IN THE SUPREME COURT OF IOWA

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

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

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED OCTOBER 10, 2018

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CERTIFICATE OF SERVICE

On October 29, 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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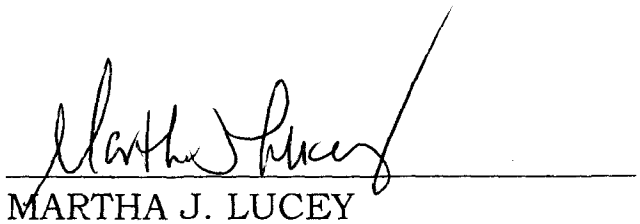

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QUESTIONS PRESENTED FOR REVIEW

I. The district court erroneously determined officers had reasonable articulable suspicion to conduct a traffic stop to investigate drug activity because "the totality of the circumstances total is zero." Dissent p. 23. Assuming reasonable suspicion existed that Baker was involved in drug dealing an investigatory stop served no purpose, and therefore cannot be valid under the Fourth Amendment or article I, section 8. Did the district court err by denying the motion to suppress illegally obtained evidence?

II. Was Baker's guilty plea involuntary because trial counsel was ineffective before the plea for failing to move to suppress evidence in AGCR212970 because the evidence was obtained by the same impressible traffic stop?

III. Did the district court abuse its discretion in imposing a prison sentence based only the fact that Baker had previously been to prison?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

Law enforcement did not have articulable reasonable suspicion of criminal activity to support the stop of Baker's vehicle. Even assuming reasonable suspicion existed that Baker was involved in marijuana dealing, there was no legitimate expectation of investigatory results. The Court of Appeals decision conflicts with this Court's decision in State v. Tyler, 830 N.W.2d 288, 298 (Iowa 2013). Iowa R. App. P. 6.1103(b)(1).

The district court erroneously determined officers had reasonable articulable suspicion to conduct a traffic stop to investigate drug activity because: 1) seven months before his Iowa arrest, a police officer from the State of Nevada reported to the Task Force that they arrested Baker for trafficking marijuana; 2) about two weeks prior to his arrest, Baker acted suspiciously and evaded Investigator Girsch when he noticed that Girsch was parked near 702 Ricker Street; 3) an anonymous caller informed the Task Force that they had

recently been inside 702 Ricker Street, stated Baker had a lot of marijuana, and believed he was selling it; 4) Investigator Isley witnessed what he believed was a hand-to-hand drug transaction involving Baker; and 5) after Sergeant Bose initiated the traffic stop, Baker threw a bag of marijuana out of his car window. "[T]he problem is not that the officers' articulated facts appear innocuous if considered separately. The State's case is weak because the *combined* circumstances did not generate reasonable suspicion for an investigatory stop." Dissent p. 17.

The Court of Appeals majority correctly concluded that the thrown baggie cannot be included in the reasonable suspicion analysis. Opinion p. 9. However, Baker's arrest in the State of Nevada, which did not result in a conviction, was merely an allegation. The Nevada information "does nothing more than tag Baker as a person of interest for the drug-enforcement task force to monitor." Dissent p. 18. Girsch's interpretation of Baker's actions two weeks prior to

the vehicle seizure only "suggests Baker wanted to avoid interaction with an undercover officer." Dissent p. 19.

The incidents from the day of the stop also do not add to the reasonable suspicion equation. The anonymous caller's tip was not corroborated in anyway except to identify the person and location as alleged by the caller. The anonymous caller was not shown to be reliable. Dissent pp. 19-20. Isley did not actually observe a hand-to-hand exchange. He assumed it was but admitted that it could have "quite possibly" been a handshake and did not see any items change hands. Dissent p. 20. "Even packaged together, these four facts do not rise to reasonable suspicion." Dissent p. 22.

Even assuming reasonable suspicion existed to conduct an investigatory stop, what investigative results did the officers reasonably expect from the stop? The State did not demonstrate what ambiguity the police intended to resolve from the traffic stop. Nor did the Court of Appeals' majority address this issue. The officers lacked probable cause to

search Baker and his vehicle at the time Bose was requested to stop the vehicle. "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 illegal seizure of Baker's vehicle lead to the discovery of the baggie of the marijuana and Baker's driver's license was revoked. Additionally, law enforcement then used the evidence to obtain a warrant to search 702 Ricker Street. The warrant lacked probable cause.

STATEMENT OF THE CASE

Justin Baker seeks further review of the Court of Appeals decision affirming his conviction 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).

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING THE MOTION TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE.

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

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.

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.

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. 266, 272, 120 S.Ct. 1375, 1379 (2000). 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). *Compare* Navarette v. California, 134 S.Ct. 1683, 1689-90 (2014) (use of 911). 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"

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. It could have "quite possibly" been a handshake. (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.

