IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Supreme Court 17-0622
	)	
JUSTIN ANDRE BAKER,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE JOEL A. DALRYMPLE AND
GEORGE L. STIGLER, JUDGES

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 12th day of February, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Justin Baker, 307 Kingsley Ave., Waterloo, IA 50701.

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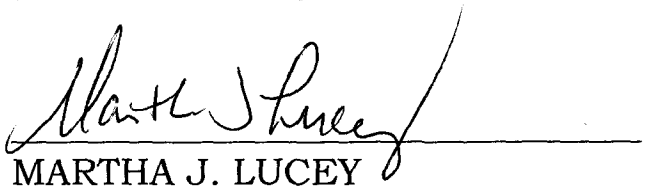

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case: Appellant Justin Baker appeals following judgment and sentence, to the charges of: possession with intent to deliver marijuana in violation of Iowa Code section 124.401(1)(d) (2015) and failure to affix a drug tax stamp in violation of Iowa Code section 453B.12 (2015) (FECR213018); driving while barred in violation of Iowa Code section 321.561 (2015) and possession of marijuana – second offense in violation of Iowa Code section 124.401(5) (2015) (AGCR212970); and driving while barred in violation of Iowa Code section 321.561 (2015) (AGCR215790).

Course of Proceeding and Disposition Below: On May 17, 2016, the State charged Baker with Count I: driving while barred; and Count II: possession of marijuana – second

offense, both for acts alleged on April 18, 2016. (AGCR212970 TI)(App. pp. 11-12).

On May 18, 2016, Baker was formally charged with Count I: possession of marijuana with the intent to deliver; and Count II: failure to affix a drug tax stamp, both for alleged acts on April 18, 2016. The Trial Information also charged Shana Caldwell. (FECR213018 TI)(App. pp. 13-15). On August 9, 2016, Baker filed a motion to suppress evidence. (MTS)(App. pp. 16-17). On September 23, 2016, the court granted the motion in part and denied the remainder of the motion. (9/23/16 Order)(App. pp. 20-27).

On November 2, 2016, Baker was charged with another count of driving while barred for acts alleged on September 28, 2016. (AGCR215793 TI)(App. pp. 28-29).

A jury trial in FECR213018 began on January 24, 2017. The jury found Baker guilty as charged. (1/31/17 Order) (App. pp. 30-32). Baker filed written guilty pleas to the three

misdemeanor charges. (AGCE21970 GP; AGCR215793 GP) (App. pp. 33-37, 38-42).

On April 17, 2017, Baker was sentenced on all charges. In FECR213018, Baker was sentenced to be incarcerated not to exceed five years on each count. In AGCR212970, Baker was ordered to be incarcerated for one year on each count. In AGCR215793, Baker was sentenced to be incarcerated for one year. The district court ordered all of the sentenced to be served concurrently. (FECR213018 Judgment; AGCR212970 Judgment; AGCR215793 Judgment)(App. pp. 43-54). Baker filed a timely Notice of Appeal. (Notice)(App. p. 55).

Facts: This appeal involves three separate criminal cases. Each case's facts are discussed separately.

AGCR212970

According to the Minutes of Testimony, on April 18, 2016, Baker was stopped at the request of the Tri County Drug Task Force by Waterloo police officer Bose. Bose activated his emergency lights to stop the vehicle as it crossed Lafayette

Street on Vinton Street. The vehicle did not immediately stop but proceeded slowly until reaching Sycamore Street where the vehicle turned right. As the vehicle was making the right turn, Bose observed Baker throw a small plastic baggie containing marijuana from the driver's window.

The in-car camera video does not show the baggie being thrown. Bose reported this was because when the vehicle turned, it was out of the angle captured by the camera. The bag of marijuana did not have any debris on it and it was clean.

Dispatch confirmed Bakers license was barred for habitual offender from July 23, 2015 until July 23, 2017. (AGCR212970 Minutes)(Conf. App. pp. 13-31).

AGCR215793

According to the Minutes of Testimony, on September 28, 2016, Waterloo police officer Girsch observed Baker driving a vehicle. Girsch knew Baker was barred from operating a

motor vehicle. After confirming Baker's driver's license status, Girsch initiated a traffic stop and arrested Baker.

(AGCR215793 Minutes)(Conf. App. pp. 53-63).

FECR213018

After the suppression hearing, the district court found the following facts:

In August of 2015, a Nevada state trooper contacted Investigator Girsch regarding the arrest of three Waterloo individuals for possession of a large quantity of marijuana. Baker was one of the three individuals arrested. Following the information relayed from Nevada, Investigators Girsch and Isley testified Baker was on the officers' "radar."

Investigator Isley testified he received, on behalf of the tri-county drug task force, an anonymous call from a concerned citizen in April 2016. The caller indicated he or she had been to Baker and Caldwell's residence at 702 Ricker Street and saw a "distributional amount" of marijuana in the house. The caller further indicated Baker and Caldwell had just returned to town with a shipment of more marijuana. Investigator Isley relayed this information to Investigator Girsch.

In early April of 2016, Investigator Girsch testified while previously conducting surveillance for an unrelated investigation, he observed Baker slow down like he was going to pull into the 702 Ricker Street address before accelerating and driving past. Although working undercover in an unmarked vehicle, Investigator Girsch, believed Baker had identified him as law enforcement. Girsch relocated his

vehicle and observed Baker circle back to 702 Ricker Street. Investigator Girsch watched Baker enter the house and leave after being inside for approximately 20-30 minutes. The Court finds the unexplained behavior of Baker attempting to distance himself from 702 Ricker Street to be significant.

According to Investigators Girsch and Isley, they conducted surveillance of Baker on April 18, 2016, based on the anonymous tip and other information they had received regarding Baker's suspected involvement with narcotics trafficking. Investigator Girsch testified he observed Baker leave 702 Ricker Street, drive to Newell Street and pull into an alley only a few blocks from the 702 Ricker address. Investigator Isley testified he witnessed a black male stick his hand in the passenger side of Baker's vehicle, immediately pull his hand back out and stick his hand in his pocket. Investigator Isley testified he recognized this behavior as a hand-to-hand drug transaction, even though he was unable to see any drugs change hands. Isley testified to his experience relating to hand-to-hand transactions. Investigator Girsch testified Baker was in the alley for less than thirty seconds. Both Isley and Girsch testified regarding their belief [a] drug transaction occurred. At this time, Sergeant Bose was directed to initiate a traffic stop on Baker's vehicle.

Sergeant Bose testified he got behind Baker, and, after verifying he had the right vehicle, he activated his emergency lights. Sergeant Bose further testified it took Baker an inordinate amount of time to stop. Specifically, Bose testified Baker did a "slow roll" and took a "longer time" to pull over. Prior to stopping his vehicle, Sergeant Bose witnessed Baker throw a bag of marijuana out the window. The marijuana was later secured by officers. The bag of marijuana, described by Sergeant Bose was a "dime sack" which could be consistent with marijuana for personal use.

