ELECTRONICALLY FILED JUL 08, 2021 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 20–1595

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STATE OF IOWA,
Plaintiff-Appellant,

vs.

EARNEST JONES HUNT, JR.,
Defendant-Appellee.

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APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
THE HONORABLE MICHAEL J. SHUBATT, JUDGE

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# AMENDED APPELLANT'S BRIEF

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## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

**I. The district court erred by suppressing drugs found on the defendant because the officer had probable cause to seize them after identifying them as heroin, powder cocaine, or crack cocaine in a pat down.**

**Authorities**

*Minnesota v. Dickerson*, 508 U.S. 366 (1993)
*Texas v. Brown*, 460 U.S. 730 (1983)
*Ball v. United States*, 803 A.2d 971 (D.C. 2002)
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*State v. Naujoks*, 637 N.W.2d 101 (Iowa 2001)

## ROUTING STATEMENT

None of the retention criteria in Iowa Rule of Appellate Procedure 6.1101(2) apply to the issues raised in this case, so transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(1).

## STATEMENT OF THE CASE

### Nature of the Case

The district court suppressed drugs found on the defendant, Earnest Jones Hunt, Jr. It concluded that the State failed to prove probable cause to seize those drugs. The State sought discretionary review, which the Iowa Supreme Court granted.

### Course of Proceedings and Facts

Police were looking for the defendant as a person of interest in a recent shooting. Tr. Supp. Hr'g, 7:4–11. An officer saw the car that the defendant was believed to be riding in and stopped it when it turned without signaling. *Id.* at 7:11 to 8:22.

The officer approached the passenger's window and identified the defendant. *Id.* at 8:17–24. The defendant acted nervous and kept feeling his pocket. *Id.* at 9:18 to 10:7. When another officer arrived, they handcuffed the defendant. *Id.* at 11:12 to 12:1.

After handcuffing the defendant, the officer patted him down for weapons. *Id.* at 12:8–22. When the office patted the defendant's

"right front sweatshirt pocket," he "immediately felt small plastic or small hardballs, packaged balls which were inside of a plastic bag. [He] could hear the crunch of the plastic bag and [he] could feel it, and [he] also felt the small individual hard packages inside of that plastic bag." *Id.* at 12:25 to 13:5. He "immediately knew that it was packaged drugs for sale inside of a plastic bag," though he was not sure if the drugs were heroin, powder cocaine, or crack cocaine. *Id.* at 6:2–11, 13:6–17, 16:12 to 17:9; Ex.1 at 14:37:23–57, 14:48:42, 14:49:08. The officer did not "manipulate or squeeze the object[s]." Tr. Supp. Hr'g, 13:18–22.

The officer arrested the defendant for the drugs. *Id.* at 13:25 to 14:4. The State charged him with possessing 40 grams or less of crack cocaine with the intent to deliver. Trail Info. (1/3/2020); App.4.

The defendant moved to suppress the drugs. Mot. Supp. (3/10/2020); App.6–8. He conceded that the officer had authority to pat him down, but said that the officer exceeded that authority by seizing the drugs. *Id.* at 2; App.7; Tr. Supp. Hr'g, 25:22 to 26:7. The State argued that the officer obtained probable cause by identifying the object in the defendant's pocket as drugs under the plain feel warrant exception. Rest. Mot. Supp. (8/6/2020) at 3; App.11.

Following a hearing, the district court suppressed the drugs because the State failed to establish probable cause "that Defendant had drugs in his pocket." Order (10/27/2020) at 2; App.14. It stated that the "item in Defendant's pocket could have been anything, and [the officer's] testimony … lacked sufficient explanation as to how and why he knew" it was drugs. *Id.*; App.14. The court further explained that all the officer knew was that the defendant had multiple "bags in his pocket," but the officer could not identify the substance in the bags even after removing the bags. *Id.* at 3; App.15.

The State applied for discretionary review. The Iowa Supreme Court granted it.

## ARGUMENT

### I. The district court erred by suppressing drugs found on the defendant because the officer had probable cause to seize them after identifying them as heroin, powder cocaine, or crack cocaine in a pat down.

#### Preservation of Error

The State preserved error by raising the plain feel warrant exception and receiving an adverse ruling. Rest. Mot. Supp. (8/6/2020) at 3; App.11; Mot. Reconsider (11/12/2020); App.17; Order (10/27/2020); App.13.

**Standard of Review**

This Court reviews constitutional questions de novo. *State v. Brown*, 890 N.W.2d 315, 321 (Iowa 2017). It gives deference to district court fact findings but is not bound by them and makes its own "independent evaluation of the totality of the circumstances as shown by the entire record." *Id.*

**Merits**

The State offered the plain feel warrant exception to justify the warrantless seizure of drugs from the defendant's pocket. The plain feel exception allows officers to seize contraband found on defendants during pat down searches. *Minnesota v. Dickerson*, 508 U.S. 366, 375–76 (1993); *State v. Cain*, No. 04–0167, 2005 WL 598791, at *4 (Iowa Ct. App. Mar. 16, 2005). When an officer has probable cause to believe an object is contraband because the object's "contour or mass makes its identity immediately apparent," an officer can seize it. *Dickerson*, 508 U.S. at 375–76. An officer has probable cause when "a person of reasonable prudence would believe a crime has been committed or that evidence of a crime might be located in the particular area to be searched." *State v. McGrane*, 733 N.W.2d 671,

682 (Iowa 2007) (quoting *State v. Naujoks*, 637 N.W.2d 101, 108 (Iowa 2001)).

