IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 19-0267

STATE OF IOWA,
Plaintiff-Appellee

vs.

JASMAINE R. WARREN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE SCOTT ROSENBERG

DEFENDANT/APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case involves existing legal precedent supporting transfer to the Court of Appeals under Iowa R. App. P. 6.1101(3)(*b*).

CASE STATEMENT

The State charged Ms. Warren with two crimes arising out of a traffic stop on May 4, 2018:

> Count I: Operating a Motor Vehicle While Intoxicated, Second Offense in violation of Iowa Code § 321J.2
>
> Count II: Driving While License was Denied or Revoked in violation of Iowa Code §§ 321J.2 and 321J.21.

(6/8/18 TI; Appx 4). Ms. Warren was charged in a related case with parking where prohibited in violation of Iowa Code § 321.358. (Polk County Case No. NTA0838898).

Ms. Warren waived her right to trial by jury and a bench trial was held October 15, 2018. (11/14/18 Ruling at 1; Appx 6). The district court found Ms. Warren guilty as charged and sentenced her to two years in prison on Count I and one year in prison on Count II, to run concurrently. (2/13/19 Count I Sent. Order; 2/13/19 Count II Sent. Order; Appx 12–20). The Court also found Ms. Warren guilty of parking where prohibited as charged in Case No. NTA0838898. (11/14/18 Ruling at 4; Appx 9). The State dismissed the parking violation, however. (Polk County Case No. NTA0838898 2/21/19 Dismissal).

FACTS

On May 4, 2018, Des Moines Police Officer Engle Ms. Warren when he saw her turn southbound onto Sixth Avenue and quickly accelerate. (Trans. at 10). Officer Engle performed a U-turn and followed Ms. Warren when she turned East onto Corning Ave. (Trans. at 10). Ms. Warren pulled her vehicle halfway into a driveway—leaving the rear portion of the vehicle sticking out into the street—

exited her car and walked away from the vehicle towards a residence. (Trans. at 10–11).

Another officer activated his overhead lights to detain Ms. Warren. (Trans. 11:2–4). Officer Engle pulled in behind that first officer and made contact with Ms. Engle. (Trans. 11:3). Officer Engle testified the only reason he stopped Ms. Warren was because her car was parked partially on the street in a no-parking zone. (Trans. at 10). On re-cross examination, Officer Engle conceded he never saw Ms. Warren speeding. (Trans. at 27).

Ms. Warren exited her car and attempted to go inside a residence. (Trans. 11). Officer Engle stopped her, told her she could not park her car there, and asked for her license, registration, and proof of insurance. (Trans. 11:8–11). Ms. Warren returned to her vehicle to get her identification card and at that point Officer Engle smelled the odor of marijuana coming from her vehicle. (Trans. 11:13).

Officer Engle continued to question Ms. Warren, eliciting from her that she had smoked marijuana earlier that day. (Trans. 12). Ms. Warren declined to take field sobriety tests. (Trans. 13:24). Ms. Warren also declined to take a urine test. (Trans. 16:9). Officer Engle

testified that he believed Ms. Warren was under the influence. (Trans 15:8). Officer Engle ran Ms. Warren's license and determined that it was revoked. (Trans. 14:3–4).

The State argued for Ms. Warren's guilt on the OWI charge based on two theories. (Trans. at 34:9 ("[T]he State is going to operate under two theories in this case.")). First, the State argued Ms. Warren was under the influence of a controlled substance. Iowa Code § 321J.2(1)(a). Second, the State argued Ms. Warren was driving while marijuana was present in her body, otherwise known as the "per se" theory. Iowa Code § 321J.2(1)(c). Acknowledging that Ms. Warren had not taken a blood or urine test, the State contended, "there is circumstantial evidence that if she had provided a urine sample . . . it would have had the presence of a controlled substance in it." (Trans. 42:18–21).

The district court found Ms. Warren guilty as charged. The district court did not specify whether if found Ms. Warren guilty under the impairment theory or the per se theory, or both. (11/14/18 Ruling at 4; Appx 9). The sentencing order states that Ms. Warren was adjudged guilty of "OWI 2nd Offense in violation of Iowa Code Section 321J.2." (2/13/19 Count I Sent. Order; Appx 12).

ARGUMENT

I. Insufficient evidence existed to sustain Ms. Warren's OWI conviction

A. Preservation & Standard of Review

"[W]hen a criminal case is tried to the court, a defendant may challenge the sufficiency of the evidence on appeal irrespective of whether a motion for judgment of acquittal was previously made." *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997). Appellate courts review sufficiency claims to determine if substantial evidence in the record supports a finding of guilty. *Id.*

> In determining whether there was substantial evidence, we view the evidence in the light most favorable to the State. Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. In determining if there was substantial evidence, we consider all of the evidence in the record, not just the evidence supporting a finding of guilt.