According to the testimony offered at the suppression hearing, the officers involved in stopping Baker were concerned he had called or texted others during his "slow roll" before stopping. Officers testified individuals involved with the sale of narcotics may warn others to destroy any remaining narcotics anticipating law enforcement at potential stash locations. The officers believed Caldwell or others may have been told to destroy evidence of narcotics at 702 Ricker Street and accordingly, proceeded to the address to secure the residence.

Upon arriving at 702 Ricker Street, officers testified Caldwell opened the door and told officers they could not come in without a warrant. The officers testified they believed there may be weapons or narcotics in the home and entered the residence to conduct a protective sweep. It is undisputed this protective sweep was done absent a warrant and absent Caldwell's consent to enter the residence.

Once inside the residence, officers located narcotics and items consistent with the sale of narcotics. Investigator Isley, with assistance from Investigator Girsch, prepared a warrant application for the search of 702 Ricker Street following the officers' protective sweep of the residence. Once the warrant was obtained, officers reentered the residence and seized a "distributional amount" of marijuana and other items.

(FECR213018 9/23/16 Order)(App. pp. 20-27).

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT GRANTING THE MOTION TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE.

Standard of Review.

The district court should have granted Baker's motion to suppress on federal and state constitutional grounds. Therefore, this Court's review is de novo. State v. Lane, 726 N.W.2d 371, 377 (Iowa 2007). This review requires an independent evaluation of the totality of the circumstances as shown by the entire record. State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001). The Court gives "deference to the factual findings of the district court due to its opportunity to evaluate the credibility of the witnesses, but [is] not bound by such findings." Lane, 726 N.W.2d at 377.

Preservation of Error.

Iowa Rule of Criminal Procedure provides that a person aggrieved by an unlawful search and seizure may move to suppress for use as evidence any items illegally obtained.

Iowa R. Crim. P. 2.11(2)(c). Baker challenged the stop of his vehicle, the warrantless entry into 702 Ricker Street, and the subsequent warrant for 702 Ricker. (MTS; MTS Tr. p. 3L13-p. 7L8)(App. pp. 16-17). The trial court granted the motion as it related to the warrantless entry into the home and denied the remainder of Baker's motion. (9/23/16 Order)(App. pp. 20-27). The issue is preserved by Baker's motion to suppress. State v. Niehaus, 452 N.W.2d 184, 186 (Iowa 1990).

Discussion.

The Fourth Amendment to the United States Constitution and Article I, section 8 of the Iowa Constitution protect persons from unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I, § 8. Banks challenged the search of the vehicle under both the Fourth Amendment to the United States Constitution and Article I, section 8 of the Iowa Constitution. (MTS)(App. pp. 16-17). While these provisions use nearly identical language and were generally designed with the same scope, import, and purpose, this Court

jealously protects its authority to follow an independent approach under our state constitution. State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010). This Court's approach to independently construing provisions of the Iowa Constitution that are nearly identical to the federal counterpart is supported by Iowa's case law. See e.g., Ochoa, 792 N.W.2d at 267; State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), overruled on other grounds by State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001). Even where a party has not advanced a different standard for interpreting a state constitutional provision, the Court may apply the standard more stringently than federal case law. State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009). When a defendant raises both federal and state constitutional claims, the Court has discretion to consider either claim first or consider the claims simultaneously. Ochoa, 792 N.W.2d at 267.

In determining whether there has been an unreasonable search, the Court has adopted a two-step approach. State v.

Breuer, 577 N.W.2d 41, 45 (Iowa 1998). First, the defendant must have a legitimate expectation of privacy in the area searched. Id. If so, then the Court will consider whether the State has unreasonably invaded that protected interest. Id. The State did not contest Baker's standing to challenge the stop of the vehicle or the search of 702 Ricker Street. (MTS Tr. p. 97L24-p. 98L8)(challenging Caldwell's standing). Any challenge to Baker's standing is waived. State v. Brown, 309 N.W.2d 425, 426 (Iowa 1981).

A. The seizure of Baker's vehicle was not supported by articulable reasonable suspicion.

Generally, unless an exception applies, a search or seizure must be conducted pursuant to a warrant to be reasonable. State v. Kreps, 650 N.W.2d 636, 641 (Iowa 2002). Valid exceptions exist for warrantless searches (1) with consent, (2) based on probable cause and exigent circumstances, (3) involving items in plain view, or (4) incident to arrest. State v. Eubanks, 355 N.W.2d 57, 58–59 (Iowa 1984). Another exception to the warrant requirement allows

an officer to stop an individual or vehicle for investigatory purposes based on a reasonable suspicion that a criminal act has occurred or is occurring. State v. Kinkhead, 570 N.W.2d 97, 100 (Iowa 1997)(citing Terry v. Ohio, 392 U.S. 1, 21–22, 88 S.Ct. 1868, 1880 (1968)). The Court has described a stop based on reasonable suspicion under Terry as an "investigatory stop." State v. Tyler, 830 N.W.2d 288, 298 (Iowa 2013); State v. Vance, 790 N.W.2d 775, 781 (Iowa 2010); State v. Tague, 676 N.W.2d 197, 204 (Iowa 2004).

The purpose of an investigatory stop is to allow a police officer to confirm or dispel suspicions of criminal activity through reasonable questioning. State v. Kreps, 650 N.W.2d 636, 641 (Iowa 2002). Such a stop and a subsequent detention is a seizure within the meaning of the constitution. Id.; Whren v. United States, 517 U.S. 806, 809–10, 116 S.Ct. 1769, 1772 (1996); State v. Heminover, 619 N.W.2d 353, 357 (Iowa 2000), overruled on other grounds by State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001). To justify an investigatory

stop, the officer must be able to point to "specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion." Heminover, 619 N.W.2d at 357 (quoting Terry, 392 U.S. at 21, 88 S.Ct. at 1880). In determining the reasonableness of the particular search or seizure, the court judges the facts against an objective standard: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Id. (quoting Terry, 392 U.S. at 21–22, 88 S.Ct. at 1880).

In Tyler, the Court stated:

> Professor LaFave has noted that the purpose of a *Terry* stop is "to allow immediate investigation through temporarily maintaining the *status quo*. If reasonable suspicion exists, but a stop cannot further the purpose behind allowing the stop, the investigative goal as it were, it cannot be a valid stop." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.3(a), at 482 (5th ed.2012) (citation and internal quotation marks omitted). The *purpose* of a *Terry* stop, then, is to *investigate* a crime.
>
> "[I]f the officer has a legitimate expectation of investigatory results, the existence of reasonable suspicion will allow the

stop—if the officer has no such expectations of learning additional relevant information concerning the suspected criminal activity, the stop cannot be constitutionally permitted on the basis of mere suspicion."