"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."

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 288, 298 (Iowa 2013).

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. State v. Tague, 676 N.W.2d 197, 204 (Iowa 2004). 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. Any evidence seized after the unlawfully seizure must be suppressed as "fruit" of the constitutional violation. Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 416 (1963). 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 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 at 681. 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

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. (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. State v. Hoskins, 711 N.W.2d 720, 727 (Iowa 2006); State v. Poulin, 620 N.W.2d 287, 290 (Iowa 2000); State v. Padavich, 536 N.W.2d 743, 748 (Iowa 1995); State v. McNeal, 867 N.W.2d 91, 102 (Iowa 2015).

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 he believed Baker recognized him because he stuck out in the neighborhood. (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). 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

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. 213, 241, 103 S.Ct. 2317, 2333 (1983). 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 202, 208 (Iowa 2013). 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.

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

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).

Both trial lawyers 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 128, 138 (Iowa 2006). 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.

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.

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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 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. "Each sentencing decision must be made on an individual basis, and no single factor alone is determinative." State v. Johnson, 513 N.W.2d 717, 719 9iowa 1994). See also State v. McKeever, 276 N.W.2d 385, 387 (Iowa 1979)(The nature of the offense alone cannot be

determinative of a discretionary sentence.); State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982)("trial court failed to follow the *McKeever* rule").

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 grant this application for further review.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $4.75, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

MARTHA J. LUCEY
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 4,491 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

Martha J. Lucey

Dated: 10/25/18

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IN THE COURT OF APPEALS OF IOWA

No. 17-0622
Filed October 10, 2018

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN ANDRE BAKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joel A. Dalrymple, Judge.

Justin Baker appeals his convictions and sentences for multiple offenses.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Genevieve Reinkoester, Assistant Attorney General, for appellee.

Heard by Vogel, P.J., Tabor, J., and Carr, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2018).

VOGEL, Presiding Judge.

Justin Baker appeals his convictions and sentences for possession with intent to deliver marijuana, failure to affix a drug tax stamp, driving while barred (two counts), and possession of marijuana, second offense.[1] He argues the district court erred in denying his motion to suppress, his counsel was ineffective for failing to file another motion to suppress, and the district court abused its discretion in imposing his sentence. We find the court properly denied the motion to suppress, he has not shown prejudice resulted from his counsel's failure to file a second motion, and the court adequately explained its reasoning for imposing his sentence. Accordingly, we affirm.

I. Background Facts and Proceedings

On August 30, 2015, Investigator Michael Girsch with the Waterloo Police Department[2] received a call from a law enforcement official in the state of Nevada. The official told Investigator Girsch they had stopped a vehicle containing three persons from Waterloo, including Baker. Nevada officials arrested all three persons after finding a distributional quantity of marijuana and other items in the vehicle. Investigator Girsch testified Baker was "on our radar" after he received the call. Nevada officials never charged Baker after his arrest.

In early April 2016, Investigator Girsch was conducting surveillance on an unrelated matter in plain clothes near Ricker Street in Waterloo. He noticed Baker

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[1] As will be explained later in the opinion, these charges were docketed under three separate case numbers: FECR 213018, possession with intent to deliver marijuana, and failure to affix a drug tax stamp; AGCR 212970, driving while barred, and possession of marijuana, second offense; and AGCR 215793, driving while barred.

[2] Investigator Girsch testified he began working for the Waterloo Police Department in 2008 and he joined the area Drug Enforcement Task Force about three-and-one-half years prior to trial.

driving a vehicle and apparently preparing to pull into the driveway at a house. Baker then appeared to notice the investigator, and he continued driving past the house. Investigator Girsch testified he "stuck out in that neighborhood" despite wearing plain clothes and "it doesn't take a rocket scientist to figure out who a cop is in certain neighborhoods." Investigator Girsch circled the block and set up in a different location. He eventually observed Baker drive toward the house again, park in its driveway, and enter the house.

On April 18, 2016, Investigator Matthew Isley with the Black Hawk County Sheriff's Office[3] received an anonymous call regarding Baker and his niece Shana Caldwell. The caller said Baker and Caldwell were living in the Ricker Street house that Investigator Girsch previously saw Baker enter. The caller also said the house contained a lot of marijuana and the two had just returned from out of town with a shipment of more marijuana.

After receiving the anonymous call, Investigator Isley began watching the Ricker Street house. He saw Baker enter the house, exit about twenty minutes later, and drive away. Investigator Isley followed Baker's vehicle. He soon observed Baker's vehicle stop in an alley, where another man put his hand in the vehicle's open passenger window and then immediately removed his hand and put it in his pocket. Investigator Isley testified he sees hand-to-hand narcotics transactions "almost daily" in his line of work and the events in the alley were consistent with a hand-to-hand narcotics transaction.

