IN THE COURT OF APPEALS OF IOWA

No. 9-848 / 09-0064
Filed February 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDALL LEE PALS,
Defendant-Appellant.

Appeal from the Iowa District Court for Worth County, Bryan H. McKinley (suppression), John S. Mackey (trial), and Colleen D. Weiland (sentencing), Judges.

Randall Pals appeals from his conviction and sentence for possession of marijuana. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Jeffrey H. Greve, County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Randall Pals appeals his conviction and sentence for possession of 0.5 grams of marijuana, in violation of Iowa Code section 124.401(5) (2007), a serious misdemeanor. Pals contends the district court erred in denying his motion to suppress the search of his vehicle. He further argues his trial counsel was ineffective for failing to file a motion to dismiss the trial information based upon a speedy trial violation. Upon our review, we affirm Pals's conviction and sentence, but preserve his speedy trial arguments for possible postconviction relief proceedings.

I. Background Facts and Proceedings.

This case began with the question, "Who let the dogs out?"[1] On August 18, 2007, Worth County Deputy Sheriff Mark Wubben received a call that two dogs, a tan and brown Brittany spaniel and a chocolate-colored Labrador retriever, were running loose and "knocking stuff down" in the City of Joice, in violation of a city ordinance. Upon his arrival in Joice, Deputy Wubben saw the dogs running loose and noticed they had no tags or collars. Wubben talked to several people around town, and no one seemed to know to whom the dogs belonged.

As Wubben continued to walk around looking for the dogs, he noticed a white pickup with a red topper driving around "like he was looking for the dogs as well." Wubben recognized the truck as belonging to Pals. He observed the Brittany in the back of the truck, but did not see the Labrador. Wubben walked around town some more, finally got back in his patrol car and drove around, but

[1] Baha Men, Who Let the Dogs Out (Edel Records 2000).

did not see the dogs or Pals's truck again. He talked to some more people on Main Street and ran into a friend of Pals who confirmed the dogs were Pals's. Wubben was told the dogs had escaped from a fenced-in area behind a bar where Pals was playing pool. Wubben drove around town some more but could not find the dogs or Pals's truck. He then left town and headed towards Rice Lake.

On the highway, Wubben encountered Pals's truck going the other way. He had dispatch run the truck's license plate. When this confirmed that the truck belonged to Pals, Wubben turned around and followed the truck. As he closed in on the truck, he saw the Brittany again in the back of the topper but not the Labrador. Wubben stopped the truck because he wanted to talk to Pals about the dogs and advise him that the dogs needed tags and collars and that the City of Joice prohibited dogs running at large.

A DVD recording of the stop from the patrol car's dash camera, which was offered and received into evidence, shows what happened next. Wubben pulled over Pals's vehicle at 1:52 p.m. He then approached the driver's side of the truck on foot to speak with Pals. In the conversation that ensued, Pals acknowledged that the two dogs belonged to him. He said he had recovered both dogs and they were in the back of his truck. When Wubben specifically asked about the Labrador, Pals stated he had the dog and it was probably hiding in the kennel located in the topper. However, Wubben testified the kennel was not visible from the outside of the vehicle and he never actually saw the Labrador.

Wubben took Pals's driver's license and went back to his patrol car. Wubben then contacted his supervisor to get advice on whether he should ticket

Pals for having animals at large. This took several minutes. Eventually, Wubben's supervisor came on the radio and responded that if Pals was polite, he should be given a verbal warning instead of a written citation for the dogs running at large.

At about 2:00 p.m., Wubben returned on foot to Pals's vehicle and asked Pals for his proof of insurance. Approximately three minutes elapsed as Pals looked unsuccessfully for his insurance card. At that point, Wubben asked Pals to step into the front of his patrol car. In a cordial way, he asked Pals if he could pat him down for weapons before he got into the car.