Id. (quoting *Commonwealth v. Chase*, 960 A.2d 108, 115 (Pa. 2008)).

State v. Tyler, 830 N.W.2d at 298. "The principal function of an investigatory stop is to resolve the ambiguity as to whether criminal activity is afoot." State v. Richardson, 501 N.W.2d 495, 497 (Iowa 1993).

The district court ruled:

Under a totality of the circumstances view, the Court finds the stop of Baker's vehicle was supported by a reasonable suspicion of criminal activity. At the time of the stop, officers had received the anonymous tip indicating Baker and Caldwell recently received a "distributional amount" of narcotics through an anonymous tip as well as prior notification by Nevada law enforcement Baker had been arrested for possession of a large quantity of marijuana. This information, in addition to Investigator Isley's observation of what he believed to be a hand-to-hand narcotics transaction, provided sufficient facts to alert experienced officers to a reasonable suspicion of criminal activity, namely the sale or distribution of narcotics. The suspicion of criminal activity was confirmed when Baker attempted to dispose of marijuana before stopping his vehicle. Given the Court's finding the stop was reasonable any suppression issues related to the stop are denied.

(9/23/16 Order p. 4)(App. p. 23). The court considered the items known to law enforcement in its totality. However, when one looks at the reasons individually and collectively, it is apparent they do not add up to reasonable suspicion.

Nevada Arrest

Girsch received information on August 30, 2015 that Baker had been arrested in the State of Nevada after a vehicle stop and search "located a large distribution quantity of marijuana along with edibles." (MTS Tr. p.20L20-p. 21L20, p. 36L10-18). Girsch did not know until the suppression hearing that Baker was not charged regarding the Nevada allegations. (MTS Tr. p. 38L4-p. 40L23).

An arrest without a conviction is merely an allegation. Allowing an officer to consider prior arrests, especially those which do not result in convictions, to form reasonable suspicion to seize an individual would eviscerate the guarantees of article I, section 8 of the Iowa Constitution. The

constitution does not permit law enforcement to stop a citizen based upon a prior arrest.

Baker was on the task force's "radar" after the call, but they failed to follow up to confirm he was actually charged and convicted. Additionally, the record reasonably shows Baker remained in the Waterloo area after the task force placed him on the "radar." If Baker had been charged and convicted of the Nevada allegations, it is not logical he would have remained in Waterloo. (MTS Tr. p. 48L14-p. 50L19).

Anonymous caller

The officers had information from an anonymous caller that Baker and Caldwell had large quantity of marijuana in the house. (MTS Tr. p. 40L24-p. 41L16, p. 61L16-p. 62L17).

Isley testified:

Q. Can you kind of tell us how that transpired?

A. The subject called stating that they had been over at 702 Ricker where they stated that Justin and Shana were living. In the past couple days they had been over there and saw that there was a distribution amount of marijuana inside the house, and they had called, and while speaking with them they

said that they had just supposedly got back into town with a shipment of more marijuana.

(MTS Tr. p. 62L6-14, p. 81L21-p. 83L7). The caller did not use the word "distribution amounts." Isley believed the caller said "a lot." (MTS Tr. p.81L5-20). Isley did not know the identity of the caller. (MTS Tr. p. 74L6-17). Isley had no other information Baker or Caldwell was dealing drugs. (MTS Tr. p. 83L13-19).

"[W]hether an anonymous tip provides reasonable suspicion for an investigatory stop depends on the quantity and quality, or degree of reliability, of that information." State v. Kooima, 833 N.W.2d 202, 206 (Iowa 2013)(citing Alabama v. White, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416 (1990)). "[I]f a tip has relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." Id.

In White, the United States Supreme Court found the stop based only on the anonymous tip did not violation the Fourth Amendment. Alabama v. White, 496 U.S. at 331, 110

S.Ct. at 2416. The anonymous caller informed police White would be leaving from a specific apartment at a particular time in a specific vehicle; that she would be going to a specific motel; and she would be in possession of cocaine in a brown attaché case. Police watched as White did almost exactly as the anonymous caller predicted. Police stopped White and found marijuana in the case and cocaine in her purse. Id. at 327, 110 S.Ct. at 2414-2415. The United States Supreme Court found it important that the anonymous tip contained a range of details related to not just the easily obtained facts existing at the time of the tip, but provided details about future actions which are not ordinarily easily predicted. Id. at 332, 110 S.Ct. at 2417.

Anyone could have "predicted" that fact because it was a condition presumably existing at the time of the call. What was important was the caller's ability to predict respondent's future behavior, because it demonstrated inside information—a special familiarity with respondent's affairs. The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car, and drive the most direct route to Dobey's Motel. Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to

believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

Id. (other citation omitted). The Court concluded it was a "close case" but under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of White's car.

In Florida v. J.L, the United States Supreme Court found an anonymous tip was insufficient to provide reasonable suspicion to stop and frisk a juvenile. 529 U.S. 266, 268, 120 S.Ct. 1375, 1376 (2000). An anonymous caller reported to police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. There was no audio recording of the tip, and nothing was known about the informant. Sometime after the police received the tip, two officers arrived at the bus stop and saw three black males. One of the three, J.L., was wearing a plaid shirt. Other than the tip, the officers had no reason to suspect any of the three of

illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. One of the officers approached J.L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket. Florida v. J.L, 529 U.S. at 268, 268, 120 S.Ct. at 1377. The officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Id. at 269, 120 S.Ct. at 1378.

The Court noted "[un]like a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated" "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." Id. (other citation omitted). The Court recognized there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." Id. The Court stated the tip in J.L.

lacked the moderate indicia of reliability present in White which was essential to the Court's decision. The anonymous call concerning J.L. provided no predictive information which left the police without means to test the informant's knowledge or credibility. The fact the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct. The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. Id. at 221, 120 S.Ct. at 1379. The Court further stated that the accuracy of the description and location of a person will only help the police identify the person whom the tipster accused. "Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity." Id. at 272, 120 S.Ct. at 1379. The reasonable suspicion requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. Id.

This Court has recognized the reliability of an anonymous tipster in cases of suspected operating while intoxicated cases is different than reports of concealed criminal behavior such as possession offenses. In State v. Walshire, an anonymous caller reported a vehicle with a suspected drunk driver. The call was apparently made on a cellular phone because the caller was following the subject car. State v. Walshire, 634 N.W.2d 625, 626 (Iowa 2001). This Court distinguished the case from J.L.:

> 1) In this case the informant revealed the basis for his knowledge—he was observing a crime in progress, open to public view; (2) in the present case, a serious public hazard allegedly existed that, in the view of the Supreme Court, might call for a relaxed threshold of reliability; and (3) the intrusion on privacy interests is slight, less than in a pat-down situation.

