of the evidence that could be said to support the verdict. Much of that testimony though is dependent upon the extent, if any, a juror would believe the witness' testimony. As it pertains to the driving allegations, the call made by Goering was simply that a "white

Chevy pickup" with no license plate number and no distinctive feature given. Tr. Vol. II, p. 45. Chevy pickups are plentiful in the State of Iowa. Tr. Vol. II, p. 45.

There was certainly testimony that a "White Chevy pickup" pick-up drove erratically past Ms. Goering. However, whether the truck that went by her was the vehicle that Seils was operating was open to a significant amount of debate. Goering made contact with dispatch at the Cummings Exit (exit 64) on southbound Interstate 35. Tr. Vol. I, p. 177. Seils' vehicle was contacted by law enforcement at the St. Charles exit (exit 52), twelve miles away. Tr. Vol. I, p. 178. This is a dark stretch of hilly interstate with no artificial lighting other than vehicle headlights. Tr. Vol. I, p. 180; Tr. Vol. II, pp. 46-47.

Goering remained on the phone with dispatch until she reached the St. Charles Exit at approximately 9 minutes and 4 seconds into the call. State's Exhibit 15; Tr. Vol. I, p. 179. According to Goering the vehicle was traveling anywhere between eighty-five and ninety miles per hour, while her vehicle maintained a consistent speed of no faster than seventy-five to eighty miles per hour. Tr. Vol. I, p. 174-76. Her vehicle remained in the far right-hand lane, commonly referred to as the "slow lane" as it traveled southbound, while the truck she complained of weaved in and out of traffic. Tr. Vol. I, p. 176. Assuming a

conservative 10 miles-per-hour difference (14.667 feet per second)[1], between the erratically driven vehicle and Goering's, over a span of time period of 9 minutes and 4 seconds (544 seconds), there would have been well over a mile difference between the vehicles (7,978.84 feet). On top of this, Goering made no mention of the distinctive Karl Chevrolet dealer plates which would have been in Seils' vehicle. Whether or not the driving behavior witnessed by Goering, as bad as it may have been, was Seils or Seils vehicle, was something that was certainly disputed and called into question by the evidence.

Just like the whether the driving witnessed by Goering could be attributed to Seils' whether or not Seils was intoxicated by alcohol was also hotly contested. This evidence was dependent upon the testimony of two primary investigating officer's whose credibility was significantly undermined. The primary investigator, Trooper Flaherty, made directly contradictory statements under oath regarding a crucial issue in the case. Tr. Vol. II, pp. 73-81. The secondary investigator, Trooper Stine, claimed Seils urinated himself despite never documenting such an important, blatant, indication of intoxication in her report. Tr. Vol. II, pp. 44 114, 126-27. Flaherty likewise did not document such an observation in his report. Tr. Vol. II, pp. 43-44. Most notably though, Salesberry,

[1] For every mile an hour an object travels it covers 1.466 feet per second. Tr. Vol. II, p. 46

who had conducted more than 1,500 operating while intoxicated investigations, did not witness anything that lead him to believe Seils had urinated himself. Tr. Vol. I, pp. 225-26.

With credibility issues of the primary investigating officer hanging by a thread, the objective evidence presented to the jury by way of the illegally discovered alcohol containers became that much more important to the case. The only evidence of alcohol that could be objectively proven was the illegally discovered alcohol containers and Seils' response to that discovery. While the State wishes to focus on the evidence that under their theory supports the verdict, the focus is not on whether a jury could possibly have convicted Seils absent the illegal evidence, the question is whether there is "no reasonable probability" that the illegally obtained and improperly admitted evidence "*might have contributed to the conviction."* (emphasis added). *Kennedy*, 846 N.W.2d at 527. Given the crucial role that the illegally obtained alcohol container evidence played in this case, the error cannot be said to be harmless beyond a reasonable doubt.

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.

Respectful consideration is certainly given to a trial court's factual findings due to its opportunity to evaluate the credibility of witnesses, but the appellate court is in no way bound by those findings. *State v. Tyler*, 830 N.W.2d 288, 291 (Iowa 2013). For the trial court's factual findings and credibility determinations to carry weight on appeal, specificity of findings and thorough analysis as to the crucial facts, are necessary. See *Id.* (Where district court failed to articular specific reasons behind its fact findings and credibility determinations, the Iowa Supreme Court did not hesitate to substitute its own). Furthermore, a credibility determination, if made, must still be based upon a coherent and facially plausible story that is not contradicted by extrinsic evidence and is not internally inconsistent. *Id.* at 296-97, citing *U.S. v. Mendoza*, 677 F.3d 822, 827 (8th Cir. 2012).

First, the trial court did not make a credibility determination regarding Flaherty's conflicting testimony. Nowhere in the ruling did the trial court even recognize the direct conflict in the officer's sworn testimony nor did the court attempt to compare Flaherty's conflicting sworn testimony to extrinsic evidence. No credibility determination was made by the trial court and consequently, this court is free to make its own credibility determination regarding Flaherty's testimony.

Second, the trial court never made a specific factual finding that Seils was arrested for operating while intoxicated prior to implied consent being invoked. In paragraph four if its ruling, the court states "Seils was arrested and charged with interference and OWI" but does not articulate or specify when, in the chain of events, it found this to have occurred. Ruling on Motion to Suppress, ¶ 4; App. P45. The court did not even recognize the legal requirement that one of the statutory conditions, i.e., lawful arrest for violation of 321J.2, must exist in ADDITION to "reasonable grounds" prior to the invocation of implied consent. Ruling on Motion to Suppress, p. 2; App. P46. The court only addressed the "reasonable grounds" requirement and left the remaining statutory prerequisite completely out of its ruling. Ruling on Motion to Suppress, p. 2; App. P46.

