

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

**STATE OF IOWA,
Plaintiff-Appellee**

vs.

**JASMAINE R. WARREN,
Defendant-Appellant.**

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

**DEFENDANT/APPELLANT'S REQUEST FOR FURTHER REVIEW
OF MAY 13, 2020 COURT OF APPEALS' DECISION**

Gina Messamer
Parrish Kruidenier Dunn Boles Gribble
Gentry Brown Bergmann & Messamer L.L.P.
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: gmessamer@parrishlaw.com
ATTORNEY FOR DEFENDANT/APPELLANT

QUESTION PRESENTED FOR FURTHER REVIEW

Whether trial counsel was ineffective for failing to seek suppression of the illegal seizure of Ms. Warren, when she committed nothing more than a parking violation and it was unnecessary for law enforcement to seize her or extend the encounter by asking for identification, registration, and proof of insurance.

TABLE OF CONTENTS

QUESTION PRESENTED FOR FURTHER REVIEW 2

TABLE OF CONTENTS 3

STATEMENT SUPPORTING FURTHER REVIEW 4

BRIEF IN SUPPORT OF FURTHER REVIEW 5

FACTS..... 6

ARGUMENT 8

 I. Ms. Warren was Illegally Seized in Violation of the Fourth Amendment to the U.S. Constitution and Article I, § 8 of the Iowa Constitution..... 8

 A. Ms. Warren was, in fact, seized by the police. 9

 B. The seizure was not justified to further an investigation into the parking violation. 10

 C. Even if the seizure was appropriate to issue the parking ticket, further detention was unreasonable because it exceeded the scope of investigation necessary to resolve the parking violation. 14

 D. The majority’s holding has enormous potential for abuse. 15

 II. Counsel was Ineffective for Failing to File a Motion to Suppress..... 18

 A. Duty 20

 B. Prejudice..... 21

CONCLUSION 22

ORAL ARGUMENT NOTICE 22

CERTIFICATE OF COMPLIANCE AND SERVICE 23

COURT OF APPEALS' OPINION..... 24

STATEMENT SUPPORTING FURTHER REVIEW

This case divided the Court of Appeals. Eight judges participated, with five judges who ruled against Ms. Warren, one judge who would not have reached the issue, and two judges who would have decided in Ms. Warren's favor. As recognized by both the majority and dissent, this case presents a constitutional issue of first impression: whether a police officer who has observed a parking violation has occurred can seize an individual for the purpose of investigation. This is a substantial question of constitutional law that should be settled by the Iowa Supreme Court. Iowa R. App. P. 6.1103(b)(2).

The Court of Appeals' decision lessens the constitutional rule that the scope of a traffic stop shall not be extended beyond its purposes, *State v. Coleman*, 890 N.W.2d 284 (Iowa 2017); and increases the circumstances under which the state can intrude upon its citizens' privacy. As the body charged with protecting and interpreting the state's Constitution, the Iowa Supreme Court should take this case. *State v. Baldon*, 829 N.W.2d 785, 790 (Iowa 2013).

BRIEF IN SUPPORT OF FURTHER REVIEW

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

Count I: Operating a Motor Vehicle While Intoxicated, Second Offense in violation of Iowa Code § 321J.2

Count II: Driving While License was Denied or Revoked in violation of Iowa Code §§ 321J.2 and 321J.21.

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

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

Ms. Warren appealed and the Court of Appeals issued an opinion on May 13, 2020, reversing the conviction on Count I and

remanding to the District Court for a new trial. (Opinion at 27). However, the conviction on Count II (which is impacted by the issue raised in this further review application) remains in place. *Id.*

FACTS

On May 4, 2018, Des Moines Police Officer Engle observed Ms. Warren, a black woman, turn southbound onto Sixth Avenue and quickly accelerate. (Trans. at 10). Officer Engle performed a U-turn and followed Ms. Warren when she turned East onto Corning Ave. (Trans. at 10). Ms. Warren pulled her vehicle halfway into a driveway—leaving the rear portion of the vehicle sticking out into the street—exited her car and walked away from the vehicle towards a residence. (Trans. at 10–11).

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

Officer Engle stopped Ms. Warren from continuing towards the residence and asked for her license, registration, and proof of

insurance. (Trans. 11:8–11). Ms. Warren returned to her vehicle to get her identification card and at that point Officer Engle smelled the odor of marijuana coming from her vehicle. (Trans. 11:13).

Officer Engle continued to question Ms. Warren, eliciting from her that she had smoked marijuana earlier that day. (Trans. 12). Ms. Warren declined to take field sobriety tests. (Trans. 13:24). Ms. Warren also declined to take a urine test. (Trans. 16:9). Officer Engle testified that he believed Ms. Warren was under the influence. (Trans 15:8). Officer Engle ran Ms. Warren’s license and determined that it was revoked. (Trans. 14:3–4).

The district court found Ms. Warren guilty as charged. However, the district court’s general verdict did not specify whether it found Ms. Warren guilty of OWI under the impairment theory or the per se theory, or both. (11/14/18 Ruling at 4; Appx 9).

Ms. Warren appealed two issues:

- I. Insufficient evidence existed to sustain Ms. Warren’s OWI conviction.
- II. Trial Counsel was ineffective for failing to seek suppression based on the illegal seizure of Ms. Warren.

(Appellant’s Br. 5-6).

The Court of Appeals determined that Ms. Warren's conviction must be reversed and remanded to the District Court for a new trial on the OWI Count (Iowa Ct. App. Op. at 27).

On the second issue, the majority reached the merits of Ms. Warren's ineffective assistance of counsel claim and considered whether law enforcement violated Ms. Warren's rights by seizing her pursuant to a parking violation and then prolonging the seizure for longer than necessary to resolve the parking violation. *Id.* at 6-27. The majority concluded that a seizure for a completed parking violation was no different from a seizure for a traffic violation, and that the officers therefore acted reasonably under the Fourth Amendment and Article I, § 8. *Id.* at 27. Two dissenting judges, however, concluded that the officers acted unreasonably in seizing Ms. Warren because it was unnecessary for the officers to seize her to enforce the parking violation. *Id.* at 39. For the reasons that follow, the dissenters were correct and the Iowa Supreme Court should accept the case on further review.

ARGUMENT

- I. Ms. Warren was Illegally Seized in Violation of the Fourth Amendment to the U.S. Constitution and Article I, § 8 of the Iowa Constitution.**

The Iowa Constitution's protections against unreasonable searches and seizures do not support seizing an individual based solely on a completed parking violation under these circumstances. Both the U.S. and the Iowa Constitutions provide protections against law enforcement unreasonably extending such a seizure beyond its stated purpose. In short, the exception to the warrant requirement created by the Court of Appeals is not "carefully drawn," *State v. Lewis*, 675 N.W.2d 516, 522 (Iowa 2004), resulting in a rule that is so unworkable as to be per se unreasonable. The evidence obtained from seizing Ms. Warren over a parking violation should have been suppressed.

A. Ms. Warren was, in fact, seized by the police.

The evidence introduced at Ms. Warren's trial demonstrated that she was subject to a *seizure* for her parking violation. Two police cars parked behind her vehicle with their lights flashing, and she was ordered to stop and not go inside the house. (Trans. 11). *See, e.g. State v. Wilkes*, 756 N.W.2d 838, 842-43 (Iowa 2008) ("Factors that might suggest a seizure include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice

indicating that compliance with the officer's request might be compelled."). As a result, her encounter with law enforcement was not voluntary and both the Fourth Amendment and Article I, § 8 are implicated by law enforcements actions.

B. The seizure was not justified to further an investigation into the parking violation.

The majority held that the seizure and subsequent investigation was justified to effectuate the issuance of the parking citation. This does not comport with reality. "[P]olice officers typically enforce parking violations by applying a ticket to the parked car." *State v. Holmes*, 569 N.W.2d 181, 185 (Minn. 1997). To issue a parking citation, it is not necessary to know who owned the car, or whether they were permitted to drive the car. Iowa Code § 321.484(1). Further, a parking violation simply is not as serious as a traffic violation. The amount of intrusion into an individual's right to privacy under Article I, § 8 should be scaled to reflect the seriousness of the violation, as recognized by the *Holmes* Court in Minnesota:

A police officer who has probable cause to believe that a person has committed a parking violation can stop the person only if the stop is necessary to enforce the violation, for example, if a person is attempting to drive off with an illegally parked car before the officer can issue the ticket. We conclude, as did the trial court, that the officer

did not stop Holmes of the purpose of enforcing the known violation.

Id. at 185 (citing U.S. Const. Amend. IV).

In *Holmes*, law enforcements' stated basis for the stop was a completed parking violation, and the defendant was found in the vicinity of the car. *Id.* at 182-85. Law enforcement proceeded to ask questions and look inside the car, where she saw a firearm. However, the questioning and inspection of the vehicle was not necessary to issue the traffic ticket. *Id.* at 185. The defendant wasn't attempting to drive the vehicle away from the scene before a ticket could be issued. *Id.* Under these circumstances, law enforcement was on a fishing expedition rather than legitimately issuing a citation for the observed parking violation.

The *Holmes* case is not an aberration – other cases to address the permissible scope of seizure and investigation into a parking violation seizure have found that the parking violation on its own is not sufficient to justify further investigation or even to enforce the parking ticket. In *State v. Medlar*, 638 N.E.2d 1105, 1107 (Ohio Ct. App. 1994), the Ohio Court of Appeals held that law enforcement could not lie in wait behind an illegally parked car for the driver to

return so that a ticket could be issued, because it simply was not necessary to personally provide the ticket to the driver. The *Medlar* court's analysis of the police officer's actions is instructive, because it mirrors what happened in Ms. Warren's case:

It seems [Officer] Jandecka had an agenda of his own, using the parking violation as a ruse to approach the driver, search his person for evidence of intoxication, such as the smell of alcohol, bloodshot eyes, slurred speech, *etc.*, and seize his person to conduct a field sobriety and blood-alcohol test. Since Jandecka deviated from usual police procedure, we conclude Medlar's arrest was pretextual and, therefore, exceeded the bounds of *Terry, supra*. *Terry* deals with reasonable investigatory stops based on articulable facts. In the case *sub judice* neither of these elements is present. The parking violation had been completed when Jandecka saw the truck parked in the fire lane. At this point Jandecka should have placed the citation on the vehicle. There was nothing further to investigate. The subsequent stop of Medlar's vehicle was a pretext since it was not based upon articulable facts, *e.g.*, erratic driving, *etc.* or other articulable facts. The pretextual search and seizure were definitely an invasion of privacy.