At approximately 2:05 p.m., Wubben and Pals entered the front of the patrol car. Once in the car, Wubben and Pals discussed where Pals currently resided and the need for Pals to change the address on his driver's license. For most of the next five minutes or so, the pair engaged in friendly chatter about where Pals worked, golf, the rainy weather, a washed-out golf tournament, and Pals's activities of that day and plans to go to a casino. Most of this friendly conversation was initiated by Pals. The need for rabies tags was also discussed. During that time, Wubben apparently prepared some kind of paperwork regarding the failure to have proof of insurance, while assuring Pals that he could call in his insurance information to the sheriff's office and avoid fifty dollars in court costs. At around 2:11 p.m., Wubben casually asked Pals if he could look in his vehicle, and Pals consented. Both got out of the patrol car and went to the truck.

At 2:12 p.m., Pals opened the driver's door for Wubben. Pals was asked to step in front of the truck, and he complied. After less than two minutes of searching the passenger compartment of the truck, Wubben said, "Oh man."

Pals responded, "What have you got?" Wubben replied, "Green stuff." In a small box located on the floor, Wubben found a clear plastic bag with a green leafy substance and also a prescription pill bottle with small bits of green leafy substance in it. Another pill bottle with a small amount of green leafy substance was also found. In total, a half gram of marijuana was retrieved from the truck. Pals denied the marijuana was his and denied knowing it was in the truck. Pals then assisted Wubben's continuation of the search by opening the passenger door of the truck and pulling the seat forward. At the conclusion of the search, Pals was handcuffed, given his *Miranda* rights, and placed under arrest for possession of a controlled substance.

On September 4, 2007, the State filed a trial information charging Pals with possession of a controlled substance, i.e., marijuana, a serious misdemeanor, in violation of Iowa Code section 124.401(5). On December 7, 2007, Pals filed a motion to suppress evidence claiming his consent to search the truck was not voluntarily made and that "Wubben lacked probable cause coupled with exigent circumstances to otherwise search the vehicle without a warrant." A hearing on the motion was held January 22, 2008. Deputy Wubben was the only witness to testify, and the DVD recording of the stop from the patrol car's dash camera was the only exhibit offered and received. The district court denied the motion to suppress, concluding Pals's constitutional rights were not violated by the stop and that his consent to the search was voluntary.

On November 3, 2008, Pals filed a waiver of jury trial and agreed to a trial on the minutes. On November 7, 2008, the district court filed its findings of fact, conclusions of law, and verdict finding Pals guilty of possession of a controlled

substance (0.5 grams of marijuana) in violation of Iowa Code section 124.401(5). Pals was sentenced to forty-eight hours' confinement in jail with credit for time already served, fined $250 plus surcharges, and assessed fees and costs.

Pals appeals, contending the district court erred in denying his motion to suppress. He argues: (1) the traffic stop was illegal; (2) his consent to search was not voluntarily made; and (3) even if voluntary, his consent to search was tainted by prior illegality. Further, he claims his trial counsel was ineffective for failing to file a motion to dismiss based on the violation of Pals's one-year speedy trial rights.

II. Motion to Suppress.

A. Scope and Standard of Review.

The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This is binding on the states via the Fourteenth Amendment. *State v. Shanahan*, 712 N.W.2d 121, 131 (Iowa 2006). Article I section 8 of the Iowa Constitution also protects this fundamental right. *See State v. Reinier*, 628 N.W.2d 460, 464 (Iowa 2001). "When constitutional rights are implicated, we review a court's ruling on a suppression motion de novo." *State v. Bergmann*, 633 N.W.2d 328, 332 (Iowa 2001). We will independently evaluate the totality of the circumstances as shown by the record and are not bound by the district court's findings. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). We do give deference to the district court's findings of fact because it had the opportunity to assess witness credibility. *Id*.

Temporary detention of individuals during the stop of an automobile by the police constitutes a "seizure" within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89, 95 (1996). Thus, the stop of a vehicle by police must not be "unreasonable under the circumstances." *Id*. 517 U.S. at 810, 116 S. Ct. at 1772, 135 L. Ed. 2d at 95. "Warrantless searches and seizures are per se unreasonable unless the State proves by a preponderance of the evidence that a recognized exception to the warrant requirement applies." *State v. Howard*, 509 N.W.2d 764, 766 (Iowa 1993) (citation omitted). Exceptions to the warrant requirement include searches based on consent, plain view, exigent circumstances, and searches incident to arrest. *Id.* at 766-67. Any evidence obtained in violation of a defendant's Fourth Amendment rights is inadmissible and should be suppressed regardless of its relevance and probative value. *State v. Schrier*, 283 N.W.2d 338, 342 (Iowa 1979) (citing *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961)).