Id. at 630.

In State v. Kooima, the Court again addressed the legality of a stop based on an anonymous tip reporting a drunk driver. 833 N.W.2d 202, 203 (Iowa 2013). This Court stated:

> Cases holding an anonymous tip had the sufficient indicia of reliability to justify the stop contain three common elements. First, the tipster gave an accurate description of the vehicle,

including its location, so the police could identify the vehicle. Next, the tipster based his or her information on personal, eyewitness observations made contemporaneously with a crime in progress that was carried out in public, identifiable, and observable by anyone. When a tipster relates personal observations consistent with drunk driving to the dispatcher, the caller's basis of knowledge is apparent. Finally, the caller described specific examples of traffic violations, indicating the report was more than a mere hunch. This lends to a greater likelihood the tip will give rise to reasonable suspicion. These three elements allow our courts and the police to determine whether an anonymous tip contains sufficient detail to permit a reasonable inference the tipster had the necessary personal knowledge that a person was driving while intoxicated.

State v. Kooima, 833 N.W.2d at 208-209. The Court acknowledged the lesson from J.L. is that "without a means for the police to test an anonymous tipster's personal knowledge or credibility, the tip is nothing more than a hunch. Without such information, the tip has no indicia of reliability in its assertion of illegality." Id. at 209-210 (other citation omitted).

After Kooima, the United States Supreme Court addressed whether an "anonymous"[1] 911 call claiming a

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1 The 911 caller did identify herself by name, but she did not testify at the suppression hearing and the audio was not introduced into evidence. The prosecution proceeded as if the tipster was anonymous. Navarette v. California, 134 S.Ct.

vehicle ran the reporting party off the road provided reasonable suspicion to stop the vehicle. Navarette v. California, 134 S.Ct. 1683, 1686-87 (2014). The Court found that even assuming the 911 caller was anonymous; the call "bore adequate indicia of reliability for the officer to credit the caller's account." Id. at 1688. First, the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability. Id. at 1689. The report was in contrast to J. L., where the tip provided no basis for concluding that the tipster had actually seen the gun. Id. Police confirmed the truck's location approximately 19 miles away from where the caller reported she was run off the road. "That sort of contemporaneous report has long been treated as especially reliable." Id. Additionally,

> There was no indication that the tip in *J. L.* (or even in *White*) was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling

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1683, 187 n.1 (2014).

event, but those considerations weigh in favor of the caller's veracity here.

Another indicator of veracity is the caller's use of the 911 emergency system. A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity.
* * *
None of this is to suggest that tips in 911 calls are per se reliable. Given the foregoing technological and regulatory developments, however, a reasonable officer could conclude that a false tipster would think twice before using such a system. The caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call.

Id. at 1689-90.

The Navarette Court then considered whether a reliable tip of an ongoing crime such as drunk driving creates reasonable suspicion for an investigative stop. Id. at 1690. The Court recognized certain driving behaviors as sound indicia of drunk driving. Id. at 1690-91. A reliable tip alleging the dangerous behaviors generally would justify a traffic stop on suspicion of drunk driving. Id. at 1691. The Court found the 911 caller reported more than minor traffic infractions and more than a conclusory allegation of drunk or

reckless driving. Id. The Court held that "an officer who already has such a reasonable suspicion need not surveil a vehicle at length in order to personally observe suspicious driving." Id. The Court found, under the totality of the circumstances, the indicia of reliability sufficient to provide the officer reasonable suspicion to execute a traffic stop. Id. at 1692.

Applying the above principals to the stop of Baker's car, the record does not show the anonymous call was shown to be reliable. The anonymous caller claimed to be inside the house at 702 Ricker where Baker and Caldwell reportedly lived. The call was made within 24-48 hours of the caller claimed to be at the house. The caller said Caldwell and Baker had a lot of marijuana and they had supposedly had just back into town. (MTS Tr. p. 62L6-14, p. 81L5-p. 83L7). Baker was twice observed at the house. (MTS Tr. p. 22L8-p. 23L20, p. 62L21-p. 63L8, p. 80L8-12). However, this is only identifying the person and location as alleged by the caller. Florida v.

J.L., 529 U.S. at 272, 120 S.Ct. at 1379. Isley did not know the identity of the caller and could not identify the telephone number from which the call was made. (MTS Tr. p. 74L6-17). Navarette v. California, 134 S.Ct. at 1689-90. Isley testified the caller made it sound like he/she was at the house "quite a bit." (MTS Tr. p. 82L14-p. 83L7). While the caller asserted familiarity with Baker and Caldwell, nothing from the tip supports the reliability of such a claim. The caller was not reporting events observable to the public. The caller was asserting criminal behavior which was concealed from the public. The prosecution failed to show the reliability of the anonymous caller. Without a finding of reliability, the caller's tip cannot be sufficient to support reasonable suspicion to stop the vehicle.

"Hand-to-hand transaction"

The determination whether the totality of the circumstances supported a reasonable suspicion to stop Baker's vehicle comes down to the alleged "hand-to-hand

transaction." Isley observed what he believed was a hand-to-hand narcotics transaction. (MTS Tr. p. 26L7-17). Isley testified:

Q. And as you drove by this alley did you observe anything?

A. I saw a black male stick his, I believe it would have been his right hand into the passenger window and immediately pull it back out and stick it into his right pocket.

Q. Is that consistent with a narcotics transaction?

A. I would say so, yes.

(MTS Tr. p. 63L25-p. 64L8, p. 68L14-p. 69L6). Isley admitted that he did not actually see an object change hands. (MTS Tr. p. 69L12-15, p. 73L11-15).

While the incident in alley might be suspicious – does it rise to the level of articulable reasonable suspicion? Does the suspected hand-to-hand transaction corroborate the anonymous tip? Based on the record, the answer must be no. After receiving the anonymous tip, which is not shown to be reliable or trustworthy, the task force started surveilling Baker. The tip and Nevada arrest colored the officer's perception of

events. What would have been a blip in an investigation turned into a justification to seize Baker. Isley observed no objects trade hands. But because of Baker's past arrest and the anonymous tip, Baker was seized for investigation. If this is permissible, it means that any citizen who is arrested, justly or unjustly, and an anonymous person makes unverified allegations can be seized for investigatory purposes. This scenario amounts to no constitutional protections for our citizens.