Id. at 1109-10.

Some of the cases permitting seizures based on parking violations ensure that the scope of the seizure is limited. In *United States v. Copeland*, 321 F.3d 582 (6th Cir. 2003), law enforcement's subsequent traffic stop of a vehicle based on a parking violation was reasonable because the vehicle attempted to leave before the parking

citation could be issued. Because the defendants were stopped “one mile from their parked location” and the officers “immediately circled the block to further investigate” after observing the parked car (during which time the defendants attempted to leave), the stop of the vehicle was reasonably necessary to issue the parking ticket. *Id.* at 594-95. The same is true of many of the cases cited by the majority in upholding the seizure of Ms. Warren – they involve suspects fleeing or attempting to evade the issuance of a parking ticket. In *State v. Nevins*, No. 15-1968, 1997-WL 213398, at *1 (Ohio Ct. App. May 9, 1997), the driver sped off as law enforcement stopped to issue the parking citation. In *Flores v. City of Palacios*, 381 F.3d 391, 393 (5th Cir. 2004), the driver of the car drove away and was arrested for evading detention.

When law enforcement seized Ms. Warren, they had evidence only of a completed parking violation. Unlike in *Copeland*, *Nevins*, or *Flores*, it was not necessary to seize Ms. Warrant to investigate the violation or to issue the ticket, because she was not fleeing with the car. Like anyone who has recently parked a car, she was merely walking away from it to her destination. Ms. Warren’s case is more like *Holmes* and *Medlar*: law enforcement was not “investigating” a

parking violation, they used the parking violation as a pretext, to further an agenda to discover evidence of greater crimes. Ms. Warren was seized and investigated absent any need to do so by law enforcement. The Iowa Supreme Court should not uphold this practice.

C. Even if the seizure was appropriate to issue the parking ticket, further detention was unreasonable because it exceeded the scope of investigation necessary to resolve the parking violation.

The majority upheld the seizure of Ms. Warren as a reasonable means of issuing the citation for the parking violation. Putting aside the fact that seizing her was not necessary to issue the citation, law enforcement nevertheless unreasonably extended the stop by asking Ms. Warren for her license and registration.

“[A]bsent reasonable suspicion of other criminal activity, the officer’s mission is to address the traffic infraction and that mission may take no longer than is necessary.” *State v. Salcedo*, 935 N.W.2d 572, 580 (Iowa 2019) (citing *Rodriguez*, 575 U.S. at 354). Iowa law requires law enforcement to allow a motorist to leave “when the reason for a traffic stop is resolved and there is no other basis for

reasonable suspicion.” *Brown*, 930 N.W.2d at 849 (citing *Coleman*, 890 N.W.2d at 301).

Far less information is necessary to issue a parking citation than a traffic citation. The owner of the vehicle is liable for the parking violation. Iowa Code § 321.484(1) (“It is unlawful for the owner, or any other person, employing or otherwise directing the driver of any vehicle to require or knowingly to permit the operation of such vehicle upon a highway in any manner contrary to law.”). A ticket can typically be left attached to the vehicle, and need not be presented to the driver or owner of the vehicle. *City of Des Moines v. Iowa Dist. Court for Polk County*, 431 N.W.2d 764, 767 (Iowa 1988). The vehicle was not going anywhere. Instead of choosing the least restrictive means for enforcing the vehicle violation, the officers – who had zeroed in on Ms. Warren well before she had parked illegally, despite seeing no traffic violations – chose to question her extensively about her activities, and asked her to retrieve paperwork from her car. In short, the officers took advantage of a parking violation to further a separate agenda, and conduct a second investigation.

D. The majority’s holding has enormous potential for abuse.

The majority's holding would allow an officer to seize virtually anyone within the vicinity of an illegally parked car. One can imagine the holding being applied to a passenger who returns to a parked car to stow shopping bags, or someone who has overstayed their parking meter by a few minutes while picking up carryout, or a struggling first-time parallel parker. Given what we know about racial policing in Iowa,¹ this is inherently problematic.

In *Coleman*, the Iowa Supreme Court warned against creating exceptions to the warrant requirement which permit discretion-less policing of Black Iowans:

[A]s we have noted previously, unlimited discretion to stop vehicles on the open road may give rise to allegations

¹ In *State v. Plain*, 930 N.W.2d 293 (Iowa 2019), the Iowa Supreme Court succinctly summarized Iowa's problematic racial enforcement of criminal law: "Iowa Ranks worst in the nation for the percentage of our prison population that is African-American (more than 25%), while African-Americans represent just 3.3% of the state's population. Kyle Munson, *Black-White Disparities Persist in Iowa*, Des Moines Register, <http://www.desmoinesregister.com/story/news/local/kyle-munson/2015/07/12/black-iowa-statistics-economics-incarceration/30059517> (last updated July 12, 2015). Troubling, too, is the fact that African-Americans in Iowa are ten times more likely to be arrested than persons of other races; and Iowa ranks third worst in the nation for our incarceration rate for black men (9.4%). *Id.*".

of racial discrimination, characterized by the descriptive phrase “driving while black.” See *State v. Lyon*, 862 N.W.2d 391, 397 (Iowa 2015); see also *State v. Harrison*, 846 N.W.2d 362, 371-72 (Iowa 2014) (Appel, J., dissenting); *Pals*, 805 N.W.2d at 772 n.2; David A Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic stops*, 87 J. Crim. L. & Criminology 544, 546-47 (1997).

As noted in *Pals*, traffic stops have emerged as a major issue in search and seizure law. 805 N.W.2d at 772-73. The use of minor traffic violations as a springboard into consent searches has prompted charges of abuse and racial profiling. *Id.* at 772: see also Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 235-36 (1989).

Coleman, 890 N.W.2d at 287. As a result, when approaching exceptions to the warrant requirement, the Supreme Court approaches the issue with

due regard for the legitimate needs of law enforcement, but with a recognition that our constitutional limitations on searches and seizures by law enforcement protect fundamental values of liberty and human dignity and are a bulwark against arbitrary governmental intrusions into the lives of citizens.

805 N.W.2d at 773.

When attempting to enforce a parking violation against Ms. Warren, law enforcement had no legitimate need to detain her and question her. She was not attempting to evade enforcement of the parking ticket, or even to evade the police. She had reached her

destination and was walking towards a house. The police had a choice between putting the ticket on her windshield or detaining her until they found some reason to arrest her. Permitting this sort of discretion-less enforcement of parking violations will lead to one thing: a spike in arrests for parking while Black. *See, e.g.* Stephen D. Hayden, “*Parking while Black*”: *Pretextual Stops, Racism, Parking, and an Alternative Approach*, 44 S. Ill. U. L.J. 105 (2019).

The majority did not approach the issue of seizures for parking violations with the respect and caution merited by the issue. At a minimum, further standards should be put in place to make sure a driver is seized only when it is actually necessary to issue the traffic citation (such as a driver fleeing with the car to prevent enforcement), and not merely because law enforcement is seeking evidence of greater crimes.

II. Counsel was Ineffective for Failing to File a Motion to Suppress.

A criminal defendant’s right to be represented by counsel and the right to effective representation is based in the Sixth Amendment to the United States Constitution and article I, § 10 of the Iowa Constitution. *State v. Dudley*, 766 N.W.2d 606, 613 (Iowa 2009). A

defendant may raise a claim of ineffective assistance of trial counsel on direct appeal of a criminal conviction if reasonable grounds exist to support the claim and the record is adequate to address the claim.² *State v. Brubaker*, 805 N.W.2d 164, 170 (Iowa 2011). “Failure of trial counsel to preserve error at trial can support an ineffective-assistance-of-counsel claim.” *Id.* Claims of ineffective assistance of counsel are reviewed de novo. *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004).

Ineffective assistance of counsel is demonstrated when (1) trial counsel fails to perform an essential duty, and (2) counsel’s errors prejudiced the applicant. *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). The applicant must satisfy both elements by a preponderance of the

² Ms. Warren’s conviction became final when the judgment and sentence were entered on February 13, 2019. As a result, and as recognized by the Iowa Court of Appeals’ Opinion, the 2019 amendments to Iowa Code § 814.7, providing that a defendant may no longer bring an ineffective assistance of counsel claim on direct appeal, do not apply to his case. *State v. Macke*, 933 N.W.2d 226, 235 (Iowa 2019).

evidence to demonstrate a constitutional violation. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

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

A. Duty

Trial counsel rendered ineffective assistance of counsel by failing to argue for suppression of evidence under Iowa Constitution article I, § 8, and the Fourth Amendment of the federal constitution based on law enforcement's unreasonable seizure of Ms. Warren without reasonable suspicion and the subsequent unlawful extension of the seizure.

Trial counsel has a duty to bring a suppression issue if it was “worth raising.” See *State v. Brown*, 930 N.W.2d 840, 855 (Iowa 2019); *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982) (counsel must exercise reasonable diligence in finding error, including consulting cases from other jurisdictions). Trial counsel breached his duty by failing to argue law enforcement infringed on Ms. Warren’s rights under article I, § 8 of the Iowa Constitution and the Fourth and Fourteen Amendment to the U.S. Constitution when they seized her without sufficient probable cause and unlawfully extended the seizure beyond the stated purpose for the stop, as discussed above. The majority erred in finding that the motion to suppress would have been meritless in light of the arguments above.

B. Prejudice

Had trial counsel secured suppression based on the unconstitutional seizure of Ms. Warren, the outcome of trial likely would have been different. The evidence against Ms. Warren was Officer Engle’s observations of her behavior and the statements Ms. Warren made to him. Had trial counsel filed a motion to suppress, that evidence would have been excluded and there would have been no case against Ms. Warren. Ms. Warren therefore was prejudiced by

her trial counsel's failure. She has established a violation of her Sixth Amendment and article I, § 10 right to effective assistance of counsel and her conviction must be reversed.

CONCLUSION

The majority's decision creates dangerous precedent that increases police discretion to seize Iowans over minor parking violations, when seizure isn't reasonably necessary. The Iowa Supreme Court should grant further review as to Issue II of the appellant's brief, hold that law enforcement cannot seize the driver of a car for a mere parking violation without more, and reverse Ms. Warren's conviction for driving while barred.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

PARRISH KRUIDENIER DUNN BOLES GRIBBLE GENTRY BROWN & BERGMANN L.L.P.

