

**IN THE COURT OF APPEALS OF IOWA**

No. 3-430 / 11-0817  
Filed June 12, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**KEITH ALLEN GOGEL,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Joseph M. Moothart, District Associate Judge.

Keith Gogel appeals from his convictions for possession of methamphetamine and unlawful possession of prescription drugs, arguing the contraband found in his car after a search during a traffic stop should have been suppressed. **REVERSED AND REMANDED.**

Kevin E. Schoeberl of Story & Schoeberl Law Firm, Cresco, for appellant.

Thomas J. Miller, Attorney General, John B. McCormally, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brian Williams, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

**DOYLE, P.J.**

Keith Gogel appeals from his convictions for possession of methamphetamine and unlawful possession of prescription drugs, arguing the contraband found in his car after a search during a traffic stop should have been suppressed. We agree and, therefore, reverse the judgment of the district court and remand the case to the district court for further proceedings.

***I. Background Facts and Proceedings.***

Keith Gogel's car was searched during a traffic stop, and methamphetamine was discovered. Gogel moved to suppress the evidence, challenging the legality of the search under the search and seizure clauses of the Iowa and Federal Constitutions. The district court denied his motion to suppress, and Gogel's subsequent application for interlocutory appeal was denied by the Iowa Supreme Court.

After a bench trial on the minutes of testimony, the district court entered its ruling concluding Gogel voluntarily consented to the search of his vehicle. The court found:

The preponderance of credible evidence presented at the hearing on the motion proved that on October 4, 2009, . . . Police Officer Andrew Nissen effected an investigatory stop of [Gogel's] vehicle . . . after obtaining a radar reading of [fifty] miles-per-hour in a [thirty-five] mile-per-hour zone. The officer approached [Gogel's] vehicle. [Gogel] was seated in the driver's seat. The officer asked [Gogel] if he knew the reason for the stop and that [he] was speeding. [Gogel] answered in the affirmative. [Gogel] provided the officer with his driver's license. The officer went to his law enforcement vehicle to run a check on the . . . license.

The officer had observed [Gogel] to be fidgety and nervous. [Gogel] also seemed to mumble and did not look directly at the officer. The officer knew that fidgeting was consistent with being a methamphetamine user. The officer had observed that [Gogel] was

missing teeth, which was also consistent with being a methamphetamine user.

The officer observed [Gogel] in the vehicle reaching for the center console and the glove box. The computer check did not reflect a history of drug usage. The officer returned to [Gogel's] vehicle and advised [Gogel] that he was [issuing him a speeding ticket but was] reducing the speed to [only ten miles-per-hour] over [the limit].

The officer asked [Gogel] if he had anything in the vehicle that he was not supposed to have. [Gogel] answered that he did not. The officer asked if he could search the vehicle. [Gogel] waived his attorney's card and indicated that he had never had to use it. [Gogel] began to read from the attorney's card.<sup>1</sup> The officer asked [Gogel] to step out of his car and brought [him] to the rear of his vehicle.

The officer asked [Gogel] to tell him if there was something in the car so that he would not have to call a drug dog down or go about finding it another way. [Gogel] responded that he did not know why the officer would search the vehicle and that he had never been searched for a speeding ticket. The officer asked [Gogel] if he minded if he searched the vehicle. [Gogel] responded that he personally didn't mind, but he didn't understand why the vehicle would be searched. The officer responded that they like to periodically search a vehicle. The officer stated, "Oh, but you don't mind?" [Gogel] again stated that he did not have a problem with it but that he didn't know why the officer was searching. The officer asked [Gogel] to produce a knife which [he] had acknowledged was on his person.

The officer searched [Gogel's] vehicle and found burnt tin foil with what appeared to be methamphetamine residue near the center console. The officer also located a hollowed out [ink] pen that could be used for smoking methamphetamine. He found a bag of white substance in a cigarette box in the glove compartment, which field tested positive for methamphetamine. The citation for speeding had not yet been issued. [Gogel] was arrested for possession of methamphetamine. After [he] was placed in handcuffs, he read from his attorney's card. The card indicated that [Gogel] refused to consent to any search of his car or effects, that

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<sup>1</sup> The back of the attorney's business card stated:

I refuse to consent to any search of my premises, the location of my arrests, my car or effects. I wish to exercise my rights under the Fifth and Sixth Amendments to remain silent and to have an attorney present during any questioning or lineup. If you ignore my exercise of these rights and attempt to procure a waiver, I wish to confer with my attorney prior to any conversation with law enforcement agents on the subject of waiver.

Gogel asserted he began reading the card and got to "I refuse to consent" when Officer Nissen interrupted him and ordered him out of the car.

he wished to remain silent, and that he wanted an attorney present during any questioning or lineup.

[Gogel] testified that he did not intend to consent to the search of his car when he said that he did not have a problem with it. He testified that he thought that the officer would search his car whether he consented or not. The defendant was [forty-two] years of age, a high school graduate, able to read and write, understands English, and knew his rights from previous incidents.