Id. (internal citations omitted).

B. Argument

The evidence presented by the State was insufficient to establish Ms. Warren violated Iowa Code § 321J.2(1)(*c*)—the per se bar—beyond a reasonable doubt. The circumstantial evidence of impairment presented by the State was insufficient; lacking test results, Ms. Warren cannot be convicted under § 321J.2(1)(*c*).

Ms. Warren was charged with OWI in violation of Iowa Code § 321J.2. (6/8/18 TI; Appx 4). An individual is guilty of OWI when:

> [T]he person operates a motor vehicle in this state in any of the following conditions:
>
> > a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.
> >
> > b. While having an alcohol concentration of .08 or more.
> >
> > c. While any amount of a controlled substance is present in the person, as measured in the person's blood or urine.

Iowa Code § 321J.2(1) (2018).

Subsections (a), (b), and (c) each provide an independent basis for conviction. The Iowa Supreme Court recently explained the difference between these three variations:

> Each prong uses a different theory and primarily relies on different evidence. The first prong primarily utilizes evidence of a person's conduct and demeanor. The second prong primarily utilizes evidence of the results of testing that measures a person's alcohol concentration level from a breath, blood, or urine specimen. The third prong primarily uses evidence of the results of testing that measures any amount of a controlled substance from a blood or urine specimen. While the last two prongs require evidence derived from a test, not conduct, the test under the third prong requires no specific threshold level of a prohibited substance.

State v. Myers, 924 N.W.2d 823, 828 (Iowa 2019). As particularly relevant here, "[t]o support a conviction under [§ 321J.2(1)(*c*)], the test *must* identify an amount of a controlled substance in a blood or urine sample beyond a reasonable doubt." *Id.* at 830 (emphasis added).

The State alleged Ms. Warren violated both §§ 321J.2(1)(*a*) and (*c*). But the State did not have test result evidence showing Ms. Warren was under the influence of a controlled substance. The State explicitly relied on circumstantial evidence of impairment in arguing Ms. Warren was guilty under § 321J.2(1)(*c*).

The *Myers* Court explicitly found this type of circumstantial evidence was insufficient to establish guilt beyond a reasonable doubt for the purposes of § 321J.2(1)(*c*). *Myers*, 924 N.W.2d at 830. *Myers* held that, as written, § 321J.2(1)(*c*) requires evidence derived from a test conducted on a defendant's urine or blood. *Id.* at 828. Conduct of a defendant or other evidence which may qualify as circumstantial evidence of the presence of a controlled substance in their blood or urine only raises a "suspicion, speculation, or conjecture [which] is insufficient" to sustain a conviction. *Id.* at 830 (citing *State v. Hearn*, 797 N.W.2d 577, 580 (Iowa 2011)).

The district court did not identify which subsection of Iowa Code § 321J.2 formed the basis of its guilty verdict. Notably, the district court's ruling predated *Myers* and the district court did not acknowledge that impairment evidence is insufficient to prove a violation of § 321J.2(1)(*c*).

When a verdict does not specify the basis or theory upon which guilt has been found, the verdict is general in nature. *State v. Pilcher*, 242 N.W.2d 348, 355 (Iowa 1976). When a crime has multiple basis of guilt, substantial evidence must support each of the alternative theories of guilt. *Id.* at 827. Here, the evidence supporting the per se alternative is lacking.

It is impossible to determine whether the district court based its finding of guilt on the unsubstantiated per se theory advocated for by the State. "[T]he validity of a verdict based on facts legally supporting one theory for conviction of a defendant does not negate the possibility of a wrongful conviction of a defendant under a theory containing legal error." *State v. Martens*, 569 N.W.2d 482, 485 (Iowa 1997). "When a general verdict does not reveal the basis for a guilty verdict, reversal is required." *State v. Heemstra*, 721 N.W.2d 549, 558

(Iowa 2006). Ms. Warren's OWI conviction therefore must be set aside.

II. Trial Counsel was ineffective for failing to seek suppression based on the illegal seizure of Ms. Warren

A. Preservation & Standard of Review

A criminal defendant's right to be represented by counsel and the right to effective representation is based in the Sixth Amendment to the United States Constitution and article I, § 10 of the Iowa Constitution. *State v. Dudley*, 766 N.W.2d 606, 613 (Iowa 2009). A defendant may raise a claim of ineffective assistance of trial counsel on direct appeal of a criminal conviction if reasonable grounds exist to support the claim and the record is adequate to address the claim. *State v. Brubaker*, 805 N.W.2d 164, 170 (Iowa 2011). "Failure of trial counsel to preserve error at trial can support an ineffective-assistance-of-counsel claim." *Id.* Claims of ineffective assistance of counsel are reviewed de novo. *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004).