By: /S/ Gina Messamer

Gina Messamer AT0011823

2910 Grand Avenue

Des Moines, Iowa 50312

Telephone: (515) 284-5737

Facsimile: (515) 284-1704

Email: gmessamer@parrishlaw.com

ATTORNEY FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) and 6.1103(4) (no more than 5,600 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1) and 6.1103(4), which are the table of contents, table of authorities, attached documents, and certificates. This brief contains 3,834 words.

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

I hereby certify that on May 22, 2020, I did serve Defendant-Appellant's Application for Further Review on Appellant by emailing one copy to:

Jasmine Warren

Defendant-Appellant

 /S/ Gina Messamer

Dated: May 22, 2020

Gina Messamer

IN THE COURT OF APPEALS OF IOWA

No. 19-0267
Filed May 13, 2020

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASMAINE R. WARREN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Jasmaine Warren appeals her criminal convictions following a bench trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Gina Messamer of Parrish Kruidenier Dunn Boles Gribble Gentry Brown &
Bergmann L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Israel Kodiaga, Assistant Attorney
General, for appellee.

Considered by Bower, C.J., and Vaitheswaran, Doyle, Tabor, Mullins,
Greer, Schumacher, and Ahlers, JJ.

MULLINS, Judge.

Jasmine Warren appeals following her convictions of second-offense operating while intoxicated (OWI) and driving with a revoked license. On appeal, Warren challenges the sufficiency of the evidence supporting the OWI conviction and argues her counsel rendered ineffective assistance in failing to seek suppression of evidence on the basis that she was subjected to an unconstitutional seizure.

I. Background Facts and Proceedings

At approximately 2:30 a.m. on May 4, 2018, Officer Jeremy Engle of the Des Moines Police Department was on routine patrol when he observed a vehicle, later determined to be driven by Warren, “to be accelerating at a high rate of speed.” Engle turned around and followed the vehicle. Thereafter, Warren illegally parked her vehicle, halfway in the roadway and halfway in a driveway of a residence. Another officer in a separate police cruiser activated his overhead lights and pulled in behind Warren. Engle pulled in behind that officer and made contact with Warren, advising she could not park her vehicle where she did.¹ Engle testified:

[Warren] seemed like she wanted to get out of the vehicle and get inside quickly. I made contact with her and I advised her that she could not park her vehicle that way. And I asked her if she had her license, registration, and proof of insurance. She walked to her car and grabbed her Iowa ID.

At that time I smelled a strong odor of marijuana emitting from her vehicle. I did observe that her license said “identification only.” I asked her what the status was and she advised me it was suspended.

¹ Most of Engle’s encounter with Warren was captured by his body camera. Video footage from the camera was admitted as evidence at trial.

She never provided a registration or insurance information. Upon questioning from Engle as to why the vehicle smelled of marijuana, Warren reported she had smoked earlier at work. She later admitted to consuming alcohol on the date in question as well. Engle confirmed Warren's license was revoked. Warren was arrested and cited for second-offense OWI, driving with a revoked license, illegal parking, and failure to provide proof of liability insurance. Warren was formally charged by trial information with second-offense OWI and driving while revoked.² Following a bench trial, she was found guilty as charged. Warren appealed following the imposition of sentence.

II. Analysis

On appeal, Warren challenges the sufficiency of the evidence supporting the OWI conviction and argues her counsel rendered ineffective assistance in failing to seek suppression of evidence on the basis that she was subjected to an unconstitutional seizure.

A. Sufficiency of the Evidence

As to the sufficiency-of-the-evidence claim, the State proceeded on two theories—that Warren operated a motor vehicle while either “under the influence of an alcoholic beverage or other drug or a combination of such substances” or “any amount of a controlled substance [was] present in [her] person, as measured in the person's blood or urine.” Iowa Code § 321J.2(1)(a), (c) (2018). The court found Warren guilty of OWI but did not specify which theory its verdict rested upon, thus amounting to a general verdict. Warren argues the evidence was insufficient

² The record indicates she was separately charged with the other crimes in simple-misdemeanor cases.

to support the latter theory and her conviction must therefore be reversed. See, e.g., *State v. Myers*, 924 N.W.2d 823, 827 (Iowa 2019) (“[I]f the pronouncement by the district court is considered a general verdict based on a crime with multiple bases for guilt, substantial evidence must support each alternative under the statute.”).

The State agrees the evidence was insufficient under the latter theory and the court rendered a general verdict.³ “Nevertheless, the State submits that reversal of Warren’s conviction on such grounds is forbidden by the newly enacted Iowa Code section 814.28,” which took effect July 1, 2019. See 2019 Iowa Acts ch. 140, § 32. That provision provides:

When the prosecution relies on multiple or alternative theories to prove the commission of a public offense, a jury may return a general verdict. If the jury returns a general verdict, an appellate court shall not set aside or reverse such a verdict on the basis of a defective or insufficient theory if one or more of the theories presented and described in the complaint, information, indictment, or jury instruction is sufficient to sustain the verdict on at least one count.

Iowa Code § 814.28 (2019).

Judgment of conviction was entered and the sentence was imposed prior to the statute’s effective date. The State submits the statute is remedial in nature and is therefore entitled to retroactive application. First, the State argues the language of the statute denotes a legislative intent for retroactive application, highlighting the “appellate court” language in the statute. However, our supreme

³ The district court’s analysis and verdict first recited the three alternatives under which the State had charged Warren. The State’s evidence at trial attempted to support two of the alternatives, but the court did not analyze each one separately or render a verdict on each. As noted above, the State concedes it was a general verdict.

court has rejected a similar notion that recently enacted statutes, Iowa Code sections 814.6 and 814.7, which foreclose a right of appeal when a defendant pleads guilty except in certain circumstances and forbid appellate courts from considering ineffective-assistance-of-counsel claims on direct appeal, denote a legislative intent for retroactive treatment. See *State v. Macke*, 933 N.W.2d 226, 235 (Iowa 2019) (“We conclude the absence of retroactivity language in sections 814.6 and 814.7 means those provisions apply only prospectively and do not apply to cases pending on July 1, 2019.”).⁴ This court has similarly rejected the notion that recently enacted legislation, Iowa Code sections 814.6A(1) and 822.3A(1), which prevent any Iowa court, including appellate courts, from considering pro se documents when a defendant is currently represented by counsel and prohibit the filing and consideration of pro se documents in proceedings under chapter 822, indicate a legislative intent for retroactive application. See, e.g., *State v. Banks*, No. 18-1337, 2020 WL 110297, at *2 n.2 (Iowa Ct. App. Jan. 9, 2020); *Campbell v. State*, No. 18-1052, 2020 WL 105086, at *1 n.1 (Iowa Ct. App. Jan. 9, 2020); *State v. Banks*, No. 18-0721, 2020 WL 105078, at *1 n.1 (Iowa Ct. App. Jan. 9, 2020); *State v. O’Connor*, No. 18-0376, 2020 WL 109509, at *3 n.1 (Iowa Ct. App. Jan. 9, 2020); *State v. Syperda*, No. 18-1471, 2019 WL 6893791, at *12 (Iowa Ct. App. Dec. 18, 2019); *Daniels v. State*, No. 18-0672, 2019 WL 6894225, at *1 n.2. (Iowa Ct. App. Dec. 18, 2019); *State v. Kehoe*, No. 18-0222, 2019 WL 6893771,

⁴ The State argues we are unable to consider Warren’s claim of ineffective assistance of counsel, discussed below. *Macke* states otherwise. See 933 N.W.2d at 232.

at *1 n.1 (Iowa Ct. App. Dec. 18, 2019); *State v. Purk*, No. 18-0208, 2019 WL 5790875, at *7 n.8 (Iowa Ct. App. Nov. 6, 2019).

Next, the State argues the statute provides a new remedy for the evil of having convictions vacated when one alternative for conviction is invalid while there is another alternative supported by sufficient evidence. However, the statute also eliminates a remedy to defendants and is thus substantive and therefore not entitled to retroactive treatment. See *Macke*, 933 N.W.2d at 232 (“[W]e have refused to apply a statute retrospectively when the statute eliminates or limits a remedy.” (quoting *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250, 267 (Iowa 1985))). Even if the statute was remedial or procedural in nature, the general rule, as recently reaffirmed by our supreme court, is that “unless the legislature clearly indicates otherwise, ‘statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered.’” *Id.* at 228 (quoting *James v. State*, 479 N.W.2d 287, 290 (Iowa 1991)). Section 814.28 lacks language clearly indicating a legislative intent for retroactivity. The statute did not exist at the time judgment of conviction was entered against Warren.

Applying the controlling statutes and court precedent in effect at the time of judgment, the court’s general verdict and the unsupported theory for guilt require reversal of Warren’s OWI conviction and a remand for a new trial on that count. See, e.g., *State v. Tyler*, 873 N.W.2d 741, 754 (Iowa 2016).

B. Ineffective Assistance of Counsel

We turn to Warren’s claim her counsel was ineffective in failing to move for suppression of evidence on the ground that she was illegally seized in violation of

her constitutional rights. Specifically, she argues counsel should have moved for suppression on the basis that she was seized absent reasonable suspicion and the seizure was impermissibly prolonged absent ongoing reasonable suspicion.

1. *To Answer or Not*

Given our remand for a new trial on count one, the dissent asserts we should not address the ineffective-assistance-of-counsel issue, and we should not address the suppression issue on this direct appeal. For the reasons stated below, we believe it is appropriate and preferred that we address the ineffective-assistance issue Warren raised.

We begin our analysis with reviewing a statute in effect at the time of entry of judgment that directed appellate courts: “If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination under chapter 822.” Iowa Code § 814.7(3) (2018).⁵ Our supreme court has emphasized:

[S]ection 814.7(3) clearly gives the appellate court only two choices when an ineffective-assistance claim is raised on direct appeal: (1) “decide the record is adequate to decide the claim,” or (2) “choose

⁵ As touched on above, effective July 1, 2019, section 814.7 was amended to provide:

An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes, and the claim shall not be decided on direct appeal from the criminal proceedings.

2019 Iowa Acts ch. 140, § 31. The amendment does “not apply to a direct appeal from a judgment and sentence entered before July 1, 2019.” *Macke*, 933 N.W.2d at 228.

to preserve the claim for determination under chapter 822.” Iowa Code § 814.7(3). . . .

. . . . If the defendant requests that the court decide the claim on direct appeal, it is for the court to determine whether the record is adequate and, if so, to resolve the claim. If, however, the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-relief proceeding, regardless of the court’s view of the potential viability of the claim.