Third, the ruling itself is internally inconsistent, and inconsistent with the testimony of all three law enforcement officers. All three officers agreed that Seils was arrested, for interference with official acts, the minute he was apprehended attempting to run into his residence. Despite this fact, the district associate court ignored that testimony and put in the findings of fact that Seils was merely "detained" at that time. Ruling on Motion to Suppress, ¶ 4; App. P45.

Finally, a review of the video recordings associated with the incident, support the finding that Seils was not arrested for operating while intoxicated prior to implied consent being invoked. Why else would Flaherty tell Seils that if he

took the test and tested below .08 he would not be charged with operating while intoxicated? Once arrested, a person cannot be "unarrested" for the offense of arrest, *State v. Davis*, 525 N.W.2d 837, 840 (Iowa 1994) (Overruled on other grounds by *State v. Williams*, 895 N.W.2d 856 (Iowa 2017), so the answer to that question is simple. Seils had not been arrested for operating while intoxicated!

In evaluating the evidence and reviewing the court's minimal and non-specific fact findings and legal conclusions, this is not the type of ruling that the appellate court can justifiably defer to credibility determinations and fact findings of the trial court. The believable record in this case is Flaherty failed to place Seils under arrest for operating while intoxicated prior to invoking implied consent.

Understanding that their credibility argument pertaining to Flaherty's testimony rests on a shaky footing, the State argues in the alternative, that Flaherty "substantially complied" with the requirements of 321J.6.

First and foremost, a lawful arrest for a violation of section 321J.2 goes to the very heart and constitutionality of the statute and consequently strict and literal compliance is necessary. Implied consent has been suggested to be an exception to the warrant requirement. See *State v. Stanford*, 474 N.W.2d 573, 575 (Iowa 1991). The invocation of the statutory coercion found in implied consent, allows law enforcement to bypass the traditional warrant requirement, force a motorist into a decision, and then use the motorist's decision against them in a criminal

prosecution. See Iowa Code § 321J.11 (use of test results) & 321J.16 (proof of refusal admissible). The fundamental premise allowing this statutory scheme to survive constitutional scrutiny under the Fourth Amendment is the fact that the individual is lawfully arrested for operating while intoxicated and consequently no longer retains the constitutional right to refuse the withdrawal of a bodily substance for purposes of chemical testing. See *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) (Search incident to arrest exception under the Fourth Amendment permits law enforcement to compel a search of an OWI arrestee and consequently criminalizing a refusal of breath testing does not run afoul of the Fourth Amendment). Thus, the statutory mandate of a lawful arrest for a violation of section 321J.2 goes the very heart and constitutionality of the statute and strict and literal compliance is necessary.

Second, the legislature took the time to specifically articulate the requirement: "A peace officer has *lawfully* placed the person under arrest *for violation of section 321J.2*." (emphasis added) Iowa Code § 321J.6(1)(a). The sentence does not end at "placed the person under arrest." It mandates a lawful arrest for the particular code section stated directly in the statute. In statutory construction, courts are to conclude that the legislature intended each term used in a statute to have significance. *Metier v. Cooper Transport Co., Inc.*, 378 N.W.2d 907, 913 (Iowa 1985). Further, "a statute will not be construed to make any part of

it superfluous." *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 305 (Iowa 2000). To accept the State's argument would be to amputate the last portion of the sentence and pretend it simply does not exist. Non-compliance can never rise to the level of substantial compliance.

Third, none of the "substantial compliance" cases involved or have resulted in an appellate court forgiving non-compliance with a clear and specific statutory mandate. They all deal with second-layer technicalities underlying the applicable statutory condition precedent to invoking implied consent or what have been characterized as "meaningless gestures." *State v. Lindeman*, 555 N.W.2d 693, 695 (Iowa 1996); See *State v. Schlemme*, 301 N.W.2d 721 (Iowa 1981) (Re-arrest of defendant by certified officer who invoked implied consent was not necessary, following initial valid and lawful arrest of defendant by officer who was also certified). *State v. Bird*, 663 N.W.2d 860 (Iowa 2003) (Calibration records for preliminary breath test device (statutory condition precedent listed in 321J.6(1)(d)) that failed to document the "value and type of standard" used to calibrate the device were still sufficient to substantially comply). Standing in stark contrast are those situations where the specific primary requirement of the statutory condition precedent to the invocation of implied consent has not been complied with. In those situations, implied consent has always been declared illegally invoked. See *State v. Palmer*, 554 N.W.2d 859 (Iowa, 1996) ("Peace officer" did not lawfully

arrest defendant for violation of 321J.2); *Meisinger v. Iowa Dept. of Transp.*, 2001 WL 22993 (Iowa Ct. App.) (failure to maintain calibration records for specific preliminary breath test unit invalidated implied consent invoked solely on PBT failure subsection).

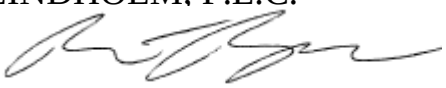
Here, Flaherty admitted that he did not comply with ANY of the statutory condition precedents to the invocation of implied consent as set forth in Iowa Code section 321J.6(1)(a) through (g). While the State argues he had "probable cause", probable cause is not the standard. That was the same argument that the State unsuccessfully attempted to make in *Laforge*. *State v. LaForge*, 2009 WL 1708843, *5 (Iowa Ct. App.). Furthermore, if "probable cause" were the legal standard for invoking implied consent, all of the statutory requirements set forth in 321J.6(1)(a) through (g) would be rendered superfluous. Such is not and cannot be the case. Implied consent was improperly and in fact, illegally invoked, and the fruits of that illegality must be suppressed. It was error for the district associate court to deny defendant's motion to suppress evidence on this ground.

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.

Respectfully Submitted,

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



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