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[3] Investigator Isley testified he attended the Iowa Law Enforcement Academy in 2003, and he subsequently worked in the jail and as a road deputy before joining the area Drug Enforcement Task Force two-and-one-half years prior to trial.

Investigator Isley then asked for a police officer to stop Baker's vehicle as part of their investigation into illegal narcotics activity. Sergeant Steven Bose with the Waterloo Police Department responded, identified Baker's vehicle, and activated his emergency lights. With the emergency lights directed at him, Baker continued to slowly drive for about one half-block, turned onto another street, and slowly drove for about another quarter-block before stopping. When Baker's vehicle turned, Sergeant Bose saw an object thrown out the driver's window. Once stopped, Sergeant Bose placed Baker in handcuffs and recovered the thrown object, which he determined was a small bag of marijuana. Baker had $200 in twenty-dollar bills in his pocket, but officials found nothing else significant on his person or in the vehicle.

Investigator Girsch testified they decided to apply for a search warrant for the Ricker Street house after the traffic stop. He testified he was concerned Baker had alerted someone at the house to destroy evidence while he continued driving a "slow roll" before eventually stopping his vehicle. According to Investigator Girsch, oftentimes when law enforcement stops a drug offender's vehicle, "if they have a stash house or something like that, they will slow roll and try to get a text or call off for people to get rid of that evidence in that residence." Before writing the search warrant application, officials performed a protective sweep of the house looking for weapons and persons. During the sweep, officials saw a digital scale and a bag of marijuana in plain sight, and they noted the odor of fresh marijuana throughout the home. After the sweep, Investigator Isley wrote and submitted the application for the search warrant. The application included a five-page affidavit setting forth supporting facts, including the Nevada arrest, Investigator Girsch's

observation of Baker's hesitation and avoidance behavior before entering the Ricker Street house, the anonymous call, the suspected hand-to-hand narcotics transaction, the bag of marijuana thrown during the traffic stop, and observations made during the sweep. The district court issued the search warrant later that day. Items found during the search included a digital scale, multiple bags of marijuana, miscellaneous packaging including both new and used empty small plastic bags, and various items containing marijuana residue.

On May 17, 2016, the State filed a trial information charging Baker with possession of a controlled substance—marijuana, second offense and driving while barred as a habitual offender. *See* Iowa Code §§ 124.401(5), 321.561 (2016). The charges were filed in case number AGCR212970. On May 18, the State filed a second trial information charging Baker and Caldwell with possession of a controlled substance with intent to deliver and a drug tax stamp violation. *See id.* §§ 124.401(1)(d), 453B.12. The charges against Baker were filed in case number FECR213018. On November 2, the State filed a third trial information charging Baker with driving while barred as a habitual offender, related to his actions on September 28, in case number AGCR215793.

On August 9, 2016, Baker filed a motion to suppress evidence for case number FECR213018, and he moved to join a similar motion filed by Caldwell. On September 12, the district court held a hearing on the motions. At the hearing, the parties clarified the motions challenged the bases for the stop of Baker's vehicle, the protective sweep of the house, and the warrant to search the house.

On September 23, 2016, the district court issued its ruling on the motions to suppress. First, the court considered the basis for the investigatory traffic stop:

> 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.

Second, the court found no exigent circumstances to support the protective sweep, and it suppressed evidence obtained in the sweep. Third, the court considered the basis for the search warrant of the house. Because the court suppressed evidence from the protective sweep, the court excised this evidence from the warrant application; however, the excised information only amounted to three paragraphs of the five-page affidavit. The remaining information in the application included Baker's arrest in Nevada, his hesitation to enter the house while Investigator Girsch watched him, the suspected hand-to-hand narcotics transaction, and the bag of marijuana Baker tossed out the car window. The court rejected the argument that the warrant application contained falsities because it failed to mention Baker was not charged by Nevada officials and Investigator Girsch wore plain clothes when he saw Baker hesitate to enter the house. Accordingly, the court found probable cause to support the warrant application, and it denied suppression issues related to the warrant and ensuing search.

On January 24, 2017, Baker and Caldwell proceeded to a jury trial on case number FECR213018. The jury found both defendants guilty of possession of

marijuana with intent to deliver and a drug tax stamp violation. On April 17, Baker pled guilty to possession of a controlled substance—marijuana, second offense, and two counts of driving while barred as a habitual offender from the other two proceedings. Also on April 17, the court entered judgment and sentence for each of the three proceedings. In addition to imposing and suspending fines and surcharges, the court imposed the following terms of incarceration: five years for possession of marijuana with intent to deliver, five years for the drug tax stamp violation, one year for possession of a controlled substance—marijuana, second offense, and one year for each of the two counts of driving while barred. All terms of incarceration were to be served concurrently.