State v. Johnson, 784 N.W.2d 192, 198 (Iowa 2010). Our court has followed that procedure. See, e.g., *State v. Hollie*, 854 N.W.2d 695, 698–99 (Iowa Ct. App. 2013) (concluding on direct appeal counsel was ineffective in failing to timely file a motion to suppress a vehicle stop involving an alleged registration violation per 321.37 (a scheduled violation) when defendant had a temporary registration card displayed and the officer’s sole reason for stopping her was “a sweeping suspicion or hunch of criminal activity on the part of people in general”).

There are occasions in which our appellate courts choose to not address an issue that has been properly presented—if a ruling is not necessary for disposition of the appeal or if the issue could be adequately or more appropriately addressed by a lower court on remand. This has happened in the context of ineffective-assistance-of-counsel claims on direct appeal. In the case of *State v. Pals*, the defendant was convicted of a single charge of possession of a controlled substance and appealed to challenge the propriety of the district court ruling denying his motion to suppress. 805 N.W.2d 767, 769 (Iowa 2011). He also lodged a claim his counsel was ineffective for failing to file a motion to dismiss on speedy-trial grounds. *Id.* at 771 n.1. On appeal, the supreme court reversed the denial of the defendant’s motion to suppress and remanded for further proceedings on the ground that his consent to search was involuntary under the Iowa

Constitution. *Id.* at 783–84. The court deemed it unnecessary to consider the claim counsel was ineffective for failing to pursue dismissal on speedy-trial grounds. *Id.* at 771 & n.1 (citing *State v. Bogan*, 774 N.W.2d 676, 684 (Iowa 2009) (deciding to not address an ineffective-assistance-of-counsel claim for faulty jury instructions when reversing on other grounds and remanding for a new trial, noting the district court would have an opportunity on remand to instruct properly)). Although the court in *Pals* did not explain its reason for declining to decide the ineffective-assistance issue, it is likely because there is no deadline to file a motion to dismiss on speedy-trial grounds and the argument could be raised on remand. See Iowa R. Crim. P. 2.33(2); B. John Burns, Iowa Practice Series, Criminal Procedure § 10.2(d) (Mar. 2020 update). Furthermore, the remand would provide an opportunity for the State to develop a record concerning possible acquiescence or waiver of speedy trial, if necessary for the court to address a motion to dismiss. See *State v. Taylor*, 881 N.W.2d 72, 77–78 (Iowa 2016).

Unlike a motion to dismiss—the issue the *Pals* court chose to leave for the district court to address—which has no filing deadline, a motion to suppress—the issue we are considering—must be filed no later than forty days after arraignment, absent a showing of good cause. See Iowa R. Crim. P. 2.11(2)(c), (4). We have found no case in which a district court in a non-postconviction-relief case found good cause based on ineffective assistance of counsel to allow a defendant to file a motion to suppress after the motions deadline.⁶ We acknowledge the dissent

⁶ We have, however, found a case in which the State appealed the district court’s grant of an extension of time to file a motion to suppress and the supreme court affirmed, reasoning:

submits *State v. Jones*, No. 05-0316, 2006 WL 133009, at *2 (Iowa Ct. App. Jan. 19, 2006), as support for its proposition that timeliness and good cause may be addressed by the district court on remand, but we view the posture of that case differently. In *Jones*, the defendant filed a motion to suppress after the motions deadline. 2006 WL 133009, at *1. She argued to the district court that counsel was ineffective in failing to timely file. *Id.* The district court “rejected the claim that ineffective assistance of prior counsel could constitute good cause” for the delay. *Id.* Jones appealed, arguing ineffective assistance of counsel constituted good cause for the late filing. *Id.* Our court recognized counsel may be found ineffective for failing to timely file a motion to suppress. *Id.* at *2 (citing *State v. Hrbek*, 336 N.W.2d 431, 436 (Iowa 1983) (concluding the record was adequate on appeal and counsel was ineffective in failing to challenge voluntariness of inculpatory statements but remanding to district court to have an evidentiary hearing to decide whether such statements were voluntary)); see also *State v. Rhiner*, 352 N.W.2d

The district court considered the *untimely motion due to the multiple changes of counsel and prior counsel's failure to represent Ortiz properly*. The district court knew that if Ortiz's motion to suppress should have been granted and the court failed to consider it pretrial, any guilty verdict in Ortiz's case may have been subject to reversal on an ineffective-assistance-of-counsel claim. It is the public policy of this state that litigation should be final at the earliest possible date. To avoid additional litigation in this matter the court did the proper thing by considering the motion rather than waiting for its merits to be determined in a postconviction relief proceeding. Accordingly, the district court did not abuse its discretion in hearing the motion under the circumstances of this case.

State v. Ortiz, 766 N.W.2d 244, 250 (Iowa 2009) (emphasis added).

The record in this case shows the criminal complaints were filed May 4, 2018, a public defender was appointed on May 14 and was replaced on May 18 by trial counsel, who represented Warren through trial on October 15 and until the filing of the notice of appeal.

258, 261 (Iowa 1984) (following *Hrbek* but deciding record was adequate on direct appeal to consider the claim counsel was ineffective in failing to timely file a motion to suppress).⁷ In *Jones*, our court concluded on appeal that trial counsel was not ineffective because a motion to suppress, if it had been filed, would have had no merit. 2006 WL 133009, at *3. The *Jones* court concluded the district court had not abused its discretion in determining good cause did not excuse an untimely motion to suppress, but it did not address whether a district court could have relied on ineffective assistance of counsel to decide the good cause⁸ requirement for avoiding waiver resulting from a late motion filing. See *id.* at *2.

The dissent cites *State v. Divis*, where a panel of this court reversed a defendant's conviction of second-degree robbery and remanded for a new trial, concluding his counsel was ineffective in not arguing for exclusion of prejudicial evidence. No. 15-1123, 2016 WL 4803749, at *1 (Iowa Ct. App. Sept. 14, 2016). The panel declined to consider the defendant's alternative claim that his counsel was ineffective in failing to file a motion to suppress alleging an illegal search and seizure. *Id.* at *1, *8. The panel took "no position on Divis's ability to litigate the suppression issue on remand." *Id.* at *8 n.3. In *State v. Johnson*, cited in *Divis*, a defendant charged with first-degree robbery filed a motion to suppress, challenging

⁷ At the time we decided *Jones*, like in our present case, an appellate court had the authority to determine the record was adequate to decide an ineffective-assistance claim or preserve it for postconviction relief. See Iowa Code § 814.7(3) (2005).

⁸ "Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial under this rule shall constitute waiver thereof, but the court, for good cause shown, may grant relief from such waiver." Iowa R. Crim. P. 2.11(3); see also Iowa R. Crim. P. 2.11(4) (providing filing deadlines).

the validity of a search warrant, which was denied by the district court for lack of standing. 756 N.W.2d 682, 685 (Iowa 2008). Johnson appealed, and this court reversed and remanded for a new trial based on Johnson's challenge to a jury instruction; we did not reach Johnson's challenge to the denial of his motion to suppress. *Id.*; see *State v. Johnson*, No. 05-0558, 2006 WL 1279119, at *1, *3 (Iowa Ct. App. May 10, 2006). Following his conviction after retrial, the defendant appealed, challenging the court's denial of his motion to suppress and the constitutionality of the court's limitations on standby counsel. *Johnson*, 756 N.W.2d at 686.⁹ *Divis* and *Johnson* are examples of cases in which this court has reversed and remanded convictions without deciding suppression issues.

Thus, case law demonstrates that an appellate court can choose to not address an ineffective-assistance claim on direct appeal when there is a reversal and remand. But should we in this case? We assume this de facto judicial exception to the legislative scheme of Iowa Code section 814.7(3) has parameters. We have asserted above that exception has occurred in cases in which ruling on the issue is not necessary for disposition of the appeal or if the issue could be adequately or more appropriately addressed by a lower court on remand.

In considering whether we should decide the issue on direct appeal, our first statutory directive is to consider whether the record is adequate on appeal to decide the issue. See Iowa Code § 814.7(3). The dissent asserts the record is

⁹ On appeal from his retrial, the supreme court decided res judicata did not prevent Johnson from again challenging the denial of his motion to suppress but found the district court's failure to rule on the motion to suppress was harmless and the search warrant was valid. *Johnson*, 756 N.W.2d at 686–87.

Johnson did not raise an ineffective-assistance-of-counsel claim in either of his appeals.

not adequate because there are unanswered factual questions. The question, though, is not whether more facts could have been developed or a more thorough record could have been made. The legislature directed us to determine whether the record is adequate. On our careful review of the record, we have concluded it is, and we will address the record more completely in the analysis of the suppression issue later in this opinion.¹⁰

Notwithstanding the adequacy of the record, which is dispositive of our authority to decide the issue, and in consideration of the case law discussion above, we have considered whether the issue could be more adequately or more appropriately addressed on remand. There are two factors that weigh against leaving the issue for remand. One is the unanswered question as to what a district court is to do with an ineffective-assistance-of-counsel claim for failure to timely file a motion to suppress¹¹ on remand. The district court has no authority in a non-postconviction-relief case to apply the *Strickland* analysis necessary for an ineffective-assistance claim. See Iowa Code § 814.7(1) (“An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822, except as otherwise provided in this section.”), (3) (allowing *appellate courts* to consider ineffective-assistance claims

¹⁰ The cases that we have reviewed in which an appellate court has chosen to not decide an ineffective-assistance-of-counsel claim, and left it unresolved on a reverse and remand, do not indicate whether the record was adequate to decide the claim. If the record was not in fact adequate, and the case was reversed and remanded on other grounds, there would be no need to preserve for possible postconviction relief as there would not yet have been a final judgment.