Ineffective assistance of counsel is demonstrated when (1) trial counsel fails to perform an essential duty, and (2) counsel's errors prejudiced the applicant. *King v. State*, 797 N.W.2d 565, 571 (Iowa

2011); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). The applicant must satisfy both elements by a preponderance of the evidence to demonstrate a constitutional violation. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

To fulfill the duty prong, an applicant must show counsel's performance fell below the level expected of a reasonably competent attorney. *Id.* The level of a reasonably competent attorney is measured against prevailing professional standards. *Id.* The prejudice prong is met when an applicant shows but for trial counsel's errors, there is a reasonable probability the result of the trial would have been different. *King*, 797 N.W.2d at 572; *see Strickland*, 466 U.S. at 694. "The likelihood of a different result need not be more probable than not, but it must be substantial, not just conceivable." *Id.*

B. Duty

Trial counsel rendered ineffective assistance of counsel by failing to argue for suppression of evidence under Iowa Constitution article I, § 8, and the Fourth and Fourteenth Amendments of the federal constitution based on law enforcement's unreasonable

seizure of Ms. Warren without reasonable suspicion and the subsequent unlawful extension of the seizure.

Trial counsel breached his duty by failing to argue law enforcement infringed on Ms. Warren's rights under article I, § 8 of the Iowa Constitution and the Fourth and Fourteen Amendment to the U.S. Constitution when they seized her without sufficient probable cause and unlawfully extended the seizure beyond the stated purpose for the stop. Under article I, § 8 of the Iowa Constitution, "The right of the people to be secure in their persons . . . against unreasonable seizures and searches shall not be violated." The search and seizure clause of the federal constitution is substantially identical to the Iowa Constitution and construction of the federal constitution is persuasive when interpreting the state provision. *State v. McCoy*, 692 N.W.2d 6, 15 (Iowa 2005). But federal decisions applying the Fourth Amendment are not binding on interpretations of the Iowa Constitution, even where the specific facts of a case do not distinguish between the protections afforded by the separate provisions. *Id.* Evidence obtained by law enforcement as a result of a violation of either the Fourth Amendment or article I, § 8

is inadmissible despite any relevant or probative value to the dispute. *Id.*

"In recent decades, [the Iowa Supreme Court has] reemphasized [its] independent constitutional tradition." *State v. Coleman*, 890 N.W.2d 284, 296 (Iowa 2017). "*[S]tate* constitutions and not the Federal Constitution were the original sources of written constitutional rights." *State v. Short*, 851 N.W.2d 474, 481 (Iowa 2014) (emphasis in original). *See also State v. Cline*, 617 N.W.2d 277, 285 (Iowa 2000) (holding that a failure to independently interpret the Iowa Constitution when raised abdicates the Court's constitutional role in state government). Accordingly, the Iowa Supreme Court has made it increasingly clear the Iowa defense attorneys should present arguments under the state constitution when the federal constitution does not adequately protect a client's rights. *See State v. Effler*, 769 N.W.2d 880, 894 (Iowa 2009) (Appel, J., specially concurring) (emphasizing "the need for criminal counsel to explore thoroughly the possibility that this court will approach the Iowa Constitution in a different fashion than the United States Supreme Court approaches parallel provisions of the Federal Constitution").

1. Unlawful seizure

Officer Engle testified that he observed a violation of Iowa Code § 321.358, which states:

> No person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic-control device, in any of the following places:
>
> . . . .
>
> (13) At any place where official signs prohibit stopping or parking.

He did not claim that he had probable cause to stop Ms. Warren for any moving violation such as speeding or disobeying a traffic signal. The crime Officer Engle observed, and the basis of his reasonable suspicion, was the vehicle's illegal location. What Officer Engle witnessed was a *completed* parking infraction.

The completed parking violation did not authorize Officer Engle to seize Ms. Warren and question her. Iowa has not addressed this exact question, but this conclusion flows logically from the traditional Fourth Amendment analysis. Both the Iowa and United States Constitutions prohibit "unreasonable intrusions by law enforcement officers." *State v. Lewis*, 675 N.W.2d 516, 522 (Iowa 2004). Subject to a few carefully drawn exceptions, warrantless searches and seizures are per se unreasonable. *Id.* It is the State's burden to prove by a

preponderance that an exception to the warrant requirement applies. *Id.* Probable cause is one such exception; reasonable suspicion is another.