B. Legality of the Stop.

Pals's primary argument on appeal, to which he devotes approximately thirty-two pages of briefing, is that the initial stop of his vehicle was improper. Pals frames the issue as whether an investigatory "*Terry* stop is permissible to investigate a *completed* misdemeanor or municipal infraction." (Emphasis added.) We think this misstates the issue. Here, Wubben had reason to believe the violation was *ongoing*, since Wubben had seen only one of the dogs in the vehicle and, for all he knew, the other was still running loose. *See State v. Feregrino*, 756 N.W.2d 700, 704-05 (Iowa 2008) (upholding vehicle stop based

on violation of municipal noise ordinance, despite defendant's contention that the ordinance was unconstitutionally vague). Because Wubben had probable cause to believe that an ordinance was still being violated, he could stop Pals's vehicle, even if the ordinance violation amounted to only a civil infraction. *See Whren*, 517 U.S. at 808, 116 S. Ct. at 1771, 135 L. Ed. 2d at 94 (holding unanimously that probable cause to believe a motorist has committed a civil traffic violation is sufficient to justify a stop); *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008) (an officer may stop a vehicle for a civil infraction based on probable cause).

This outcome corresponds with common sense. The dogs had been creating a disturbance in town. As far as Wubben could tell, one of them had not yet been caught and was still running free in violation of the ordinance. Could Wubben pull over the truck driven by the dogs' owner to make sure the situation was being addressed? We believe so. This result clearly strikes a proper balance between public welfare and personal intrusion. If we adopted Pals's view of the law, an officer confronted by dogs running free in violation of an ordinance could not adopt the most expedient course of action of stopping the owner's vehicle and asking him to round up the dogs, but instead could only deliver a citation to his home. *See Whren*, 517 U.S. at 818, 116 S. Ct. at 1777, 135 L. Ed. 2d at 101 (stating when a traffic stop is not done in an extraordinary manner, it "is governed by the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact"). [2]

[2] We do not mean to imply that it would have been unlawful to stop Pals's vehicle for a prior misdemeanor or municipal violation. That issue is not before us, and we do

C. Voluntariness of Consent.

Pals further argues (albeit briefly) that he did not voluntarily consent to the search. However, as the district court correctly found, the deputy employed no ruse or fraud, no threat, and no coercion. Instead, he casually asked: "Say, you don't have anything, any weapons or drugs or anything like that in the vehicle, do ya? Do you care if I take a look?" It is apparent and not disputed that Pals assented. Indeed, as one reads Pals's brief, although he tries to fashion a totality of the circumstances argument based on *Reinier*, 628 N.W.2d at 460, his essential point is that his consent was not voluntary because he had been "seized." That is, his vehicle had been stopped and he was sitting in the front of the patrol car. This factor alone is not sufficient, however; otherwise, any consent given by a person in detention would be invalid.

The State has the burden to prove the consent was voluntary, and voluntariness is a question of fact to be determined from the totality of all the circumstances. *State v. Lane*, 726 N.W.2d 371, 378 (Iowa 2007). The question of voluntariness requires consideration of many factors, although no factor itself may be determinative. *Id*. These factors include:

> *personal characteristics* of the [consenter], such as age, education, intelligence, sobriety, and experience with the law; and features of the context in which the consent was given, such as the length of detention or questioning, the substance of any discussion between the [consenter] and police preceding the consent, whether the [consenter] was free to leave or was subject to restraint, and whether the [consenter's] contemporaneous reaction to the search was consistent with consent.

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not decide it today. Our present point is simply that a traffic stop is permitted when there is probable cause to believe the motorist is *continuing* to commit a misdemeanor or municipal infraction.

Id. (quoting *United States v. Va Lerie*, 424 F.3d 694, 709 (8th Cir. 2005)).