¹¹ The forty-day deadline for filing a motion to suppress expired prior to the first trial. See Iowa R. Crim. P. 2.11(2)–(4). Failure to have filed the motion to suppress constituted a waiver of the right to file such a motion. Iowa R. Crim. P. 2.11(3).

in a direct appeal from criminal proceedings if the record is adequate). We have no case law that guides our determination—or a determination by the district court—of whether it would be an abuse of discretion for the district court to find good cause to waive the time deadline for filing a motion to suppress¹² under the circumstances of this case. We acknowledge under certain facts the district court might reasonably determine acts or omissions of counsel constitute good cause for failure to timely file a motion to suppress, but our cases show general inadvertence by counsel or client when either has the factual information necessary to form the basis for a motion to suppress does not amount to good cause. See, e.g., *State v. Ball*, 600 N.W.2d 602, 605 (Iowa 1999) (finding good cause lacking where counsel or client were at least apprised of the factual information that would form the basis for a pretrial motion to suppress); *State v. Cole*, 295 N.W.2d 29, 39 (Iowa 1980) (same); *State v. Courts*, No. 19-0074, 2020 WL 1548496, at *3 (Iowa Ct. App. Apr. 1, 2020) (“Neither Courts’s initial failure to take an interest in her own defense nor defense counsel’s failure to investigate the case constitute “good cause” for missing the filing deadline.”); *Hollie*, 854 N.W.2d at 697 (agreeing with district court that “counsel’s tardiness in realizing the viability of the suppression issue alleged in its motion” did not amount to good cause); *Jones*, 2006 WL 133009, at *2 (finding no good cause when sole alleged reason

¹² Failure to timely file a motion to suppress “shall constitute waiver thereof, but the court, for good cause shown, may grant relief from such waiver.” Iowa R. Crim. P. 2.11(3). Whether good cause exists is a discretionary decision, and “[f]actors considered in the application of this standard include the adequacy of the defendant’s reasons for failure to comply with applicable rules of procedure and whether the State was prejudiced as a result.” *State v. Eldridge*, 590 N.W.2d 734, 736 (Iowa 1999).

for delay was ineffective assistance of counsel); *cf. Peoples Nat. Gas Co. v. City of Hartley*, 497 N.W.2d 874, 875–76 (Iowa 1993) (holding “counsel’s inadvertence and oversight do not constitute ‘good cause’”).

Furthermore, the district court’s analysis of good cause might be influenced by an evaluation of the ultimate merits of the issue presented. But that would require the district court to engage in a *Strickland* prejudice analysis. As our analysis of the suppression issue below illustrates, the seizure question in this case is one of first impression, having not previously been determined by an appellate court in Iowa. Thus, a remand would leave the district court with little or no direction on the issues likely to be presented. Also, if Warren were unsuccessful on either the timeliness issue or the ultimate suppression issue, a further appeal and/or a postconviction-relief action would likely follow; thus requiring more judicial resources both in the district and appellate courts. *See Ortiz*, 766 N.W.2d at 250 (“It is the public policy of this state that litigation should be final at the earliest possible date.”).

Another wrinkle present here distinguishes this case from those discussed above and militates against deferring the issue to the district court instead of us answering the call of section 814.7(3). Warren was convicted of *two* crimes: OWI and driving while barred.¹³ Evidence supporting both of those crimes was obtained after the allegedly unconstitutional seizure occurred. We have reversed Warren’s conviction on count one, but she remains convicted on count two. If we were to

¹³ In *State v. Pals*, summarized more thoroughly above, the defendant was convicted of *one offense*, and the supreme court reversed and remanded the case, choosing to not address a claim of ineffective assistance of counsel for failing to challenge an alleged speedy-trial violation. 805 N.W.2d at 771 n.1.

find counsel was ineffective as alleged, then Warren would likewise be entitled to a new trial on count two. If we were to find counsel was not ineffective, the conviction on count two is final and only count one requires a retrial on the merits. If we were to elect to not address the suppression issue and remand the OWI conviction to the district court, then not only would the suppression issue and the timeliness issue be included in the remand, we would be required to preserve Warren's ineffective-assistance claim on the driving while revoked conviction for a possible postconviction action in a second case, adding to and complicating future litigation. *Ortiz*, 766 N.W.2d at 250.

Thus, we are not convinced we should decline to exercise our authority under section 814.7(3) if the record is adequate to decide the claim on direct appeal. Upon our de novo review, we find the record adequate to decide the claim and proceed to the merits.

2. *The Merits*

To succeed on her ineffective-assistance-of-counsel claim, Warren must establish "(1) that counsel failed to perform an essential duty and (2) that prejudice resulted." *State v. Kuhse*, 937 N.W.2d 622, 628 (Iowa 2020); accord *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We "may consider either the prejudice prong or breach of duty first, and failure to find either one will preclude relief." *State v. McNeal*, 897 N.W.2d 697, 703 (Iowa 2017) (quoting *State v. Lopez*, 872 N.W.2d 159, 169 (Iowa 2015)). A failure to register meritless arguments or motions does not amount to ineffective assistance of counsel. See *State v. Lilly*, 930 N.W.2d 293, 298 (Iowa 2019); *State v. Tompkins*, 859 N.W.2d 631, 637 (Iowa 2015).

We thus turn to whether a motion to suppress would have been meritorious

if pursued on the grounds argued on appeal. Warren generally argues she was subjected to an unconstitutional seizure. We likewise review constitutional suppression issues de novo. *State v. Fogg*, 936 N.W.2d 664, 667 (Iowa 2019). “[W]e independently evaluate the totality of the circumstances as shown by the entire record.” *State v. Smith*, 919 N.W.2d 1, 4 (Iowa 2018) (alteration in original) (quoting *State v. White*, 887 N.W.2d 172, 175 (Iowa 2016)). “Each case must be evaluated in light of its unique circumstances.” *Fogg*, 936 N.W.2d at 667 (quoting *State v. Coffman*, 914 N.W.2d 240, 244 (Iowa 2018)).

“The Fourth Amendment [to] the United States Constitution,” as applied to the states by the Fourteenth Amendment, “and article I, section 8 of the Iowa Constitution protect individuals against unreasonable searches and seizures.” *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001); accord *State v. McNeal*, 867 N.W.2d 91, 99 (Iowa 2015). Evidence obtained following a violation of these constitutional protections is generally inadmissible at trial. See *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963); *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961); *Naujoks*, 637 N.W.2d at 111.

Warren essentially argues Engle had no basis to make contact with her because he observed “a *completed* parking infraction” as opposed to an ongoing traffic violation. We start our analysis with a threshold question: *Who* is liable for a parking violation? We find the answer in statutory provisions. “No *person* shall stop, stand or park a vehicle” in any one of fifteen statutorily specified places, except under specified circumstances, none of which are applicable here. Iowa Code § 321.358 (emphasis added). A “[p]erson” means every natural person,” including various entities. *Id.* § 321.1(52). An “[o]perator” or “driver” means every

person who is in actual physical control of a motor vehicle upon a highway.”¹⁴ *Id.* § 321.1(48).

Engle saw Warren drive a car, park it perpendicular to a road, and exit the vehicle. He believed she had parked the car illegally pursuant to section 321.358.¹⁵ She is a person who was the driver of a motor vehicle on a highway who parked a vehicle. If the car was parked in violation of section 321.358 and she was the person who parked the car, she violated a criminal statute directive: “no person shall . . . park a vehicle” in a proscribed place. *Id.* § 321.358. The clarity of those provisions is not diminished by the possibility an owner of a vehicle may have responsibility for a parking violation under certain circumstances. See *id.* § 321.484(2). This liability scheme makes sense. If the driver is at the illegally parked car or easily and readily identifiable, liability should and does rest with the driver. In reality, illegally parked cars may be observed by law enforcement officers when no driver is found in the area. On such occasions, by simply “running the license plate” an officer can identify the registered owner and leave a parking

¹⁴ “‘Street’ or ‘highway’ means the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic.” Iowa Code § 321.1(78).

¹⁵ On appeal, Warren’s ineffective-assistance claim rests on her contentions that trial counsel failed to file a motion to suppress: “The completed parking violation did not authorize Officer Engle to seize Ms. Warren and question her,” and the stop was unlawfully extended. She does not claim trial counsel should have challenged whether there was a parking violation. Warren’s own recitation of the facts states: “Ms. Warren pulled her vehicle halfway into a driveway—leaving the rear portion of the vehicle sticking out into the street—exited her car and walked away from the vehicle towards a residence.” Footage from the officer’s body camera confirms that. There is no dispute she violated Iowa Code section 321.358. Thus, there is no need for further record development concerning how or where the car was parked.

citation in the name of the owner on the windshield of the illegally parked car.¹⁶ Warren seems to suggest that should have been Engle's course of action.

Officer Engle first approached Warren concerning a parking violation. A parking violation is a simple misdemeanor, criminal offense. See *id.* § 321.482. The inclusion of certain simple misdemeanor offenses in the statutory schedule of fines under sections 805.8 and 805.8A was done by the legislature in order to make uniform and simplify the punishment. See *State v. Butler*, 706 N.W.2d 1, 3 (Iowa 2005); see also *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 354 (Iowa 2015). Scheduled violations of state law under section 805.8A are simple misdemeanor criminal offenses. Furthermore, a law enforcement officer has the authority to arrest the offender for a scheduled violation of chapter 321 but may issue a citation in lieu of arrest. See *State v. Orozco*, 573 N.W.2d 22, 24–25 (Iowa 1997); see also Iowa Code § 805.6.¹⁷

The case of *Davis v. City of Albia* illustrates an application of the foregoing principles:

An arrest without a warrant may be made by a peace officer for a public offense committed in the officer's presence. Iowa Code § 804.7. "A public offense is that which is prohibited by statute and is punishable by a fine or imprisonment." *Id.* at § 701.2. A peace officer may issue a citation in lieu of a warrantless arrest, which is common practice where a scheduled fine is the penalty, but is not required to. *Id.* at § 805.1(1). See *State v. Orozco*, 573 N.W.2d 22, 25 (Iowa 1997) (peace officer has authority to make an arrest for a scheduled traffic violation). Whether to make an arrest instead of issuing a citation is within the peace officer's discretion. See *State v. Adams*, 554 N.W.2d 686, 690 (Iowa 1996).

¹⁶ We need not and do not decide if, under the circumstances of this case, an owner would be liable for paying a fine upon issuance of a citation to the owner if the owner was not the person who parked the car illegally.

¹⁷ As a practical matter, parking violations typically result in issuance of a citation.

Davis' truck was parked in a persons with disabilities parking space. The truck had a rearview mirror in the "driver's compartment." Davis did not hang the placard from the mirror as required by the DOT rule, but put it on the dashboard. There was thus probable cause to believe Davis had committed the misdemeanor public offense of improper use of a persons with disabilities parking permit. The offense occurred in [the officer's] presence and he could therefore make a warrantless arrest of Davis without violating either Iowa law or the Fourth Amendment.