What investigative result did the officers reasonable expect from the traffic stop? See State v. Tyler, 830 N.W.2d at 298 ("[I]f the officer has a legitimate expectation of investigatory results, the existence of reasonable suspicion will allow the stop—if the officer has no such expectations of learning additional relevant information concerning the suspected criminal activity, the stop cannot be constitutionally permitted on the basis of mere suspicion.). The officers lacked probable cause to search Bakers' vehicle at the time Bose was

requested to stop the vehicle and he activated his emergency lights. The only means of investigating any believed criminal activity was to talk to Baker and expect him to confess his alleged crime – either delivery of marijuana or possession of marijuana. "If reasonable suspicion exists, but a stop cannot further the purpose behind allowing the stop, the investigative goal as it were, it cannot be a valid stop." State v. Tyler, 830 N.W.2d at 298.

The police were not engaged in a legitimate investigative activities when Baker's car was seized. The district court improperly relied on the evidence Baker attempted to dispose of marijuana before stopping his vehicle. (9/23/16 Order p. 4)(App. p. 23). Baker was seized when Bose turned on his squad car emergency lights to effectuate the stop. The reasonableness of official suspicion must be measured by what the officers knew before they conducted their seizure. Florida v. J.L., 529 U.S. at 271, 120 S.Ct. at 1379.

The seizure of Baker's vehicle was not supported by reasonable suspicion. The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 416 (1963). Any evidence seized after the unlawfully seizure must be suppressed as "fruit" of the constitutional violation. Id. Additionally, the information must be excised from the search warrant application for the determination whether the application was supported by probable cause. State v. McGrane, 733 N.W.2d 671, 681 (Iowa 2007).

B. The search warrant was not supported by probable cause.

"The standard for probable cause is whether a person of reasonable prudence would believe a crime has been committed or that evidence of a crime might be located in the particular area to be searched." State v. Naujoks, 637 N.W.2d 101, 108 (Iowa 2001). The task of the judge issuing the search warrant is to make a practical, common-sense decision

whether given, all the circumstances set forth in the affidavit presented to the judge, there is a fair probability that law enforcement authorities will find evidence of a crime at a particular place. State v. Davis, 679 N.W.2d 651, 656 (Iowa 2004). A finding of probable cause depends on a nexus between the criminal activity, the things to be seized and the place to be searched. Id.

It is well established that the issuance of a search warrant is to be tested entirely by the recital in affidavits and the magistrate's abstracts of oral testimony endorsed on the application. No other evidence bearing on the issue should be received in a suppression hearing regarding a search warrant. State v. Thomas, 540 N.W.2d 658, 661-62 (Iowa 1995).

The district court received evidence at the suppression hearing. Presumably the evidence was presented only for the purposes of determining the legality of the seizure of Baker's car and the omission of information from the search warrant application. "Although the court is "limited to considering the

facts presented to the issuing judicial officer in determining whether probable cause existed, ... in determining whether misrepresentation was intentional or material the surrounding facts are relevant and may be considered."" State v. Green, 540 N.W.2d 649, 657 (Iowa 1995)(quoting State v. Paterno, 309 N.W.2d 420, 424 (Iowa 1981)). Unrelated to the Franks inquiry, this Court may not consider any other relevant information present in the record which was not presented to the magistrate issuing the warrant. State v. Thomas, 540 N.W.2d at 662; State v. Seager, 341 N.W.2d 420, 426 (Iowa 1983). A warrant whose affidavit and application are lacking as to the probable cause determination may not be rehabilitated or fortified by later testimony. State v. Thomas, 540 N.W.2d at 662 (quoting State v. McManus, 243 N.W.2d 575, 577 (Iowa 1976)).

The district court ruled, in relevant part:

Pursuant to the officers' testimony at the suppression hearing, the Court finds the officers' decision to obtain a warrant was made prior to their initial entry into 702 Ricker Street. According to Investigator Girsch, officers decided to obtain a

warrant following the stop of Baker's vehicle and proceeded to the residence to merely secure the scene while a warrant was obtained. Having found the initial entry into the residence unlawful, the Court must determine whether the warrant would have still been issued by excising "the illegally obtained information from the warrant application and determine whether the remaining legally obtained information supports probable cause." ***

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Upon review of Application for Search Warrant filed in SWCR017510, the Court notes only three paragraphs of the five page Addendum must be excised. The remainder of the Addendum discusses Baker's arrest in Nevada for felony narcotics trafficking, Baker's hesitation to enter the Ricker Street residence when he thought officers were watching, the anonymous tip regarding a distributional amount of marijuana being stored in the Ricker Street residence, the hand-to-hand transaction conducted by Baker in the secluded alley, and Baker's attempt to discard marijuana prior to the stop of his vehicle.

The Court finds Caldwell's argument regarding the information presented to the court was deceptive unpersuasive. Although the warrant application fails to mention no charges had been filed in Nevada, a judge could infer as much when only the arrest was mentioned. Additionally, although there was no mention Baker hesitated to enter the Ricker Street address with plain clothed officer in an unmarked car was watching, it is not unreasonable to assume Baker is familiar with undercover officers. Lastly, the information presented in the application was sufficiently tied to 702 Ricker Street considering the anonymous tip and the officers' reasonable belief Baker was residing there. The Court finds the warrant application, even absent the three paragraphs of excised

information pertaining to the officers' initial entry, was supported by probable cause. Any suppression issues related to the warrant issued for 702 Ricker Street are denied.

(9/23/16 Order pp. 6-7)(App. pp. 25-26). The warrant application lacked probable cause that there was evidence of illegal activity at the house.

Illegal seizure of Baker's vehicle

The information that Baker discarded marijuana when he was illegally seized must be excised from the warrant application. State v. McGrane, 733 N.W.2d 671, 681 (Iowa 2007). Without the information that Baker attempted to discard marijuana after Bose activated his emergency lights, the warrant lacks probable cause. The discarded marijuana was the only evidence that Baker actually possessed marijuana. The other information contained in the warrant was mere suspicion.

Franks hearing evidence

In Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978), the United States Supreme Court developed a means to

examine the truthfulness of an affiant in presenting evidence to a magistrate supporting issuance of a search warrant. The Iowa Supreme Court adopted the Franks standard in State v. Goff, 323 N.W.2d 204, 206-208 (Iowa 1982). The inquiry adopted by Franks is limited to a determination of whether the affiant was purposely untruthful with regard to a material fact in his application for the warrant, or acted with reckless disregard for the truth. Franks v. Delaware, 438 U.S. at 171-72, 98 S.Ct. at 2684-85. If the court finds that the affiant consciously falsified the challenged information, or acted with reckless disregard for the truth in his application for the warrant, the offensive material must be deleted and the remainder of the warrant reviewed to determine whether probable cause existed. Id. Allegations of negligence or mistake are insufficient to sustain an assault on the warrant, and only impeachment of the affiant is permitted, not of a nongovernment informant. Id. at 171, 98 S.Ct. at 2684; State v. Goff, 323 N.W.2d at 210.