Baker now appeals. He argues the district court erred in denying his motion to suppress, his counsel was ineffective for failing to file a motion to suppress in case number AGCR212970, and the court abused its discretion in imposing his sentences.

II. Standard of Review

"We review the denial of a motion to suppress on constitutional grounds de novo." *State v. Ingram*, 914 N.W.2d 794, 798 (Iowa 2018). "We review claims of ineffective assistance of counsel de novo." *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012). When a sentence is within the statutory limits, we review challenges to the sentence for abuse of discretion. *State v. Seats*, 865 N.W.2d 545, 552 (Iowa 2015).

III. Motion to Suppress

Baker argues the district court erred in denying the motion to suppress evidence from both the investigatory stop and the search of the Ricker Street

house. Specifically, he argues the investigatory stop was not supported by reasonable suspicion, and the search warrant for the house was not supported by probable cause. Baker raises his arguments under the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution.

A. Investigatory stop

Law enforcement stopped Baker's vehicle in order to investigate ongoing illegal narcotics activity. An officer may make a warrantless stop of "an individual or vehicle for investigatory purposes based on a reasonable suspicion that a criminal act has occurred or is occurring." *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002); *see also Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). "Our decisions have universally held that the purpose of a *Terry* stop is to investigate crime." *State v. Tyler*, 830 N.W.2d 288, 293 (Iowa 2013); *see also State v. Vance*, 790 N.W.2d 775, 780 (Iowa 2010) ("The principal function of an investigatory stop is to resolve the ambiguity as to whether criminal activity is afoot."). "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.'" *Kreps*, 650 N.W.2d at 641 (quoting *State v. Heminover*, 619 N.W.2d 353, 357 (Iowa 2000)). "The circumstances under which the officer acted must be viewed 'through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.'" *Id.* at 642 (quoting *United States v. Hall*, 525 F.2d 857, 859 (D.C. Cir. 1976)). "Whether reasonable suspicion exists for an investigatory stop must be determined in light of the totality of the circumstances confronting a police officer, including all information available to the officer at the time the decision to stop is made." *Id.*

The parties disagree about the time to determine whether reasonable suspicion existed. The State asserts the reasonable-suspicion determination includes everything the officials knew at the time Baker fully acquiesced to authority by stopping his vehicle; accordingly, his actions in throwing a bag of marijuana out of his vehicle while slowly coming to a stop after Sergeant Bose activated his emergency lights contribute toward reasonable suspicion for the investigatory stop. However, our supreme court has declared the reasonable suspicion determination for an investigatory traffic stop includes "all information available to the officer *at the time the officer makes the decision to stop the vehicle*." *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004) (emphasis added). At the time Sergeant Bose activated his emergency lights, law enforcement officials had already made the decision to stop Baker's vehicle. *See id.* Therefore, we cannot consider Baker's actions after activation of the emergency lights, including him throwing a bag of marijuana out the window while he slowly stopped, in determining whether reasonable suspicion existed.

Before the stop of Baker's vehicle, Investigator Isley believed he had engaged in criminal activity, specifically the possession of marijuana with intent to deliver, which is a felony. *See* Iowa Code § 124.401(1)(d). Investigator Isley decided to stop Baker after he witnessed a suspected hand-to-hand narcotics transaction. He knew several facts at the time he made this decision: (1) Baker's actions were consistent with the hand-to-hand narcotics transactions he knew from personal experience and training; (2) an anonymous caller reported Baker had just returned from out of town with a large shipment of marijuana and there was a large quantity of marijuana in the Ricker Street house; (3) Baker left the Ricker Street

house immediately before the suspected hand-to-hand narcotics transaction; (4) Investigator Girsch recently witnessed Baker hesitating then attempting to avoid being seen entering the house; and (5) Baker was arrested in Nevada several months prior when officials there found him and a large quantity of marijuana in the same vehicle. As someone with more than ten years of law enforcement experience, including more than two years serving on the area Drug Enforcement Task Force, Investigator Isley knew these facts were indicative of illegal narcotics activity. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) (stating a totality-of-the-circumstances review may consider the officers' "experience and specialized training to make inferences from and deductions about the cumulative information available to them"); *see also State v. Pals*, 805 N.W.2d 767, 774 (Iowa 2011) ("[I]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion." (quoting *United States v. Hensley*, 469 U.S. 221, 229 (1985)). When viewing the totality of the circumstances, we, like the district court, find these facts create more than a mere suspicion of criminal activity. *See Tague*, 676 N.W.2d at 204. Therefore, reasonable suspicion supported the stop of Baker's vehicle, and the district court did not err in denying the suppression of evidence from the stop.