434 F. Supp. 2d 692, 703 (S.D. Iowa 2006) (involving a suit alleging unlawful arrest and excessive force).

Iowa has no case law directly on point with the facts of this case, so we will examine cases from other jurisdictions for guidance. Warren cites two cases from other jurisdictions in support of her position that "parking violations do not supply reasonable suspicion or probable cause for a seizure." Both of those cases are readily distinguishable. The first contemplates a situation in which law enforcement observed a commercial vehicle illegally parked in the fire lane of a mall and, instead of placing a citation on the unattended vehicle, waited for the owner to return and personally serve him with a citation. *State v. Medlar*, 638 N.E.2d 1105, 1105–06 (Ohio Ct. App. 1994). When the driver returned, the officer tried to get his attention by sounding an air horn and shining a spotlight. *Id.* at 1106. The driver did not notice, and he got in the vehicle and drove away. *Id.* The officer followed the vehicle and initiated a traffic stop; the driver was ultimately charged with driving under the influence. *Id.* The Ohio Court of Appeals concluded that waiting for the parking offender was unreasonable because the officer could have simply issued a citation and placed it on the windshield. *See id.* at 1109–10.

The Ohio Court of Appeals has itself distinguished *Medlar* from a situation in which an illegally parked vehicle is occupied, concluding an encounter was

appropriate when an officer observed an occupied vehicle engaging in a parking violation. *State v. Eason*, 69 N.E.3d 1202, 1210 (Ohio Ct. App. 2016), *appeal denied*, 149 Ohio St. 3d 1406 (Ohio 2017). In that case, an officer observed a vehicle in violation of an overnight parking ban. *Id.* at 1208. The vehicle was running, the driver's side door was ajar, and an individual was seated in the driver's seat. *Id.* at 1205. Officers encountered the individual, who was sleeping, woke him up, and asked him to step out of the vehicle, after which the officers observed signs of impairment. *Id.* at 1205–06. Following standard field sobriety testing and an inventory search of the vehicle, the defendant was charged with multiple crimes. *Id.* at 1206. On appeal following the denial of his motion to suppress, the defendant argued the officers had no basis to remove him from his vehicle because his violation of the overnight parking ban only authorized the officers to issue a parking violation notice and the infraction did not warrant further investigation. *Id.* at 1207–08. The court of appeals concluded the officer's observation of the parking violation "served as a lawful basis to stop the vehicle" and justified the officers' request that the defendant exit the vehicle. *Id.* at 1210. The court distinguished the situation from *Medlar*, noting waiting for the driver of an unoccupied vehicle when a citation could be left on the car is unreasonable, but encountering an individual who is observed to have committed the parking violation is not. *Id.* at 1210–11.

Similarly, in *State v. Jones*, the Ohio Court of Appeals considered a situation in which an officer observed an illegally parked vehicle with the rear driver's side door open and someone's "legs hanging out." No. 92820, 2009 WL 3490947, at *1 (Ohio Ct. App. Oct. 29, 2009). The officer pulled alongside the vehicle to "make

sure the person was okay” or “talk to him about the violation.” *Id.* While speaking with the subject, the officer observed contraband. *Id.* The defendant was charged with drug offenses. *See id.* at *3. On appeal following the denial of his motion to suppress, the defendant argued a parking violation was an insufficient basis for the officer to encounter him. *Id.* at *4. The court of appeals disagreed concluding, “The fact that it was a parking violation, and not a traffic violation, is a distinction without a difference.” *Id.* at *5.

The cases go on. In *State v. Nevins*, the Ohio Court of Appeals considered a situation in which an officer observed an illegally parked vehicle, activated his emergency lights, and pulled in behind the vehicle with the intention of issuing a parking ticket. No. 15-1968, 1997 WL 231198, at *1 (Ohio Ct. App. May 9, 1997). As he was pulling up, “the car started to pull off,” so the officer activated his siren, upon which the vehicle immediately stopped. *Id.* The officer approached, advised of the reason for the stop, and asked for the motorist’s driver’s license, which the motorist could not provide. *Id.* The officer removed the driver from the vehicle and patted him down, “felt something hard in one of his pockets,” and placed the defendant in his cruiser, being under arrest for failure to display a valid license. *Id.* When backup arrived, the defendant was removed from the cruiser and crack cocaine was located in his pocket. *Id.* An inventory search uncovered more of the substance. *Id.* The district court concluded the parking violation did not provide probable cause for an encounter and granted the defendant’s motion to suppress. *Id.* at *2. The court of appeals reversed, noting the officer’s observation of the parking violation provided the officer probable cause to stop the defendant. *Id.* at *3.

In *Flores v. City of Palacios*, an officer sought to detain a motorist for parking illegally. 381 F.3d 391, 393 (5th Cir. 2004). The officer shined a spotlight on the vehicle, several people fled, and the driver drove away. *Id.* She was eventually stopped and arrested for evading detention. *Id.* The driver sued the city for, among other things, unlawful arrest. *Id.* The district court denied summary judgment on the claim. *Id.* On appeal, the plaintiff argued “her arrest for evading detention was unconstitutional because [the officer] did not have reasonable suspicion to detain her in the first place.” *Id.* at 402. The Fifth Circuit disagreed, concluding the parking violation provided the officer with authority to detain her. *Id.* at 403. The cases concluding parking violations are sufficient to warrant a seizure go on and on. See, e.g., *United States v. Choudhry*, 461 F.3d 1097, 1101 (9th Cir. 2006) (“[T]he parking violation justified the investigatory stop of [the] vehicle.”), *cert. denied*, 549 U.S. 1236 (2007); *United States v. Copeland*, 321 F.3d 582, 593–94 (6th Cir. 2003) (noting “an office has probable cause to stop a driver in the course of a parking violation”); *United States v. Thornton*, 197 F.3d 241, 248 (7th Cir. 1999) (rejecting claim that a parking violation is not a crime and is therefore insufficient to establish probable cause), *cert. denied*, 529 U.S. 1022 (2000); *Herring v. State*, 16 A.3d 246, 255 (Md. Ct. Spec. App. 2011) (“We believe a parking violation to be at least the functional equivalent to the stop of a moving vehicle in violation of the motor vehicle laws.”); *People v. Ingram*, 312 N.W.2d 652, 654 (Mich. 1981) (concluding officer’s request for defendant’s driver’s license for purpose of issuing parking citation was reasonable).

Here, different from *Medlar* and more similar to the other cases discussed, Engle physically observed Warren illegally park her vehicle, and Warren remained

in the immediate vicinity of her illegally parked vehicle when Engle made contact with her and told her she could not park there. The unreasonableness of the police conduct in *Medlar* flowed from the officer lying in wait, not the nature of the violation.

The second case cited by Warren also involved an unattended vehicle observed to be illegally parked by a parking monitor. See *State v. Holmes*, 569 N.W.2d 181, 182 (Minn. 1997). After discovering seven unpaid parking tickets on the vehicle, the monitor called for the vehicle to be towed pursuant to Minnesota law. *Id.* Before the tow truck arrived, the vehicle's occupant returned and asked that the vehicle not be towed. *Id.* at 182–83. The monitor refused and directed the defendant to retrieve his belongings from his car. *Id.* at 183. He was cooperative and did so but, because the monitor felt intimidated, she called for police assistance. *Id.* The officer who arrived thereafter asked for the defendant's identification, subjected him to a pat down, placed him in a locked police cruiser, and ultimately searched his vehicle, all after the monitor had already issued a parking citation. *Id.* at 183–84. The Minnesota Supreme Court found the parking violation was an insufficient basis for seizing the defendant and searching his vehicle because it all occurred after the citation was issued. *Id.* at 185, 189. We find *Holmes* inapplicable to the case at hand. It merely stands for the proposition that a police encounter must end after the reason for it is completed, a now fundamental principle in search and seizure jurisprudence. See, e.g., *Rodriguez v. United States*, 575 U.S. 348, 350 (2015) (“[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.”); *In re Prop. Seized from*

Pardee, 872 N.W.2d 384, 392 (Iowa 2015) (“Because addressing the infraction is the purpose of the stop, it may ‘last no longer than is necessary to effectuate th[at] purpose.’” (alteration in original) (citation omitted)). It does not stand for the proposition, Warren’s general argument on appeal, that parking violations, as opposed to traffic violations, are legally insufficient to justify a seizure. See, e.g., *United States v. Hester*, 910 F.3d 78, 88 n.6 (3d. Cir. 2018) (“[T]he nature of the violation—whether traffic or parking—[is] merely a factor among many at issue”); *Haynes v. State*, 937 N.E.2d 1248, 1252–53 (Ind. Ct. App. 2010) (distinguishing *Holmes* and concluding a parking violation is a sufficient basis to conduct a seizure where an illegally parked car drives away before the officer can issue a ticket), *appeal denied*, 950 N.E.2d 1196 (Ind. 2011); *Rodell v. Comm’r of Public Safety*, No. A03-283, 2003 WL 22787606, at *1–2 (Minn. Ct. App. Nov. 25, 2003) (same), *appeal denied*, (Feb. 17, 2004); see also *United States v. Johnson*, 874 F.3d 571, 573–74 (7th Cir. 2017) (noting *Whren* “applies to parked as well as moving vehicles, and to parking violations as well as moving violations”), *cert. denied*, 139 S. Ct. 58 (2018). Nor do the cases stand for the proposition there can be no contact for a “completed parking violation.”

Here, as noted, Warren was in the immediate vicinity of her illegally parked vehicle when Engle made contact with her and told her she could not park there. We find the encounter was supported by a reasonable basis for the purpose of Engle advising Warren of the illegal nature of her parking.

Warren goes on to argue that, after advising her of the reason for the encounter, Engle impermissibly prolonged the seizure by asking for her license, registration, and proof of insurance, his receipt of which was allegedly

“unnecessary for the enforcement of the completed violation.” She argues the “violation could have been enforced by way of a citation placed on the vehicle.” The law is clear that when the reason for a seizure is resolved and there is not a continuing basis for reasonable suspicion, it is constitutionally required that the subject be allowed to go his or her way without further ado. *State v. Coleman*, 890 N.W.2d 284, 301 (Iowa 2017). The dissent cites *Coleman* and questions, if the officer could have placed a citation on the vehicle and walked away, then why was there a continuing basis for the stop?

While we agree issuing a citation in the manner argued by Warren was doable, neither Warren or the dissent point us to authority that the argued procedure for enforcement was constitutionally or statutorily required, or that citing the owner should be preferred over citing the driver who actually committed the offense observed by a law enforcement officer. Engle had sufficient grounds to issue a citation. He could have verified the owner of it in his system and issued a citation to that person and left it on the car. It was certainly possible that Warren was not the owner of the vehicle. Having witnessed her illegally park the vehicle, it was certainly not unreasonable for Engle to request Warren’s identification to issue the citation in her name. In fact, having observed Warren illegally park the vehicle, Engle had statutory authority to arrest Warren. See Iowa Code § 804.7(1), (2); *Orozco*, 573 N.W.2d at 25. Under the unique circumstances of this case, we find Engle’s request for Warren’s identification and the continuing seizure for that purpose was reasonable, which is all that is constitutionally required. See U.S. Const. Amend. IV; Iowa Const. art. I, § 8. Furthermore, additionally requesting

Warren's registration and proof of insurance did not impermissibly prolong the encounter.