The federal court determined that the reckless disregard for the truth required by Franks is not established by a mere failure to investigate. United State v. Dorfman, 542 F.Supp. 345, 365-70 (N.D. Ill. 1982)(rev'd on other grounds 690 F.2d 1230). The court's inquiry should also focus on the ways and means by which the affiant supplies the facts to the issuing magistrate. United States v. Namer, 680 F.2d 1088, 1094-1095 (5th Cir. 1982); State v. Seager, 341 N.W.2d 420, 424-425 (Iowa 1983). Another focus of a Franks inquiry is whether the affiant consciously presented false or misleading information to the issuing magistrate, or acted recklessly in presenting the factual information in such a way that it could mislead the magistrate. State v. Niehaus, 452 N.W.2d 184, 188 (Iowa 1990). A failure to disclose facts can also constitute a misrepresentation and reckless disregard for the truth. State v. Paterno, 309 N.W.2d 420, 424 (Iowa 1981). Franks inquiry regarding a reckless disregard can be proven by an inference from circumstances evincing obvious reasons to

doubt the veracity of the allegations. State v. Niehaus, 452 N.W.2d at 187.

The application only informed the magistrate Baker had been "arrested" for a narcotics offense in the State of Nevada. (Addendum p. 1)(Conf. App. p. 6). Girsch agreed that he could have run Baker's NCIC criminal history prior to applying for the search warrant, but he did not. Girsch testified that he "didn't write he was convicted of anything like that." (MTS Tr. p. 39L10-p. 40L23, p. 47L3-p. 48L2). Isley testified he did a criminal record background check on Baker before preparing the search warrant application. Isley agreed he did not include in the warrant application that Baker had not been convicted in Nevada. Isley testified:

Q. And it also shows up on the criminal background check that he wasn't charged with anything in Nevada; correct?

A. I would have to look at it, but I -- if I didn't put it in there then he most likely hadn't been charged. Or convicted I should say.

Q. And you didn't tell the judge that he wasn't convicted of that. You just said that he was arrested for that.

A. Correct.

(MTS Tr. p.70L5-11, p.71L4-20)

An individual's prior conviction is a valid consideration in determining probable cause for issuance of a warrant. See State v. Hoskins, 711 N.W.2d 720, 727 (Iowa 2006) (considering officer's knowledge of suspect's prior drug convictions in determining whether there was probable cause to justify search); State v. Poulin, 620 N.W.2d 287, 290 (Iowa 2000)(considering defendant's prior conviction in determining whether there was probable cause to support the issuance of a search warrant); State v. Padavich, 536 N.W.2d 743, 748 (Iowa 1995)(noting that several factors, including "a suspect's history of involvement in the drug trade[,]" may be considered in determining whether there is probable cause to support the issuance of a search warrant); State v. McNeal, 867 N.W.2d 91, 102 (Iowa 2015)(The use of such information is common in law enforcement and is of some, although limited, value in the ultimate determination of probable cause.).

The district court determined the affiant did not mislead the magistrate by failing to disclose Baker was not charged and convicted. (9/23/16 Order pp. 6-7)(App. pp. 25-26). The district court did not explain the relevance of only an arrest without conviction or even charge. An arrest is merely an allegation and does not help support the probable cause determination.

Baker's hesitation to enter Ricker Street driveway

Girsch was working undercover when he said Baker avoided him by not turning into the driveway. (MTS Tr. p. 22L8-p. 23L20). Girsch was not in uniform or driving a marked car. (MTS Tr. p. 45L5-p. 46L2). Girsch testified:

Q. He would have had no reason to believe that you were a law enforcement officer?

A. I believe I stuck out in that neighborhood, my vehicle, all kinds of things. I mean, let me put it this way. People in town, they know what cars we drive because we have the same cars forever. They know our faces because we used to work the streets with them, you know, we dealt with them on the streets. All those things add up to, I mean, it's not take a -- it doesn't take a rocket scientist to figure out who a cop is in certain neighborhoods.

Q. Your whole -- you try and blend in; right?

A. That's the goal, yeah.

Q. Okay. And so you have no reason to believe that Mr. Baker would have identified you as a law enforcement officer at that point?

A. Oh, I believe he did.

Q. Okay, but you have nothing to support that with facts; right?

A. Well the suspicious behavior, seeing me then leaving an area, and then when I'm gone then he goes in the area he was going to, you know, yeah, I believe -- I strongly believe I was identified.

(MTS Tr. p. 46L3-25). The warrant application did not inform the magistrate the officer was not immediately identifiable as police because he was in plain clothes. (Addendum pp. 1-2)(Conf. App. pp. 6-7).

The district court did not explain why would be reasonable to assume Baker could identify an undercover officer. (9/23/16 Order p. 7)(App. p. 26). Girsch's statements of "certain neighborhoods" and "that neighborhood" were not very subtle references to race. Cf. Raymond, Down

on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion, 60 Ohio St. L.J. 99, 139 (1999)(In other contexts, some courts readily recognize that "neighborhoods" can be proxies for race.). Using the character of the neighborhood as a factor in the determination of reasonable suspicion results in the consideration by proxy of the impermissible factors of race. Id. at 138-139. Any inference that Baker avoided Girsch because he was a police officer cannot be made without some indication Baker knew Girsch was an officer. Additionally, avoidance is much different than the suspicion raised by head-long flight. Illinois v. Wardlow, 528 U.S. 119, 128-130, 120 S.Ct. 673, 678-79 (2000).

Anonymous call

The credibility of the informant must be found within the application or sworn testimony, which is reviewed under the totality of the circumstances. State v. Johnson, 756 N.W.2d 682, 686 (Iowa 2008). The task of the issuing magistrate is

simply to make a practical, common-sense decision whether, given all the circumstance set forth in the affidavit before him, including the "veracity' and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2332 (1983).

Cases applying the totality of the circumstances analysis have consistently recognized the value of corroboration of details of an informant's tip by independent police work. Illinois v. Gates, 462 U.S. at 241, 103 S.Ct. at 2333. "It is enough, for purposes of assessing probable cause, that "corroboration through other sources of information reduced the chances of reckless or prevaricating tale," thus providing "a substantial basis for crediting the hearsay."" Illinois v. Gates, 462 U.S. at 232, 103 S.Ct. at 2329 (quoting Jones v. United States, 362 U.S. 257, 269-70, 80 S.Ct. 725, 735-36 (1960)). Law enforcement failed to include any facts obtained from an

independent investigation to corroborate the anonymous tipster. (Addendum p. 2)(Conf. App. p. 7).