Although Pals was subjected to a pat-down search and was in the police car when consent was given, the circumstances as a whole leave no doubt that his consent was voluntary. The encounter between Pals and Wubben was relatively brief and cordial. The two engaged in very amicable discussion, with most of the conversation being initiated by Pals. Pals sat in the front seat of the police car and was not in handcuffs. Wubben's request for consent was completely devoid of any coercion, undue pressure, or threats. After providing consent, Pals opened the driver's side door for Wubben. Accordingly, we conclude Pals's consent was voluntary.

D. "Exploitation" of Alleged Prior Illegal Conduct.

This brings us to Pals's final suppression argument, namely that the search, albeit consensual, amounted to exploitation of prior illegal conduct within the meaning of *Lane*, 726 N.W.2d at 380-83. *Lane* addressed when the results of a consensual search that was preceded by illegal police conduct should be suppressed under the "fruit of the poisonous tree" doctrine. *Id*. at 380. *Lane* holds that when the consent amounts to an "exploitation" of the prior illegality, any discoveries from the search must be suppressed. *Id*. at 381. However, the holding in *Lane* does not come into play unless there was "prior illegality." *See id*. at 380 ("The phrase 'fruit of the poisonous tree' refers to indirect or secondary evidence obtained as a result of a prior illegality.").

Pals argues that the search was preceded by an "illegal seizure" of himself. We disagree. We have concluded the initial stop was lawful; Pals does not question the deputy's right to ask for his driver's license and proof of

insurance (assuming the legality of the initial stop); and there is no evidence that Wubben detained Pals longer than was necessary to deal with these matters and the admitted violation of the municipal ordinance. If there was any delay in the process, it was due to Pals's desire to engage in friendly banter.

Pals's real objection is that "[t]here was no reason connected to the traffic stop itself to ask Pals permission to search his vehicle" and that "Wubben was on a fishing expedition." In short, Pals relies on an apparent right of a citizen not to be subjected to an expanded investigation without independent grounds for the expansion. But there is no such right. Law enforcement officials broaden investigations all the time. In doing so, they often ask for permission to conduct searches. The law of search and seizure permits this so long as the person being questioned has not been unlawfully detained, and so long as the state is not in some other manner exploiting its own prior illegal conduct. Otherwise stated, a consent search cannot violate the Fourth Amendment or its Iowa counterpart unless, at a minimum, it was itself the byproduct of an unconstitutional search or seizure.

Our supreme court applied this principle in *State v. Smith*, 683 N.W.2d 542 (Iowa 2004). In that case, a sheriff's deputy pulled over a vehicle for running a stop sign. *Smith*, 683 N.W.2d at 543. He issued a traffic citation to the driver, and then asked the driver if she would wait while he identified the passenger. *Id*. The driver agreed, and the deputy accordingly asked the passenger for identification. *Id*. The passenger provided a non-operator identification card, whose contents the deputy relayed to his dispatcher. *Id*. This ultimately led to the passenger being arrested, and to a packet of methamphetamine falling out of

the passenger's pants pocket during his arrest. *Id*. In holding that the passenger's motion to suppress the methamphetamine should have been denied, our supreme court concluded that the deputy did not have to have any reasonable and articulable suspicion vis-à-vis the passenger. *Id*. at 546. To the contrary, that court held it was entirely permissible for the deputy to expand the scope of the traffic stop so long as no additional seizure occurred. *Id*. at 546-48. Because the request for identification did not involve or require a separate seizure, it was lawful. *Id*. Most notable of all, our supreme court cited with approval *State v. Williams*, 646 N.W.2d 834, 842 (Wis. 2002), a decision that upholds a consent search that occurred at the conclusion of a traffic stop. *Smith*, 683 N.W.2d at 548. Our supreme court specifically cited *Williams* for the proposition that a "motorist [is] not 'seized' when [an] officer, after [a] traffic stop was complete, ask[s] for consent to search." *Id*. *Smith*, in our view, controls here.