Upon Warren opening her car door for the purpose of retrieving her identification, Engle immediately smelled marijuana, thus providing a reasonable ground for investigating additional criminal activity and a continuing basis for the seizure. In addition, when she produced her identification card to Engle, it indicated she did not have valid driving privileges and her privileges to drive had been suspended or revoked, thus also supporting a continuing basis for the seizure.

We conclude filing a motion to suppress based on the arguments urged on appeal would have been meritless and counsel was not ineffective as alleged. We expressly do not conclude that every police encounter flowing from a parking violation will meet the constitutional requirement of reasonableness. We acknowledge the dissent's concern for the possibility of "sweeping intrusions" by law enforcement in applying *Whren* to parking violations, but we find the conduct in this case satisfies the constitutional-reasonableness requirement.

III. Conclusion

We reverse Warren's OWI conviction and remand the matter for a new trial on that count. We find trial counsel was not ineffective as alleged and thus affirm Warren's conviction of driving while revoked.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All judges concur except Vaitheswaran, J., who concurs in part and dissents in part, and Tabor and Doyle, JJ., who also concur in part and dissent in part.

VAITHESWARAN, Judge (concurring in part and dissent in part)

I concur in part and dissent in part. I concur in Part A of the majority opinion. I dissent from Part B of the majority opinion. I would decline to reach the ineffective-assistance-of-counsel issue for the reasons stated in footnote 18 of the second partial dissent.

TABOR, Judge (concurring in part and dissenting in part)

Can a parking violation justify a peace officer in seizing a motorist outside her car and conducting an investigation? Warren faults her counsel for not testing that proposition at trial. The majority rejects her claim of ineffective assistance, finding nothing to suppress because the officer acted reasonably under the Search and Seizure Clauses of the U.S. and Iowa Constitutions. I respectfully dissent on the ineffective-assistance-of-counsel issue.¹⁸ In my view, it is ill-advised to reject Warren’s complaint on direct appeal—and, in doing so, decide a question of

¹⁸ First, I disagree with the majority that the “preferred” method for addressing Warren’s ineffective-assistance claim is rejecting it on direct appeal. True, Iowa Code section 814.7(3) (2018) offers two choices for resolving ineffective-assistance claims: decide on direct appeal or preserve for postconviction relief (PCR). But here we have a third option. Because we remand for a new trial on the OWI count, we need not address whether counsel should have moved to suppress evidence of the seizure. See *State v. Pals*, 805 N.W.2d 767, 771 n.1 (Iowa 2011) (declining to address counsel’s failure to move for speedy-trial dismissal because court reversed on other grounds); *State v. Divis*, No. 15-1123, 2016 WL 4803749, at *8 n.3 (Iowa Ct. App. Sept. 14, 2016) (declining to reach claim alleging counsel should have moved to suppress because court reversed on evidentiary grounds). But if—as the majority contends—those cases are not persuasive here, the better approach would be to preserve the issue for PCR. See *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009) (“We will address on direct appeal claims of ineffective assistance of counsel only if we determine the development of an additional factual record would not be helpful and these elements can be decided as a matter of law.”).

The majority cites *State v. Hollie*, as an example of our court reaching a suppression issue, raised in the context of ineffective assistance, on direct appeal. 854 N.W.2d 695 (Iowa Ct. App. 2013). But in *Hollie* trial counsel moved to suppress and the district court held a suppression hearing. 854 N.W.2d at 697. Counsel’s ineffectiveness was the untimely filing of the meritorious motion. *Id.* at 698. Unlike *Hollie*, Warren had no chance to make a record specific to the suppression issues.

As for the driving-while-revoked conviction, Warren may address counsel’s performance in relation to that offense in a PCR action. Nothing prevents bifurcated treatment of the convictions. In fact, if this case had been appealed after July 1, 2019, we would have been without statutory authority to address the ineffective-assistance claim on direct appeal. See *State v. Trane*, 934 N.W.2d 447, 464–65 (Iowa 2019) (discussing amendment to section 814.7(3)).

first impression in Iowa—without a full airing of the facts bearing on the suppression challenge.¹⁹

But if compelled to decide the question on the record we do have, I would find Warren proved by a preponderance of the evidence that her counsel breached a duty by not moving to suppress and prejudice resulted. “Subject to a few carefully drawn exceptions, warrantless searches and seizures are per se unreasonable.” *State v. Lewis*, 675 N.W.2d 516, 522 (Iowa 2004). “The State has the burden to prove by a preponderance of the evidence” that Warren’s seizure was justified. *Id.*; *State v. Baker*, 925 N.W.2d 602, 610–11 (Iowa 2019). The State cannot satisfy its burden: Warren’s parking violation did not authorize police to seize her in place of issuing a ticket.

Just to be clear at the outset, police did seize Warren. *Cf. State v. Fogg*, 936 N.W.2d 664 (Iowa 2019) (finding no seizure where officer did not activate emergency lights or engage in “authoritative behavior”). Neither the State nor the majority contends otherwise. And that seizure had nothing to do with her driving. True, Officer Engle testified at the bench trial that he first noticed her car “accelerating at a high rate” of speed. But he acknowledged on cross examination she was not speeding. Officer Engle did not articulate that Warren violated any traffic law or committed any other crime. Yet two police cars arrived at the scene. Their flashing emergency signals bathed the officers’ encounter with Warren in

¹⁹ The majority’s concern about timeliness (or good cause for untimeliness) of a motion to suppress under Iowa Rule of Criminal Procedure 2.11(4) may be addressed by the district court on remand. *See generally State v. Jones*, No. 05-0316, 2006 WL 133009, at *2 (Iowa Ct. App. Jan. 19, 2006) (entertaining possibility that ineffective assistance of prior counsel could be good cause for untimely motion to suppress).

alternating red and blue light, as the officers circled her car, using flashlights to look inside the windows.

Our view of their investigation emerges from Officer Engle's body camera footage, which the State offered into evidence at the bench trial. The video starts off with no sound: Warren is standing outside her closed car door, holding open her wallet.²⁰ An officer extracts her identification card. The officers apparently ask Warren if she has used marijuana, because when the audio begins she answers: "Yeah we smoked, at least I'm honest." Officer Engle then asks for her registration and insurance. At this point, Warren opens the driver's side door and reaches across the front seat to find those documents in the glove box. As she does so, she says: "[I]t does smell like weed." The officers then launch their OWI inquiry.

On this record, because the officer could have issued a parking ticket without seizing Warren, trial counsel was ineffective in not moving to suppress evidence discovered during the investigation that followed that initial seizure.²¹ As Warren urges on appeal, the Minnesota Supreme Court's analysis in *State v. Holmes* is apt. 569 N.W.2d 181 (Minn. 1997). *Holmes* held "a police officer who

²⁰ Officer Engle's trial testimony is somewhat at odds with the video footage. He testified Warren walked to her car and "grabbed her Iowa ID." But the video shows Warren has her ID and the car door is closed until the officers ask for her registration and proof of insurance. The order of the questioning matters to the suppression issues, which is why a more complete record is necessary to decide this matter fairly.

²¹ Case law from Iowa, as well as other jurisdictions, should have alerted counsel this suppression issue was "worth raising." See *State v. Brown*, 930 N.W.2d 840, 855 (Iowa 2019); *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982) (explaining counsel must exercise reasonable diligence in finding error which includes consulting cases from other jurisdictions).

merely has reasonable suspicion that a *parking* violation has occurred cannot seize an individual for the purpose of investigation.” *Id.* at 185.

The majority rejects *Holmes*, reasoning it “stands for the proposition that a police encounter must end after the reason for it is completed.” That reading is too truncated. When read in full, the language in *Holmes* is broader. The Minnesota court noted: “[P]olice officers typically enforce parking violations by applying a ticket to the parked car.” *Id.* And it advised:

A police officer who has probable cause to believe that a person has committed a parking violation can stop the person only if the stop is necessary to enforce the violation, for example, if a person is attempting to drive off with an illegally parked car before the officer can issue the ticket.

Id. The logic in *Holmes* applies here. Stopping Warren was unnecessary to enforce the parking violation.

Plus, cases on the permissible scope of investigations should also have sparked a suppression motion. *See, e.g., Rodriguez v. United States*, 575 U.S. 348, 350 (2015); *In re Pardee*, 872 N.W.2d 384, 396 (Iowa 2015); *State v. Coleman*, 890 N.W.2d 284, 301 (Iowa 2017). Collectively, these cases prohibit officers from extending an investigative stop beyond the time needed to handle their core mission. Officer Engle’s stated mission was to enforce a parking violation. Checking on Warren’s license, registration, and insurance was unreasonable because it exceeded that mission.

Again to be clear, neither the State nor the majority rely on reasonable suspicion that criminal activity was afoot based on the totality of circumstances confronted by the officers when they first seized Warren. Rather, the entire justification for the seizure is enforcement of a parking violation. *See* Iowa Code

§ 321.358(13) (prohibiting a person from stopping or parking a vehicle “at any place where official signs prohibit stopping or parking”).²² This singular rationale separates Warren’s case from a federal case cited by the majority, *United States v. Hester*, 910 F.3d 78, 88 n.6 (3d Cir. 2018) (explaining “nature of the violation—whether traffic or parking—was merely one factor among many at issue, and we do not today address whether a mere parking violation would be sufficient to support reasonable suspicion”). In *Hester*, the court found an officer had reasonable suspicion to detain passengers in a vehicle because it was illegally idling near a crosswalk in front of a store with a known history of narcotics activity, close to midnight, in a high-crime area of Newark. 910 F.3d at 87–88. The officer did not articulate similar factors here.

Unlike *Hester*, the majority holds Officer Engle’s initial seizure of Warren was “supported by a reasonable basis for the purpose of Engle advising Warren of the illegal nature of her parking.” At the same time, the majority acknowledges the officer could have verified the owner of the vehicle, issued a citation to that person, and left it on the car. So why was the seizure reasonable?

The State contends the seizure was reasonable because Officer Engle had probable cause to believe Warren violated section 321.358(13).²³ The State relies on *United States v. Johnson* for the proposition that a parking violation—like any minor traffic violation—provides probable cause to stop a motorist. See 874 F.3d

²² Again emblematic of our undeveloped record, no evidence supports a finding that “official signs” prohibited parking on this residential street. On the video, Warren tells the officers she planned to go inside the house and ask her cousin to move his truck so she would have room to park in the driveway.