The district court found the information was sufficiently tied to the Ricker Street house because of the anonymous tip and the officer's belief Baker lived at the residence. (9/23/16 Order p. 7)(App. p. 26). The affiant failed to include any information in the warrant application to demonstrate the reliability of the anonymous informant. (Addendum p. 2) (Conf. App. p. 7). The affiant failed to include any information to corroborate the anonymous caller. The application alleged Baker lived at the house and was observed at the residence on two occasions. (Addendum pp. 1-2)(Conf. App. pp. 6-7). However, this is only identifying the person and location as alleged by the caller. Florida v. J.L., 529 U.S. at 272, 120 S.Ct. at 1379. The caller was not reporting events observable to the public. The caller was asserting criminal behavior which was concealed from the public and did not provide any predictive information which could be corroborated. State v.

Kooima, 833 N.W.2d at 208. The application failed to show the reliability of the anonymous caller. Without a finding of reliability, the caller's tip cannot be sufficient to support probable cause for issuance of the warrant.

Probable cause

When excising the illegally obtained marijuana evidence from the unlawful seizure of Baker's car, the reckless omission that Baker's Nevada arrest did not result in a conviction and that Girsch was undercover and the unreliable anonymous caller, the issuing magistrate was only left with the suspected hand-to-hand transaction. The alleged hand-to-hand transaction is insufficient to create probable cause for the search warrant of the residence. First, the application provided a conclusion that "it appeared" to Isley that the individuals had done a hand-to hand drug transaction. Assuming Isley was correct although he did not see any object actually exchanged, the application does not provide Baker was the seller instead of the buyer. If Baker was the buyer,

there is no nexus to the residence. Even assuming, Baker was the seller there is no credible information Baker had additional drugs at the Ricker Street residence.

If this Court finds the affiant did not act with reckless disregard for the truth regarding the lack of Nevada conviction and that Girsch was working undercover, the application still lacks probable cause for issuance of the warrant. An arrest without conviction is an impermissible consideration for probable cause to believe an individual is involved in other criminal behavior. As argued above, at most Baker avoided Girsch. Baker's avoidance of law enforcement is not indicative of criminal behavior compared to the suspicion generated from head-long flight.

The warrant lacked probable cause. The district court erred in failing to suppress the evidence obtained. This Court must reverse Baker's convictions, suppress the marijuana evidence and remand for further proceedings. If the State cannot proceed to another trial without the suppressed

evidence, Baker must be given a new sentencing hearing. The sentences imposed on all counts in the three cases were part of an overall sentencing package. (Sent. Tr. p. 11L17-p. 14L8). See State v. Harrington, 805 N.W.2d 391, 395-96 (Iowa 2011)("we think it only realistic, and not necessarily undesirable to a defendant, that a district court may, as it imposes individual sentences on individual counts, consider each sentence part of an integrated whole. Thus, although Iowa law does not require a district court to construct a "sentencing package" in the same way federal law does, we think the discretion and flexibility afforded district courts under our sentencing statutes allows for district courts to do just that."). Once the felony offenses are no longer subject to a sentence, the district court should be given an opportunity to refashion the sentences on the misdemeanor charges.

II. BAKER'S GUILTY PLEA WAS INVOLUNTARY. TRIAL COUNSEL WAS INEFFECTIVE BEFORE THE PLEA FOR FAILING TO MOVE TO SUPPRESS EVIDENCE IN AGCR212970.

Standard of Review.

Because a constitutional right is presented, the standard of review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

Preservation of Error.

Claims of ineffective assistance of counsel are properly before the Court on direct appeal. State v. Kellogg, 263 N.W.2d 539, 543 (Iowa 1978). The Court has stated that "[a] defendant can ... challenge the validity of his guilty plea by proving the advice he received from counsel in connection with the plea was not within the range of competence demanded of attorneys in criminal cases." State v. Carroll, 767 N.W.2d 638, 642 (Iowa 2009).

Discussion.

The defendant is entitled to the assistance of counsel. U.S. Const. amend. VI; U.S. Const. amend. XIV; Iowa Const.

art. I, § 10. Further, the defendant is entitled to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). The test to be applied to determine if a defendant was denied effective assistance of counsel is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

When specific errors are relied upon to show the ineffectiveness of counsel, the defendant must demonstrate: 1) counsel failed to perform an essential duty; and 2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d at 14. The essential duties required of counsel cannot be set out as a list of detailed rules and the standard to be applied to the essential duty prong is "whether counsel's assistance was reasonable considering all the circumstances." Strickland v. Washington, 466 U.S. at 686, 104 S.Ct. at 2065. Prejudice is found where there is a reasonable probability that, but for the counsel's

unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068.

Generally, in claims of ineffective assistance of counsel in violation of the Sixth Amendment, the standard of prejudice in a guilty plea case is that a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have plead guilty and would have insisted on going to trial. State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006); Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985). The prejudice element in a guilty plea case "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. at 59, 106 S.Ct. at 370.

Baker was charged with possession of marijuana and driving while barred for acts arising from the traffic stop on April 18, 2016. (AGCR212970 TI)(App. pp. 11-12). Baker was assigned different attorneys in the two cases arising from the events on April 18, 2016. (AGCR212970 Appearance;

FECR213018 Appearance)(App. pp. 7-10). Trial counsel in FECR213018 filed a motion to suppress challenging the stop of Baker's vehicle. (FECR213018 MTS)(App. pp. 16-17). No motion was filed in AGCR212970. After the adverse ruling on the motion to suppress in FECR213018, trial counsel appointed in the felony case took over representation of Baker. (9/23/16 Order; AGCR212970 GP)(App. pp. 20-27, 33-37).

Trial counsel breached a legal duty in failing to file a motion to suppress the evidence gained from the unlawful seizure of Baker's vehicle in AGCR212970. As argued above in Division I(A), the seizure was not supported by articulable reasonable suspicion. The only reason for the seizure was to investigate drug related activity. (MTS Tr. p. 9L23-p. 10L16, p. 17L15-p. 18L4). The record shows that Bose did not execute the traffic stop because he knew Baker was barred from driving. Only because Baker was seized by law enforcement did the police check his driver's license status which resulted in the charge of driving while barred. As

argued above in Division I(A), the motion to suppress challenge to the seizure of Baker's vehicle was meritorious. Trial counsel breached an essential duty by failing to challenge the seizure in AGCR212970.

Baker was prejudiced by counsel's failure. To prove prejudice Baker must show that but for counsel's inaction he would not have entered the guilty plea. State v. Straw, 709 N.W.2d at 13; State v. Carroll, 767 N.W.2d at 644. The guilty pleas to driving while barred and possession of marijuana-second offense were entered without any type of plea agreement. (AGCR212970 GP ¶8)(App. p. 34). Had counsel moved to suppress the evidence in AGCR212970, the trial court should have granted the motion resulting in no evidence to submit to a factfinder to prove Baker guilty of the two charges. The State would have been unable to go forward with the prosecution. Cf. State v. Utter, 803 N.W.2d 647, 654 (Iowa 2011)(The remedy for a violation of the speedy indictment rule is an absolute dismissal of the charge with

prejudice.). Additionally if counsel had filed a motion to suppress and advised Baker to proceed to trial, error would have been preserved on appeal. Baker would not have pled guilty if he had known the court should suppress the evidence and the State would not have been able to continue the prosecution. Therefore, he did not enter into the plea voluntarily or intelligently. Accordingly, a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Utter, 803 N.W.2d at 655.