Baker and the dissent argue none of these individual facts create a reasonable suspicion of illegal activity. We agree that none of the facts, standing alone, generates reasonable suspicion justifying an investigatory stop. However, our supreme court has directed us to consider "the totality of the circumstances" when evaluating whether reasonable suspicion exists to justify an investigatory

stop. *Kreps*, 650 N.W.2d at 641–42. Reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence." *Id.* at 642. (quoting *State v. Richardson*, 501 N.W.2d 495, 496–97 (Iowa 1993)). "One of the most common situations in which investigatory stops occur is direct police observation of suspicious conduct." *Id.* at 643. Despite any weakness in any of the facts standing alone, we find the totality of all circumstances when viewed with Investigator Isley's experience in drug enforcement generates reasonable suspicion to justify the investigatory stop of Baker's vehicle. *See State v. Bumpus*, 459 N.W.2d 619, 624 (Iowa 1990) (finding that, although law enforcement lacked probable cause to arrest after witnessing a suspected narcotics transaction, all factors known to the officers created "reasonable and articulable cause for suspicion that criminal activity was taking place" to justify an investigatory stop).

B. Search warrant

A search warrant must be supported by probable cause. *State v. McNeal*, 867 N.W.2d 91, 99 (Iowa 2015). "Probable cause to search requires a probability determination that '(1) the items sought are connected to criminal activity and (2) the items sought will be found in the place to be searched.'" *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997) (quoting *United States v. Edmiston*, 46 F.3d 786, 789 (8th Cir. 1995)). "The issuing judge 'is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information,' probable cause exists." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "In doing so, the judge may rely on 'reasonable, common

sense inferences' from the information presented." *Id.* (quoting *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995)).

All of the facts providing reasonable suspicion for the stop of Baker's vehicle also support the search warrant. Additionally, because the stop of his vehicle was proper as explained above, his actions in slowly stopping and throwing a bag of marijuana out his vehicle also support the issuance of the search warrant. *See State v. McGrane*, 733 N.W.2d 671, 680 (Iowa 2007) (explaining evidence must be suppressed under the exclusionary rule if the evidence was "discovered as a result of illegal government activity"). These facts provide probable cause to support the search warrant. *See id.*

Baker also argues the search warrant is invalid because its supporting affidavit contains false statements.[4] Specifically, he notes the affidavit mentions the Nevada arrest but does not mention he was never charged or convicted following the arrest, and he notes the affidavit mentions Investigator Girsch observed him hesitate to enter the Ricker Street house but does not mention Girsch wore plain clothes at the time.

To invalidate the affidavit, the defendant must show the affiant included a "deliberate falsehood" or acted with "reckless disregard for the truth." *Groff*, 323

[4] In its brief, the State argued Baker waived any argument on the affidavit's validity because he did not follow the proper procedure before the district court. Ordinarily, a defendant must make a preliminary showing of falsity in the affidavit before reaching an evidentiary hearing. *State v. Groff*, 323 N.W.2d 204, 209 (Iowa 1982) (citing *Franks v. Delaware*, 438 U.S. 154, 171–72 (1978)). While Baker made no such preliminary showing, his co-defendant raised the affidavit's validity and the district court squarely ruled on the issue when denying the motions to suppress. At oral argument, the State acknowledged it never questioned the procedure used to challenge the affidavit's validity before the district court and it had therefore waived any argument Baker failed to follow the proper procedure to challenge the affidavit's validity. *See Groff*, 323 N.W.2d at 209.

N.W.2d at 209 (quoting *Franks*, 438 U.S. at 171–72). "Allegations of negligence or innocent mistake are insufficient." *Id.* (quoting *Franks*, 438 U.S. at 171–72). "A 'false' affidavit statement is one which misleads the magistrate into believing the existence of certain facts which enter into his thought process in evaluating probable cause." *Id.* at 210. Baker does not point to any explicitly incorrect statements in the affidavit; instead, he notes the affidavit does not say he was not charged or convicted following the Nevada arrest and it does not note Investigator Girsch wore plain clothes when he saw Baker hesitate to enter the Ricker Street house. Baker has presented no evidence the affiant, Investigator Isley, deliberately obfuscated by omitting these facts. Nor has Baker shown a reckless disregard for the truth that would mislead a magistrate who is familiar with criminal investigations. The affidavit correctly said Baker was arrested in Nevada, and it was not reckless to not also specify he had not been charged or convicted following the arrest. The affidavit also clearly identified Investigator Girsch as an investigator with the local drug enforcement task force who was conducting an investigation at the time he witnessed Baker hesitate to enter the house. Investigator Girsch testified he was identifiable as law enforcement despite wearing plain clothes and he believed Baker recognized him as such. Accordingly, it was not reckless to not also specify Investigator Baker wore plain clothes. Therefore, the affidavit did not contain false statements. *See id.*

Furthermore, even if the affidavit contains false statements, those falsities invalidate the warrant only if the warrant lacks probable cause without those challenged statements. *Id.* at 209. Setting aside the challenged statements, the warrant is still supported by the anonymous call and the observations of law

enforcement that Baker left the Ricker Street house, engaged in a suspected hand-to-hand narcotics transaction, and tossed a bag of marijuana while slowly coming to a stop after Sergeant Bose activated his emergency lights. These unchallenged statements provide probable cause to support the affidavit.