²³ The officer issued Warren a citation for this scheduled violation, but the State later dismissed the charge.

571 (7th Cir. 2017). The *Johnson* majority upheld a seizure when “the car was stopped 7 or 8 feet from a crosswalk” and issuing a ticket necessarily entailed “a brief seizure of the car and its occupants.”²⁴ 874 F.3d at 572–73. During that seizure, the officer saw a gun on the car’s floor, which led to Johnson’s arrest. *Id.* at 573.

Unlike *Johnson*, it was unnecessary for Officer Engle to seize Warren to enforce the parking violation. As the majority acknowledges, the officer could have left a citation on Warren’s car. See *City of Des Moines v. Iowa Dist. Ct.*, 431 N.W.2d 764, 767 (Iowa 1988) (rejecting argument that “windshield copies of traffic citations cannot constitute a legal process sufficient to invoke the court’s jurisdiction”). Instead, Officer Engle “made contact and advised her that she could not park her vehicle that way.”²⁵ He also prolonged the encounter by asking her “if she had her license, registration, and proof of insurance.” The majority holds it was “not unreasonable” to request Warren’s identification to issue the citation in her name in case she was not the registered owner of the vehicle.²⁶

²⁴ Two judges dissented in *Johnson*, objecting to the majority’s extension of *Whren v. United States*, 517 U.S. 806 (1996), to allow “this pretextual seizure based on the suspected parking violation.” 874 F.3d at 575 (Hamilton, J., dissenting). The dissenters found that extension defied the reasonableness standard of the Fourth Amendment. *Id.*

²⁵ The record does not show the officers had a pressing safety-related concern about the precarious nature of Warren’s parking. They pulled in behind her. They did not have the car moved during their investigation. After arresting Warren, Officer Engle handed her keys to an occupant of the house who agreed to take care of the car.

²⁶ The majority highlights the driver’s liability for parking violations under section 321.358. Yet the majority acknowledges vehicle owners are responsible for parking violations in most situations. See Iowa Code § 321.484(2) (stating owners “shall not be held responsible” for parking violations if the owner produces a copy of a lease or rental agreement for the vehicle). Likewise, owners may be asked to identify the person who drove their vehicle if officers have reasonable

Let's think about what that holding means. Even if officers have all the information they need to issue a parking citation, they can now seize any person in the vicinity of their illegally parked car and ask for identification. This holding reaches even further than *Johnson*, where the officer saw the passenger in the illegally parked car "make movements that led him to infer that [he] was hiding something."²⁷ 874 F.3d at 573. In Iowa, no furtive behavior would be necessary. Every errant parker could be seized.

And would the majority's holding really affect only drivers intercepted in the vicinity of their recently parked cars? That distinction seems important to the majority in distinguishing *Medlar*. There, the Ohio court found a constitutional violation when an officer waited five to ten minutes for the driver of a commercial vehicle parked in a mall's fire lane to return before seizing the driver. 638 N.E.2d at 1109–10. Yet the majority's distinction offers no legal difference. Why was it more reasonable to stop Warren as she walked away from her illegally parked car than it would be for officers to bide their time and seize her as she returned?

cause concerning a moving violation; but not so for parking infractions. See *id.* § 321.484(3). Given that different statutory treatment of moving and parking violations, Officer Engle's seizure of Warren was unreasonable. As the Ohio court noted in *State v. Medlar*, "It is neither necessary nor requisite that the person issuing the parking citation see or record the information contained on the driver's license." 638 N.E.2d 1105, 1108 (Ohio Ct. App. 1994).

²⁷ Fourth Amendment scholars envisioned this scenario under the *Johnson* holding: "a motorist can pull into a metered parking space, begin searching in their car for change to put into the meter, and end up being seized by the police because the meter was expired and the act of looking for meter change could be interpreted by the officer as furtive behavior." See Stephen D. Hayden, "*Parking While Black*": *Pretextual Stops, Racism, Parking, and an Alternative Approach*, 44 S. Ill. U.L.J. 105, 142 (2019) (borrowing example from Howard University amicus curiae brief in favor of petition for certiorari in *Johnson v. United States*, No. 17-1349, 2018 WL 1910945 (Apr. 23, 2018)).

In stepping away from *Medlar*, the majority points to a more recent Ohio case, *State v. Eason*, 69 N.E.3d 1202, 1208 (Ohio Ct. App. 2016). Unlike *Medlar*, the vehicle was occupied when the officer in *Eason* observed the parking violation. *Eason*, 69 N.E.3d at 1208 (describing the scene: “he pulled up to the vehicle in which appellant was sitting because the car was illegally parked, the driver’s door was ajar, and the vehicle’s engine was running”). The officer could not tell if Eason “was alive or in need of medical assistance or simply sleeping.” *Id.* That scenario is a far cry from the officer’s seizure of Warren outside her car when he could have left a ticket on the windshield. Similarly, the other out-of-jurisdiction cases string-cited by the majority involve defendants who were occupants of illegally parked cars. In those instances, like *Johnson* discussed above, addressing the parking violations necessarily entailed a seizure.

Over and above asking for identification, under the majority’s holding, police can ask any person who illegally parks for vehicle registration and proof of insurance. Neither are necessary to the mission of issuing a parking ticket. The majority contends asking for that information did not impermissibly prolong the police encounter with Warren. But it did. The demand for that information occasioned her going back into her car, which smelled of burnt marijuana.²⁸

“[A]bsent reasonable suspicion of other criminal activity, the officer’s mission is to address the traffic infraction and that mission may take no longer than

²⁸ Granted, an investigative detention may grow out of a seizure justified on different grounds if the officers develop reasonable suspicion of criminal activity to expand their investigation. See *State v. Knight*, 853 N.W.2d 273, 278 (Iowa Ct. App. 2014). But officers may only expand the scope and duration of a stop where they develop new reasonable suspicion before any impermissible extension of the stop. See *Pardee*, 872 N.W.2d at 396.

is necessary.” *State v. Salcedo*, 935 N.W.2d 572, 580 (Iowa 2019) (citing *Rodriguez*, 575 U.S. at 354). What is necessary to address a parking violation differs from what is necessary to address a moving violation. As the majority concedes, it was unnecessary to Officer Engle’s mission to seize Warren at all, much less to extend their encounter by asking for identification, vehicle registration, and proof of insurance.

When recently considering whether pretextual traffic stops violate the Iowa Constitution, our supreme court highlighted protections in state law meant to “curtail law enforcement’s abuse of authority during traffic stops.” *Brown*, 930 N.W.2d at 849. Listed first among those protections was the requirement that an officer allow a motorist to leave “when the reason for a traffic stop is resolved and there is no other basis for reasonable suspicion.” *Id.* (citing *Coleman*, 890 N.W.2d at 301). Under *Brown* and *Coleman*, if Officer Engle’s only mission was to enforce the parking regulation, he was required to let Warren leave upon issuing a citation. He lacked authority to seize her or to extend the seizure by asking her unrelated questions.

The police conduct suggests Warren’s parking violation was pretext for a more expanded investigation. For instance, at the bench trial, Officer Engle testified: “There was a police officer that pulled up behind her and turned his lights on before I was there. I think my back lights were on, and then I made contact.”

This show of authority echoes the situation described by the *Johnson* dissent:

The officers swooped in on the car, suddenly parking close beside and behind it with bright lights shining in from both directions, opening the doors, pulling all the passengers out and handcuffing them. The district court found, and the majority and I agree, that the passengers were seized as the officers swarmed them, *before* the

officers had any sign that one passenger had a firearm. The sole basis for this intrusive and even terrifying “investigatory stop”? A suspected parking violation . . . for parking too close to an unmarked crosswalk.

874 F.3d at 575 (Hamilton, dissenting). As the *Johnson* dissent observed: “The police tactics here would never be tolerated in more affluent neighborhoods.” *Id.* at 576. Those dissenters believed extending *Whren* to parking violations was “arguably defensible” but unreasonable because it would erode Fourth Amendment protections.

Back home, the majority of our court acknowledges the concern that applying *Whren* to parking violations invites widespread intrusions against individual liberty. But the majority finds that concern overblown. It professes to limit its holding to “the unique circumstances of this case” and cautions not “every police encounter flowing from a parking violation will meet the constitutional requirement of reasonableness.” Yet the majority’s extension of *Whren* to parking violations contains no limiting principles—except perhaps the distinction from *Medlar* where the officer lied in wait for the driver. That stated limitation is unlikely to deter law enforcement from vigorously pursuing this avenue of investigation. See *Brown*, 930 N.W.2d at 906–10 (Appel, J., dissenting) (discussing judicial concern over consequences of *Whren*); see also Wayne LaFare, *Search & Seizure* § 1.4(f) (5th ed.) (“The effect of *Whren* . . . is that . . . the pretext doctrine has disappeared from Fourth Amendment jurisprudence, thus leaving citizens without adequate protection against arbitrary seizures and searches.”).

One final note: Warren emphasizes her violation was a *completed* parking infraction. See Iowa Code § 805.8A(1)(a) (classifying parking violations under

section 321.358 as scheduled violations subject to a fine of five dollars). In *Pals*, our supreme court described federal courts as divided on whether the Fourth Amendment per se prohibits police from seizing a motorist based only on reasonable suspicion of “a mere completed misdemeanor.” 805 N.W.2d at 774 (comparing *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004), with *United States v. Hughes*, 517 F.3d 1013, 1017–18 (8th Cir.2008)). But even those courts applying a balancing test often find reasonable suspicion of a completed misdemeanor to be insufficient to justify a seizure under the Fourth Amendment. See *Hughes*, 517 F.3d at 1018 (finding government’s interest in investigating prior criminal trespass did not outweigh individual’s interest in being “free from arbitrary interference by police”). This line of cases also should have prompted defense counsel to file a motion to suppress.

On this record, I would find the officer acted unreasonably in seizing Warren to investigate a parking violation. The majority admits the officer didn’t need to stop her to issue the citation. His mission in issuing a parking ticket did not require her to provide identification, vehicle registration, or proof of insurance. By not moving to suppress, counsel breached an essential duty and his client suffered prejudice. If it is proper to reach the suppression issue, both convictions should be reversed.

Doyle, J., joins this partial dissent.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	Case Title
19-0267	State v. Warren

Electronically signed on 2020-05-13 08:35:15