Smith is consistent with U.S. Supreme Court precedent. In the words of that court,

> An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

Arizona v. Johnson, 555 U.S. ___, ___, 129 S. Ct. 781, 788, 172 L. Ed. 2d 694, 704 (2009). Prior Supreme Court decisions illustrate this point. In *Illinois v. Caballes*, 543 U.S. 405, 410, 125 S. Ct. 834, 838, 160 L. Ed. 2d 842, 848 (2005), the U.S. Supreme Court held it was lawful for the Illinois state police to bring a narcotics-detection dog to the scene to sniff for drugs in a vehicle that had been

subjected to a routine traffic stop. The Court specifically rejected the Illinois Supreme Court's conclusion that the use of a canine sniff dog was unconstitutional because it "unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation." *Id*. at 407, 125 S. Ct. at 836-37, 160 L. Ed. 2d at 846. The Court noted that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id*., 125 S. Ct. at 837, 160 L. Ed. 2d at 846. However, because the stop was not prolonged more than necessary by the Illinois police, there was no constitutional violation since the dog sniff did not independently violate the defendant's Fourth Amendment rights. *Id*. at 409, 125 S. Ct. at 838, 160 L. Ed. 2d at 847.

The same analysis applies here. Wubben did not prolong Pals's detention. He had Pals's consent to conduct the vehicle search. At most, Wubben, like the Illinois police, "enlarg[ed] the scope of a routine traffic stop." But an enlarged investigation does not equate to a Fourth Amendment violation, unless there has been either an improper seizure or an improper search. Neither occurred here.

Furthermore, in *Muehler v. Mena*, 544 U.S. 93, 100-01, 125 S. Ct. 1465, 1471-72, 161 L. Ed. 2d 299, 308-09 (2005), the U.S. Supreme Court again endorsed the same view of the Fourth Amendment. One issue in that case was whether the officers who detained Mena in the course of a search of her house violated her constitutional rights by inquiring as to her immigration status. *Mena*, 544 U.S. at 100-01, 125 S. Ct. at 1471-72, 161 L. Ed. 2d at 308-09. The Court held that they did not:

> The Court of Appeals also determined that the officers violated Mena's Fourth Amendment rights by questioning her about her immigration status during the detention. [Citation omitted.] This holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event. But the premise is faulty. We have "held repeatedly that mere police questioning does not constitute a seizure." *Florida v. Bostick,* 501 U.S. 429, 434, 111 S. Ct. 2382 (1991); s*ee also INS v. Delgado,* 466 U.S. 210, 212, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Bostick, supra,* at 434-435, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (citations omitted). As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status.

Id.

The logic of these decisions is compelling: Police conduct potentially violates the Fourth Amendment only when it involves an unreasonable search or seizure. *Asking questions*, including a question whether a party will consent to a search, does not by itself amount to either a search or a seizure.

For the foregoing reasons, the district court did not err in denying Pals's motion to suppress.

III. Ineffective Assistance of Counsel.

Pals further claims his trial counsel rendered ineffective assistance by failing to file a motion to dismiss based on the violation of his right to be tried within one year of arraignment. *See* Iowa R. Crim. P. 2.33(2)(*c*) ("All criminal cases must be brought to trial within one year after the defendant's initial

arraignment . . . unless an extension is granted by the court, upon the showing of good cause.").

We review ineffective assistance of counsel claims de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). Ordinarily, we preserve ineffective assistance of counsel claims for postconviction relief proceedings. *Id*. We will only address these claims on direct appeal if we determine the development of an additional factual record would not be helpful and the claims can be determined as a matter of law. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009).

We find the record on direct appeal inadequate to resolve this claim. There is nothing in this record to shed light on why the delay occurred, or whether any agreements had been made regarding the date of trial. Therefore, we preserve the claim for potential postconviction relief proceedings.

IV. Conclusion.

We affirm Pals's conviction and sentence for possession of a controlled substance, but preserve for a possible postconviction relief application his ineffective assistance of counsel claim.

AFFIRMED.

Vogel, P.J., concurs; Doyle, J., dissents.

DOYLE, J. (dissenting)

I respectfully dissent. Although I agree that Wubben was authorized to stop Pals's truck, that Wubben's request for consent to search the truck was completely devoid of any coercion, undue pressure, or threats, and that Pals's consent was voluntary, I disagree with the majority's conclusion that there was no violation of Pals's rights under the Fourth Amendment and Article I section 8 of the Iowa Constitution.[3] I conclude that Wubben's expansion of the scope of the stop by his consent inquiry to search, when not supported by any reasonable articulable suspicion of criminal activity beyond the purpose of the stop, violated Pals's constitutional rights to be free from unreasonable searches and seizures.