Trial counsel provided ineffective assistance. This Court must reverse Baker's convictions for driving while barred and possession of marijuana in AGCR212970 and remand for further proceedings.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPOSING SENTENCE.

Standard of Review.

A sentence imposed by the district court is reviewed for errors at law. Iowa R. App. P. 6.907; State v. Thomas, 547

N.W.2d 223, 225 (Iowa 1996). Where a challenged sentence does not fall outside the statutory limits, the Court reviews the trial court's decision for abuse of discretion. State v. Thomas, 547 N.W.2d at 225; State v. Wright, 340 N.W.2d 590, 592 (Iowa 1983).

Preservation of Error.

Review of sentencing is properly before this Court upon direct appeal despite the absence of objection in the trial court. State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994) (No procedure which allows defendant to address the court during or after the pronouncement of sentence).

Discussion.

In exercising its discretion, the district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant's age, character, and propensities or chances of reform. State v. Loyd, 530 N.W.2d 708, 713 (Iowa 1995)(quoting State v. Johnson, 513 N.W.2d

717, 719 (Iowa 1994)). The court owes a duty to both the defendant and the public. As such, the court must exercise the sentencing option that would best accomplish justice for both society and the individual defendant, after considering all pertinent sentencing factors. State v. Fink, 320 N.W.2d 632, 634 (Iowa Ct. App. 1982).

Iowa Rule of Criminal Procedure 2.23(3)(d) requires the trial court to state on the record its reasons for selecting a particular sentence. Iowa R. Crim. P. 2.23(3)(d). Although the explanation need not be detailed, at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action. State v. Jackson, 445 N.W.2d 337, 343 (Iowa 1989)(finding a terse and succinct statement may be sufficient, so long as the brevity of the court's statement does not prevent review of the trial court's sentencing discretion).

On April 17, 2017, Baker was sentenced on all charges. Baker was sentenced to be incarcerated not to exceed five

years for possession with intent to deliver and tax stamp violation (FECR213018), one year for possession of marijuana-second offense and driving while barred (AGCR212970), and one year for driving while barred (AGCR215793). The district court ordered all of the sentences to be served concurrently. (FECR213018 Judgment; AGCR212970 Judgment; AGCR215793 Judgment)(App. pp. 43-54). The district court stated the reasons for imposition of a prison sentences:

> And these events occurred, the drug trafficking charge and the drug tax stamp on April 18, 2016. So that would be roughly six years after you were released. So you leave me very little discretion in that regard except for whether they're going to be consecutive or concurrent to one another.
> ***
> I have chosen to run these matters concurrent because as I said they are serious matters. I don't know if you said it or didn't say it but the PSI writer at least believes you said it. They are serious matters no matter how we look at it, but I don't think they're so serious as to warrant a stacking of these matters five plus five plus one plus one plus two. I just don't see it as being that critical. I have chosen not to go with the recommendation by your attorney to place you at the residential facility because as I have said, you have been to prison once and here it is six years later and you're still doing this. You're still doing drugs or at least you were doing drugs, so apparently all of the treatment modalities that your attorney pointed out a short while ago didn't work because here you are. Okay.

(Sent. Tr. p. 11L17-p. 14L8).

The Supreme Court has stated:

In applying the abuse of discretion standard to sentencing decisions, it is important to consider the societal goals of sentencing criminal offenders, which focus on rehabilitation of the offender and the protection of the community from further offenses. It is equally important to consider the host of factors that weigh in on the often arduous task of sentencing a criminal offender, including the nature of the offense, the attending circumstances, the age, character and propensity of the offender, and the chances of reform. Furthermore, before deferring judgment or suspending sentence, the court must additionally consider the defendant's prior record of convictions or deferred judgments, employment status, family circumstances, and any other relevant factors, as well as which of the sentencing options would satisfy the societal goals of sentencing.

State v. Formaro, 638 N.W.2d 720, 724-25 (Iowa 2002)(other citations omitted). The district court's stated reasons only involved Baker's prior criminal record which resulted in a prison sentence. The record shows that the district court failed to consider the minimum sentencing factors and relied only on the prior criminal history.

It is undisputed Baker had prior criminal convictions which resulted in a prison sentence. (PSI p. 3)(Conf. App. p.

66). Baker was imprisoned for the offenses of willful injury causing serious injury, assault while participating in a felony, and carrying weapons. Baker was sentenced to fifteen years on the charges. Two of the counts were forcible felonies which required he be incarcerated. Iowa Code §§ 702.11 and 907.3 (2005). Baker was eighteen years old at the time of the offenses. (PSI p. 3)(Conf. App. p. 66). After being released on parole and discharging his sentence, Baker had been convicted of misdemeanor offenses which resulted in fines, limited jail time and probation. (PSI p. 4)(Conf. App. p. 67).

The decision for a prison sentence under the rational that once a prison sentence has been imposed, prison is the only option is an abuse of discretion. The district court's reasoning fails to take into consideration the minimum sentencing factors and thereby abused its discretion.

The district court abused its discretion in imposing the prison sentences. All of Baker's sentences should be vacated and the cases remanded for resentencing because the

sentences were imposed as part of an overall sentencing package. State v. Harrington, 805 N.W.2d 391, 395-96 (Iowa 2011).

CONCLUSION

Justin Baker respectfully requests this Court reverse his convictions, order the evidence obtained from the seizure of his vehicle and the Ricker Street residence suppressed and remand for further proceedings. If the State is unable to proceed to a retrial in FECR213018, Baker respectfully requests this Court order resentencing on any remaining misdemeanor charges because the sentences were imposed as part of an overall sentencing package. State v. Harrington, 805 N.W.2d 391, 395-96 (Iowa 2011). Alternatively, Baker respectfully requests this Court vacate his sentences and remand for resentencing.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $6.05, and that amount has been paid in full by the Office of the Appellate Defender.

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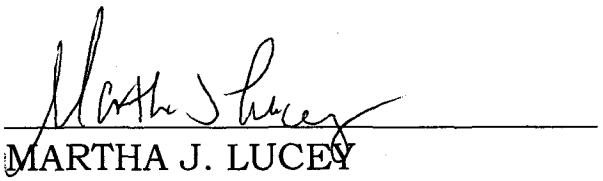

Dated: 2/8/18

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