IV. Ineffective Assistance

Baker next argues his counsel was ineffective for failing to file a motion to suppress in case number AGCR212970.[5] A successful ineffective-assistance-of-counsel claim requires proving "(1) counsel failed to perform an essential duty; and (2) prejudice resulted." *Clay*, 824 N.W.2d at 495. Prejudice resulted if, "but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 496. Baker's counsel filed a motion to suppress in case number FECR213018, and he argues his counsel should have filed the same motion in case number AGCR212970. As explained above, the court did not err in denying the motion to suppress for FECR213018. Therefore, he cannot show prejudice resulting from his counsel's failure to file the same motion to suppress for AGCR212970.

V. Sentencing

Finally, Baker argues the district court abused its discretion in imposing his sentence because the court did not fully explain its reasons for the sentence. When imposing a sentence, the district court must provide "a statement of reasons on the record." *State v. Thacker*, 862 N.W.2d 402, 408. "[A] 'terse and succinct'

[5] Baker was initially assisted by separate counsel in FECR213018 and AGCR212970. After his motion to suppress was denied, counsel in FECR213018 took over the representation of Baker in AGCR212970. On appeal, Baker does not specify which counsel was ineffective in failing to file a motion to suppress in AGCR212970.

statement may be sufficient, 'so long as the brevity of the court's statement does not prevent review of the exercise of the trial court's sentencing discretion.'" *Id.* (quoting *State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989)). At the sentencing hearing, the district court provided the following explanation to Baker:

> I have chosen to run these matters concurrent because as I said they are serious matters. . . . 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 . . . . 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.

This explanation is adequate for our review. Baker notes the court did not discuss all of the factors of sentencing. *See State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002) (stating the factors of sentencing include "the nature of the offense, the attending circumstances, the age, character and propensity of the offender, and the chances of reform"). However, the court is not required to explicitly address every factor. *See State v. Boltz*, 542 N.W.2d 9, 11 (Iowa 1995) ("[T]he failure to acknowledge a particular sentencing circumstance does not necessarily mean it was not considered."). We find no abuse of discretion in Baker's sentence.

VI. Conclusion

The district court properly denied Baker's motion to suppress, and no prejudice resulted from his counsel's failure to file a similar motion to suppress in

a related proceeding. Additionally, the district court did not abuse its discretion in imposing his sentence.

AFFIRMED.

Carr, S.J., concurs; Tabor, J., dissents.

TABOR, Judge (dissenting)

I respectfully dissent. The district court should have granted Baker's motion to suppress evidence found during an investigatory stop of his vehicle and a warranted search of his residence.

Courts review investigatory stops based on the totality of the circumstances. The United States Supreme Court has warned against a "divide-and-conquer analysis" where reviewing courts assign no weight to facts susceptible to innocent explanations when deciding if the police had reasonable suspicion. *United States v. Arvizu*, 534 U.S. 266, 274 (2002). But here, the problem is not that the officers' articulated facts appear innocuous if considered separately. The State's case is weak because the *combined* circumstances did not generate reasonable suspicion for an investigatory stop. Rather than just discouraging a divide-and-conquer inquiry, the State essentially advances an amass-and-aggrandize approach to the suppression challenge.

To that end, the State alleges reasonable suspicion to stop Baker arose from "five separate incidents":

> 1) a few months before his Iowa arrest, state law enforcement in Nevada reported to the Tri-County Drug Enforcement Task Force that they arrested [Baker] for trafficking marijuana through the state; 2) About two weeks prior to his arrest, [Baker] acted suspiciously and evaded Investigator Girsch when he noticed that Girsch was parked near 702 Ricker Street; 3) an anonymous caller informed the Tri-County Drug Enforcement Task Force that they had recently been inside 702 Ricker Street, stated [Baker] had a lot of marijuana, and believed he was selling it; 4) Investigator Isley witnessed a hand-to-hand drug transaction involving [Baker]; and 5) After Sergeant Bose initiated the traffic stop but before [Baker] acquiesced to the show of authority, [Baker] threw a bag of marijuana out of his car window, which was recovered by Sergeant Bose.