Courts from other jurisdictions have concluded parking violations do not supply reasonable suspicion or probable cause for a seizure. *Coleman*, 890 N.W.2d at 299 (recognizing state court precedents are useful in determining proper constitutional approach). The Ohio Court of Appeals has held parking violations do not amount to reasonable suspicion justifying a seizure. *State v. Medlar*, 638 N.E.2d 1105, 1109 (Ohio Ct. App. 1994). As explained by *Medlar*:

> *Terry* deals with reasonable investigatory stops based upon articulable facts. In the case *sub judice* neither of these elements is present. The parking violation had been completed when [the officer] saw the truck parked in the fire lane. At this point [the officer] should have placed the citation on the vehicle. There was nothing further to investigate.

Medlar, 638 N.E.2d at 1109–10

Likewise, the Minnesota Supreme Court has held, "A police officer who has probable cause to believe that a person has committed a parking violation can stop the person only if the stop is necessary to enforce the violation[.]" *State v. Holmes*, 569 N.W.2d

181, 185 (Minn. 1997). *Holmes* emphasized that parking violations are perhaps the least egregious crimes and are typically enforced by applying a ticket to the parked car. *Holmes*, 569 N.W.2d at 185. As a leading commentator has stated, "[t]he *Terry* rule should be expressly limited to investigation of serious offenses." 4 Wayne R. LaFave, Search and Seizure, Nature of the suspected offense § 9.2(c) (5th ed.). Accordingly, *Holmes* held parking violations do not justify a seizure.

Here, Officer Engle observed a completed parking violation. Ms. Warren's vehicle was almost entirely parked in the driveway of the residence, though it blocked the sidewalk. Officer Engle could have written Ms. Warren a ticket. He did not do so. Instead, he seized Ms. Warren and pursued an investigation independent of the parking violation. This seizure was not necessary to enforce the completed violation. Ms. Warren's license, registration, and insurance information were unnecessary for the enforcement of the completed violation. By seizing Ms. Warren, Officer Engle therefore violated Ms. Warren's rights under article I, § 8 and the Fourth Amendment.

Trial counsel rendered ineffective assistance of counsel by failing to file a motion to suppress arguing Officer Engle's seizure of

Ms. Warren violated her constitutional rights. A reasonably competent attorney would have recognized that Ms. Warren's best defense was suppressing the evidence obtained after her seizure. A reasonably competent attorney also would have recognized that the stated reason for the stop—the parking violation—did not justify the interaction that followed. There is no conceivable strategy that would explain trial counsel's failure to file a motion to suppress on this basis.

2. Unlawful extension of stop

"[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015). "A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." *Id.* The Iowa Supreme Court has held an officer may not extend a traffic stop to request a defendant to produce license, registration, and insurance information. *Coleman*, 890 N.W.2d at 301.

The basis of the stop was a parking violation. Again, that violation could have been enforced by way of a citation placed on the vehicle. Ms. Warren's license, registration, and insurance information were unnecessary for the enforcement of the completed violation. Certainly, Officer Engle's questioning of Ms. Warren and her activities that night was beyond the scope of the "mission" of the stop.

Accordingly, trial counsel should have moved to suppress evidence gathered as a result of the impermissible extension of the stop if the initial seizure. Trial counsel was ineffective when he failed to do so. A reasonably competent attorney would have been familiar with *Rodriguez* and its progeny and recognized that Officer Engle far exceeded the time reasonably necessary to resolve the parking issue. There is no conceivable strategy that would explain trial counsel's failure to file a motion to suppress on this basis.

C. Prejudice

Had trial counsel secured suppression based on the unconstitutional seizure of Ms. Warren, the outcome of trial likely would have been different. The evidence against Ms. Warren was Officer Engle's observations of her behavior and the statements Ms.

Warren made to him. Had trial counsel filed a motion to suppress, that evidence would have been excluded and there would have been no case against Ms. Warren. Ms. Warren therefore was prejudiced by her trial counsel's failure. She has established a violation of her Sixth Amendment and article I, § 10 right to effective assistance of counsel and her conviction must be reversed.

CONCLUSION

Based on Issue I, the Court should vacate Ms. Warren's conviction on Count I and remand for dismissal of that Count. Based on Issue II, the Court should vacate Ms. Warren's conviction on both Count I and Count II and remand for further proceedings.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates. This brief contains 3,301 words.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Bookman Old Style.

I hereby certify that on September 11, 2019, I did serve Defendant-Appellant's Final Brief on Appellant by emailing one copy to:

Jasmaine Warren

Defendant-Appellant

___/S/ *Gina Messamer*_____

Dated: September 11, 2019

Gina Messamer