Gogel was convicted of possession of a controlled substance, methamphetamine, in violation of Iowa Code section 124.401(5) (2011), and unlawful possession of prescription drugs, in violation of Iowa Code section 155A.21. Gogel was sentenced to 365 days in jail with all but seven days suspended. He was placed on probation for two years and ordered to pay fines, costs, and attorney fees. Gogel now appeals.

## ***II. Discussion.***

On appeal, Gogel argues the district court should have granted his motion to suppress on federal and state constitutional grounds, and he presents two search and seizure claims in this appeal. Because the federal and state constitutional search and seizure principles applicable to this appeal are thoroughly discussed in *State v. Pals*, 805 N.W.2d 767, 775-82 (Iowa 2011), we need not repeat them here.

Gogel first asserts there were no articulable facts to give rise to reasonable suspicion of some separate illegal activity that would justify the request to search Gogel's car. Second, he asserts his consent to search the car cannot be considered free and voluntary because it was coerced under the facts and circumstances of this case. Our review is de novo. *Pals*, 805 N.W.2d at 771. We independently evaluate the totality of circumstances as shown by the

entire record. *Id.* We give deference to the court's factual findings, but we are not bound by such findings. *Id.*

**A. Legality of Requesting Search Unrelated to Purposes of Stop.**

Our supreme court has recognized “the substantial split of authority over the issue of the proper scope of searches in the context of automobile stops,” but it declined to address the issue in *Pals* in light of an error preservation question. *Id.* at 775-77. Although we believe the better line of authority holds that any effort to obtain consent for a search unrelated to the purposes of the traffic stop requires at least reasonable suspicion of criminal activity, see *id.* at 776 (listing authorities), we need not decide that issue here. Upon our review de novo review, we agree with the district court's conclusion that Officer Nissen did have reasonable suspicion to justify asking for consent to search Gogel's car:

It was not improper for Officer Nissen to ask [Gogel] whether he had anything in the vehicle that he was not supposed to have. Officer Nissen knew that [Gogel's] act of being fidgety and nervous as well as the absence of teeth were characteristics consistent with those of a methamphetamine user. [Gogel] appeared to be making furtive movements when left alone in the car. Under these circumstances, the officer had reasonable, articulable suspicion to justify a request for consent to search the vehicle.

Accordingly, we affirm on this issue.

**B. Voluntariness of Consent.**

While we agree with the district court that there was reasonable suspicion to justify Officer Nissen's request for consent, we disagree with the district court's

conclusion that Gogel's consent was voluntary. In deciding this question, we apply the analysis set forth in *Pals*.<sup>2</sup> See *id.* at 779-83.

We note that Gogel was detained at the time of the consent to search. While bathed in the blue and red strobic show of authority from a police cruiser, Gogel found himself seized as he stood on the side of a public highway after being ordered out of his car by a uniformed and armed officer of the law. In fact, such seizure occurred when he began to read from the attorney's card "I refuse to consent," at which point he was interrupted and ordered out of his car. A reasonable person in Gogel's position would have believed that he was not free to leave. See *id.* at 782-83. The setting of a traffic stop on a public highway is "inherently coercive." *Id.* at 783. Under these circumstances, it is likely Gogel did not feel free to decline to give consent for a search even though the search was unrelated to the purpose of the original stop. See *id.*

Like *Pals*, Gogel was never advised that he was free to leave or that he could voluntarily refuse to consent without any retaliation by police. See *id.* Instead, he was told if he did not consent, a drug dog would be called or the officer would "go about finding it another way then." Further, like *Pals*, Gogel was not advised by the officer that he had concluded business related to the stop at the time he asked for consent. See *id.* In fact, the business related to the stop had not been concluded. The officer still had possession of Gogel's driver's license, and he had not yet filled out or issued the speeding ticket. "The lack of

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<sup>2</sup> The district court did not have the benefit of the *Pals* decision when deciding Gogel's motion to suppress.

closure of the original purpose of the stop makes the request for consent more threatening.” *Id.*

In light of these factors, we conclude that Gogel’s consent was not voluntary under article I, section 8 of the Iowa Constitution. See *id.* As the supreme court concluded in *Pals*: “To conclude otherwise would require us to give too much weight to words spoken by an individual and ignore the surrounding conditions strongly pointing to involuntariness of the consent.” *Id.*

The record indicates there was no break between the illegal action and the evidence subsequently obtained. “As a result, there is no attenuation of the taint sufficient to avoid exclusion of the evidence obtained as a result of the unlawful search.” *Id.* at 784.

### ***III. Conclusion.***

For the above reasons, we conclude the district court erred by refusing to grant Gogel’s motion to suppress. As a result, the judgment of the district court is reversed, and the case remanded for further proceedings.

**REVERSED AND REMANDED.**