Let's start with the fifth "incident" cited by the State. The majority correctly concludes Officer Bose's assertion Baker threw a baggie of marijuana from the car did not support the reasonable-suspicion calculus. Baker allegedly threw the baggie after the officer signaled him to stop. So we are left with four facts to consider in our calculus.

Turning to the first incident, seven months before the Iowa stop at issue, investigator Michael Girsch received a call from a trooper who arrested Baker following a traffic stop in the state of Nevada. The trooper alleged Baker was one of three occupants in a vehicle transporting "a large distribution quantity of marijuana." According to Girsch, receiving that information put Baker "on our radar." Although the Nevada trooper shared the arrest information with Iowa authorities, for reasons not revealed in our record, Nevada prosecutors did not pursue criminal charges against Baker. Given the staleness of the Nevada information and the unverified aspect of Baker's participation, this incident does nothing more than tag Baker as a person of interest for the drug-enforcement task force to monitor.

The second incident occurred in early April. Driving an unmarked car, Investigator Girsch was conducting surveillance for an unrelated investigation when he noticed Baker

> traveling in the 700 block of Ricker Street. It appeared he was going to pull into a driveway and then observed me sitting, . . . and to me it looked like he saw me and may have gotten scared or something, continued to drive past a residence, which I thought it looked like he was going to pull into.

The State describes Baker's action as "evading" Investigator Girsch. That is an exaggeration. Girsch did not signal Baker to stop. Thirty seconds later, after

Girsch circled the block, he saw Baker pull into the original driveway. A generous interpretation of Girsch's perception suggests Baker wanted to avoid interaction with an undercover officer. Even assuming Girsch accurately read Baker's behavior as skittish in early April, that action contributed no significant weight to the investigators' reasonable suspicion—more than a week later—that evidence of a crime could be discovered by stopping Baker's car.

The third incident happened the day of the stop. At the task force office, Investigator Matt Isley reportedly fielded a telephone call from an anonymous person claiming to have seen a large amount of marijuana inside Baker's residence in the previous few days. The caller alleged Baker and his niece just "got back into town with a shipment of more marijuana." In response to the call, Investigator Isley went to surveil the Ricker Street house. He saw Baker enter and leave about twenty minutes later in a blue Buick. But Isley did not provide any details corroborating the anonymous tip. And nobody on the task force knew or tried to find the identity of the caller.

"An anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." *Florida v. J.L.*, 529 U.S. 266, 270 (2000) (noting in some situations a suitably corroborated anonymous tip may exhibit "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop" (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990))). Baker argues no such indicia of reliability appear in his case. The anonymous caller was reporting criminal behavior concealed from public view. Neither the State nor the majority even try to distinguish this situation from *J.L*, instead falling back on the totality-of-the-circumstances principle. The uncorroborated, anonymous tip received by

Investigator Isley is not reliable enough to bolster a reasonable-suspicion finding, even viewed along with the other evidence.

The fourth incident quickly followed the initial surveillance. Investigators Girsch and Isley tailed Baker in separate unmarked cars. Girsch saw Baker turn into an alley. Girsch testified:

> As I passed by the alley I glanced over, saw the Buick stopped talking to one or two individuals in the alley. I continued past and then Investigator Isley was probably right behind me or close to and he soon radioed that he observed a hand-to-hand transaction with the subject driving the blue Buick and then the people standing outside the vehicle.

Investigator Isley testified that as he was driving by he could see "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."

At the suppression hearing, the prosecutor asked Investigator Isley if what he saw was consistent with a "hand-to-hand narcotics transaction." Isley answered "yes." He testified in his line of work he saw narcotics transactions occur hand to hand "multiple times a day." Or depending on what the task-force officers are doing—"almost daily probably." On cross examination, Isley acknowledged he could not see any object—neither drugs nor cash—change hands. Isley agreed it could have "quite possibly" been just a handshake.

The majority credits Investigator Isley's experience in witnessing hand-to-hand narcotics transactions as the lynchpin for upholding the investigatory stop. But as the saying goes, "it is tempting, if the only tool you have is a hammer, to

treat everything as if it were a nail."[6] In the seconds Isley had to glance down the alley as he drove by, he did not actually see a hand-to-hand exchange. Isley asserts someone reached into the passenger window of Baker's car and then placed his hand in his pocket. Isley assumed he witnessed a drug exchange because he alleges he sees such interactions "almost daily" or even "multiple times a day."