"Once a lawful stop is made, an officer may conduct an investigation 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *State v. Aderholdt*, 545 N.W.2d 559, 563 (Iowa 1996) (citing *United States v. Cummins*, 920 F.2d 498, 502 (8th Cir. 1990), *cert. denied*, 502 U.S. 962, 112 S. Ct. 428, 116 L. Ed. 2d 448-49 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889, 905 (1968))). In conducting this investigation, a law enforcement officer may ask the individual for various documents related to driving, including a driver's license and registration, may ask the individual to sit in the patrol car, and may question the individual

[3] The subject is not without controversy. Close to a thousand appellate decisions are annotated in Thomas Fusco, Annotation, *Permissibility Under Fourth Amendment of Detention of Motorist by Police, Following Lawful Stop for Traffic Offense, to Investigate Matters Not Related to Offense*, 118 A.L.R. Fed. 567 (Supp. 2009). For a spirited discussion of the issue, see 4 Wayne R. LaFave, *Search and Seizure* § 9.3(d) & (e), at 389-97 (4th ed. 2004).

regarding the purpose of his or her travel and destination.[4] *Aderholdt*, 545 N.W.2d at 563-64. When an officer forms a reasonable suspicion of other wrongdoing during a lawful traffic stop, the officer may broaden the investigation. *Id*. at 564 ("If . . . the detainees' responses or actions raise suspicions unrelated to the traffic offense, the officer's inquiry may be broadened to satisfy those suspicions.").

> If reasonably related questions raise inconsistent answers, or if the licenses and registration do not check out, a [police officer's] suspicions may be raised so as to enable him to expand the scope of the stop and ask additional, more intrusive, questions. If, however, no answers are inconsistent and no objective circumstances supply the [police officer] with additional suspicion, the [police officer] should not expand the scope of the stop.

United States v. Ramos, 42 F.3d 1160, 1163 (8th Cir. 1994) (holding continued detention after stop for failure to wear seat belts was unreasonable where driver and passenger both produced valid drivers' licenses, were cooperative, said they were going to visit a sick cousin, and the truck was not stolen), *cert. denied,* 514 U.S. 1134, 115 S. Ct. 2015, 131 L. Ed. 2d 1013 (1995). Additionally,

> while the concern for officer safety in [the] context [of a routine traffic stop] may justify the "minimal" additional intrusion of ordering a driver . . . out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search.

Knowles v. Iowa, 525 U.S. 113, 117, 119 S. Ct. 484, 488, 142 L. Ed. 2d 492, 498 (1998).

There is nothing in Wubben's statement attached to the minutes of testimony and no testimony from Wubben that he had any basis to believe that

[4] The United States Supreme Court has rejected a "search incident to citation" exception to the Fourth Amendment's warrant requirement. *See Knowles v. Iowa*, 525 U.S. 113, 117-18, 119 S. Ct. 484, 487-88, 142 L. Ed. 2d 492, 497 (1998).

Pals had any drugs in the truck. The State stipulated at the suppression hearing that the sole reason for Wubben's stop of Pals's truck "was the follow-up to the investigation of the dogs at large." Review the DVD of the stop reveals no factual basis upon which Wubben could have formed a reasonable articulable suspicion to broaden his investigation. Furthermore, Wubben did not assert that he had any basis to suspect there were drugs in the truck before he asked to search.

The cases of *State v. Smith*, 683 N.W.2d 542 (Iowa 2004), and *State v. Williams*, 646 N.W.2d 834 (Wis. 2002), cited by the majority, are distinguishable from the case at hand. In *Smith*, the defendant was not seized, for Fourth Amendment purposes, when the police officer asked him for identification and checked for outstanding warrants following conclusion of the traffic stop. *Smith*, 683 N.W.2d at 546. Likewise, in *Williams*, the traffic stop had concluded before the officer questioned the defendant about contraband in the car. *Williams*, 646 N.W.2d at 840. Finding the defendants not "seized" at the time the officers' requests were made, the *Smith* and *Williams* courts concluded the constitutional protections against unreasonable search and seizure did not come into play. *Smith*, 683 N.W.2d at 547-49; *Williams*, 646 N.W.2d at 842. This case is different because Pals was still "seized" when Wubben asked to search. The stop had not concluded. Pals was still sitting in the patrol car. Pals had not been told he was free to go. It is reasonable to assume that Pals did not feel free to leave the patrol car at the time the search request was made, and that this feeling on his part was reasonable under all the circumstances. *See United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d

497, 509 (1980). I conclude the *Terry* protections were still in effect at the time Wubben's made his request to search.