The investigators did not testify the alley was a known drug-trafficking area. And even if they had, "[t]he fact that an exchange of an item occurs in a drug-prone location and that it is observed by an experienced narcotics officer does not, without more, give rise to probable cause or reasonable suspicion." *People v. Reeves*, No. 2015BX025259, 2018 WL 560239, at *3 (N.Y. Crim. Ct. Jan. 26, 2018); *see also People v. Ocampo*, 879 N.E.2d 353, 363–64 (Ill. App. 2d Dist. 2007) (holding defendant's observed actions, including taking something from his pocket during short conversation with driver, "even when taken together, are simply far too common, without more, to give rise to a reasonable suspicion versus only a hunch of criminal activity"). The State relies on *State v. Roberts*, No. 09-0590, 2010 WL 1050078, at *4 (Iowa Ct. App. Mar. 24, 2010), where our court said it was "not of consequence" that a detective "did not see drugs as a part of the hand to hand exchange." But *Roberts* involved a controlled drug buy just before the hand-to-hand exchange. *See id.* No similar facts accompanied Baker's encounter in the alley.

[6] This quote is originally attributed to Abraham Maslow, *Toward a Psychology of Being* (1968).

After Baker left the alley, the task-force investigators arranged for a uniformed officer to pull him over. Officer Bose stopped Baker based on the four incidents outlined above. Even amassed and aggrandized, those circumstances are too unsubstantiated to provide reasonable suspicion to believe evidence of criminal activity could be found on Baker or in his Buick at the time of the stop. Granted, reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). But police officers must be able to point to "specific and articulable facts" measured against an objective standard to justify their "particular intrusion" upon a citizen. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). In other words, we ask if the facts available to the officer at the moment of seizure would warrant a reasonably cautious person to believe the officer took appropriate action.

In Baker's case, a reasonably cautious person would have expected investigators to justify their seizure of Baker with more confirmed suspicions. The investigators based their stop on (1) a seven-month old phone call from Nevada, (2) a week-old, perceived, momentary avoidance of an undercover officer, (3) an anonymous call—unrelated to any surrounding circumstances, and lacking any corroboration, and (4) an alleged "hand-to-hand" transaction where the officer could see neither objects nor hands. Even packaged together, these four facts do not rise to reasonable suspicion.

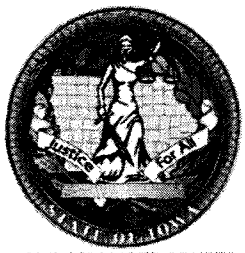
Consideration of the totality of the circumstances allows courts to view seemingly innocuous facts in light of surrounding circumstances, allowing insight into why a fact may not be so innocuous after all. For example—a parked car may,

at first glance, seem innocuous. But the totality of the circumstances may illuminate the reasonable suspicion: the parked car was in a non-residential area with no legitimate attractions at 12:40 a.m., a time when all surrounding businesses were closed, in an area previously burglarized on several occasions—and just when the officer begins approaching the car, the parked car pulls away. *See State v. Richardson*, 501 N.W.2d 495, 497 (Iowa 1993). While any one of those facts alone seems harmless, viewed together, they give rise to a reasonable suspicion criminal activity is afoot. *See id.* Courts may consider the totality of the circumstances to reach the sum of reasonable suspicion. But here, the separate facts contribute nothing to the whole. We cannot consider the totality of the circumstances when the total is zero.

Even if we could assume reasonable suspicion existed that Baker was involved in drug dealing, the State did not establish the purpose of stopping his car. Investigatory stops allow law enforcement to resolve ambiguities regarding potential criminal activity. *State v. Tyler*, 830 N.W.2d 288, 298 (Iowa 2013) (quoting 4 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 9.3(a) (5th ed. 2012)). "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." *Id.* (quoting *LaFave*, *supra*, at § 9.3(a)). Here we must ask: what ambiguity did Officer Bose aim to resolve in stopping Baker? If Investigator Isley believed he witnessed a "hand-to-hand" drug transaction in the alley, what did he hope to learn from a limited seizure of Baker based on reasonable suspicion? The anonymous tipster alleged Baker had drugs in his home but spoke nothing of his vehicle. So even if credible, the tip did not illuminate

expected fruits of the investigatory stop. Officers did not surveil Baker's residence long enough to detect any pattern of activity. Additionally, if investigators believed Baker distributed marijuana to a buyer during the "hand-to-hand" transaction—without information suggesting Baker possessed more drugs in his vehicle and intended to conduct more drug deals—an investigatory stop served no purpose, and thus cannot be valid under the Fourth Amendment or article I, section 8.

Because the investigatory stop was unsupported by reasonable suspicion and not conducted for a legitimate purpose, any evidence Baker allegedly discarded marijuana was a fruit of the illegal stop and unavailable for the search warrant application. *See State v. McGrane*, 733 N.W.2d 671, 681 (Iowa 2007). Without that evidence, the State lacked probable cause for the search warrant. The remaining information in the warrant application did not rise to the level of probable cause to search. The district court should have granted the motion to suppress.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
17-0622	State v. Baker

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