Additionally, I disagree with the majority's analysis of *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005), and *Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005). Neither of the majority decisions in *Mena* or *Caballes* discussed *Terry* or the scope of a *Terry* stop. I would instead adopt the analysis and rationale found in *State v. Smith*, 184 P.3d 890 (Kan. 2008). After a thoughtful and detailed analysis of *Caballes*, *Mena*, and other United States Supreme Court cases, the *Smith* court concluded:

> In light of [the Supreme Court's] recent affirmation of *Terry* principles in *Hiibel* [*v. Sixth Judicial Dist Court of Nev., Humboldt Cty.*, 542 U.S. 177, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004)] and the careful limitation of the issue in *Caballes* and *Mena* to the question of whether there was an additional search or seizure, we are not persuaded that *Mena* can be read as an alteration or abandonment of the rules regarding the limited scope of a *Terry* stop.

Smith, 184 P.3d at 902. The court held that it was error to rule "that *Mena* allows law enforcement officers to expand the scope of a traffic stop to include a search not related to the purpose of the stop, even if a detainee has given permission for the search." *Id*.

The well-reasoned dissent in *State v. Washington*, 898 N.E.2d 1200, 1212 (Ind. 2009), also adopts a similar view. In *Washington*, Justice Robert Rucker recognized that a number of courts look to the scope of the detention as well as its duration in determining whether there has been a Fourth Amendment violation in the context of a traffic stop. *Washington*, 898 N.E.2d at 1213 n.1 (Rucker, J., dissenting). He endorsed "this more reasoned view" and concluded "[a] police

officer asking a stopped motorist about the presence of illegal substances, with no basis whatsoever to believe they are present, is patently unreasonable and thus inconsistent with the protections afforded by the Fourth Amendment." *Id*. at 1213 (Rucker, J., dissenting). I agree.

The majority here also quotes the United States Supreme Court's recent decision in *Arizona v. Johnson*, 555 U.S. ___, 129 S. Ct. 781, 172 L. Ed. 2d. 694 (2009), decided after the Indiana and Kansas decisions cited above, as support for their position. However, in my view, the facts in *Johnson* are too dissimilar to the present case to provide us with much guidance.

In *Johnson*, a car was stopped after a license plate check revealed that the vehicle's registration had been suspended for an insurance-related violation, which constituted a civil infraction warranting a citation. *Johnson*, 555 U.S. at ___, 129 S. Ct. at 784, 172 L. Ed. 2d. at 700. One officer approaching the vehicle observed that Johnson, the rear seat passenger, was wearing clothing and colors consistent with a gang's membership. *Id*. at ___, 129 S. Ct. at 785, 172 L. Ed. 2d. at 701. The officer questioned Johnson related to the stop. *Id*. at ___, 129 S. Ct. at 785, 172 L. Ed. 2d. at 701. Based on the officer's observations and Johnson's answers to her questions while he was still seated in the car, the officer suspected that Johnson might have a weapon on him. *Id*. at ___, 129 S. Ct. at 785, 172 L. Ed. 2d. at 701. The officer asked Johnson to get out of the car and patted him down. *Id*. at ___, 129 S. Ct. at 785, 172 L. Ed. 2d. at 701. The officer found a gun and Johnson was arrested for possession of a weapon by a prohibited possessor. *Id*. at ___, 129 S. Ct. at 785, 172 L. Ed. 2d. at 701.

Johnson filed a motion to suppress the evidence found during the officer's pat-down, contending the frisk was unconstitutional because his encounter with the officer was consensual and the officer therefore had no right to frisk him. *Id*. at ___, 129 S. Ct. at 785, 172 L. Ed. 2d. at 701; *Johnson*, 170 P.3d 667, 670 (Ariz. Ct. App. 2007). Johnson's motion was denied and he was ultimately convicted with illegally possessing the gun. Johnson appealed, claiming the search violated his rights. *Johnson*, 555 U.S. at ___, 129 S. Ct. at 785, 172 L. Ed. 2d. at 701.

On appeal, the United States Supreme Court reaffirmed that "officers who conduct 'routine traffic stop[s]' may 'perform a "patdown" of a driver and any passengers *upon reasonable suspicion* that they may be armed and dangerous.'" *Id*. at ___, 129 S. Ct. at 787, 172 L. Ed. 2d. at 703 (emphasis added). However, the court also stated, quoted by the majority here:

> An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

Id. at ___, 129 S. Ct. at 788, 172 L. Ed. 2d. at 704. The Court ruled that the encounter remained a seizure and was not consensual. *Id*. at ___, 129 S. Ct. at 788, 172 L. Ed. 2d. at 704. Therefore, the Court found it was proper, assuming reasonable suspicion, for the officer to conduct the *Terry* pat-down. *Id*. at ___, 129 S. Ct. at 788, 172 L. Ed. 2d. at 704 ("[The officer] surely was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, [the officer was not permitting a dangerous person to get behind [the officer].")

Here, the facts are unlike *Johnson* because Wubben had no reasonable suspicion to ask to search Pals's truck. The officer did not ask to search for weapons, nor did the officer state any reason to believe Pals was armed. Pals had already exited his vehicle, had been patted-down, and was confined in the front seat of the patrol car when Wubben asked if he could search the truck. The officer did not articulate any reason to expand the scope of his inquiry, and without any reasonable suspicion of other wrongdoing during a lawful traffic stop, the officer was not permitted to broaden his investigation. *See Aderholdt*, 545 N.W.2d. at 564.

Nevertheless, even if the Fourth Amendment under the Supreme Court's recent *Johnson* decision permissibly broadens the scope of Wubben's questioning of Pals, I would reverse the trial court's suppression ruling because I believe Wubben's request to search for drugs, with no reasonable articulable suspicion to do so, violated Article I, section 8 of the Iowa Constitution. Article I, section 8 of the Iowa Constitution also contains a right to be free from unreasonable searches and seizures. Iowa Const. art. I, § 8. "We zealously guard our ability to interpret the Iowa Constitution differently from authoritative interpretations of the United States Constitution by the United States Supreme Court." *State v. Wilkes*, 756 N.W.2d 838, 842 n.1 (Iowa 2008) (citing *In re Detention of Garren*, 620 N.W.2d 275, 280 n.1 (Iowa 2000)). In interpreting other similar state constitutional provisions regarding this issue, I find persuasive *State v. Fort*, 660 N.W.2d 415, 416 (Minn. 2003) ("Exercising our independent authority to interpret our own state constitution, we conclude that in the absence of reasonable, articulable suspicion a consent-based search obtained by

exploitation of a routine traffic stop that exceed the scope of the stop's underlying justification is invalid."), and *State v. Carty*, 790 A.2d 903, 905 (N.J. 2002) ("We hold that, in order for a consent to search a motor vehicle and its occupants to be valid, law enforcement personnel must have a reasonable and articulable suspicion of criminal wrongdoing prior to seeking consent to search a lawfully stopped motor vehicle.").

The state motto of Iowa is: "Our liberties we prize and our rights we will maintain." It is inscribed on the Great Seal of Iowa and on our state flag. *See* Iowa Code §§ 1A.1, 1B.1 (2009). It is not just some empty marketing slogan. I recognize the importance of drug interdiction in combating drug crimes. However, there must be a balance struck between drug interdiction efforts and preservation of our rights and liberties. Requiring an officer to articulate a reasonable suspicion to expand the scope of the officer's inquiry is a very minimal requirement to preserve our citizens' rights and liberties.

For all these reasons, I conclude that Wubben's request to search Pals's truck violated Pals's constitutional right to be free from an unreasonable search. I would reverse the district court's suppression ruling.