Here, the district court suppressed the drugs found on the defendant, concluding that the State had "not met its burden of showing that there was probable cause to believe that Defendant had drugs in his pocket." Order (10/27/2020) at 2; App.14. It reached that conclusion because the officer's "testimony that he knew it was drugs lacked sufficient explanation as to how and why he knew that to be true" and the officer "did not know exactly what was in the bags he thought he felt" "*even after* he had removed them." *Id.* at 2, 3; App.14, 15.

The district court erred in suppressing the drugs in at least two ways. First, the district court mistakenly believed that the officer had to "know exactly" what was in the bags to have probable cause. Second, imposing that heightened standard led the court to mistakenly conclude that the State had not shown probable cause.

First, the officer need not have known "exactly what was in the bags" to have probable cause to seize them. Instead, probable cause arises when a "person of reasonable prudence would believe a crime has been committed." *McGrane*, 733 N.W.2d at 682. A reasonably

prudent person would believe that the defendant possessed drugs here. The officer felt multiple "packaged balls" inside another plastic bag. Tr. Supp. Hr'g, 12:14 to 13:17. From his experience, the officer knew that is how heroin, powder cocaine, and crack cocaine are packaged for sale in Dubuque. *Id.* From patting the bags, the officer knew that the defendant had one of those three drugs. *See id.* Thus, the officer had probable cause to seize the drugs.

The district court found it significant that the officer could not tell which drug—heroin, powder cocaine, or crack cocaine—the defendant possessed. Order (10/27/2020) at 3; App.15. But the officer did not need to identify the specific drug. *See McGrane*, 733 N.W.2d at 682 (explaining that probable cause arises when a reasonable person would believe a crime has been committed). All three are illegal, and the officer knew the defendant had one of them. That was sufficient to establish probable cause.

Second, caselaw confirms that the State proved the officer had probable cause to seize the drugs. Multiple Iowa Court of Appeals decisions hold that an officer who feels a bag with drugs in a defendant's clothes during a pat down is sufficient to provide probable cause to seize the drugs. *State v. Harriman*, 737 N.W.2d

318, 320–21 (Iowa Ct. App. 2007); *State v. Ahmetovic*, No. 17–0913, 2018 WL 3655086, at *3–4 (Iowa Ct. App. Aug. 1, 2018); *State v. Banks*, No. 11–0429, 2012 WL 652444, at *4 (Iowa Ct. App. Feb. 29, 2012); *Cain*, 2005 WL 598791, at *4 (officer felt pipe used to smoke drugs). That is what happened here: the officer felt balled up baggies of heroin, powder cocaine, or crack cocaine in another bag in the defendant's pocket and seized what he knew to be drugs. Tr. Supp. Hr'g, 12:14 to 13:17.

The district court compared this case unfavorably to *State v. Carey*, No. 12–0230, 2014 WL 3928873, at *6 (Iowa Ct. App. Aug. 13, 2014), and offered that comparison as a basis to suppress. Order (10/27/2020) at 2–3; App.14–15. But the facts here closely resemble those found sufficient to provide probable cause to seize marijuana under the plain feel exception in *Carey*.

There, an officer had "extensive experience with narcotics investigations" and "immediately recognized the contents of [the defendant's] back pocket to be a plastic bag of marijuana during the pat-down search." *Carey*, 2014 WL 3928873, at *6. The officer recognized it as such because of the bag's "distinct feel"—it was "tied in the corner of a sandwich bag[,] packaged very tightly with a knot,"

and had “seeds and stems” distinctive to marijuana. *Id.* Those facts led the Court of Appeals to uphold the seizure under the plain feel exception. *Id.* at 7.

Here, like *Carey*, the officer had “extensive experience” with drugs, including seven years on a drug task force. Tr. Supp. Hr’g, 5:1–23. And like in *Carey*, the officer here knew how various drugs are typically packaged: meth is “packaged in small Ziploc-type gem baggies, and powder cocaine, crack cocaine, and heroin are packaged in the corner of sandwich baggies, just twisted into a knot and tied into small circulars.” *Id.* at 6:2–11. Again, like in *Carey*, the officer immediately recognized what he felt on the defendant as drugs from its packaging. *Id.* at 12:14 to 13:17. And like the distinctive marijuana “seeds and stems” the officer felt in *Carey*, the officer here felt “small hardballs” in a plastic bag, which was consistent with how heroin, powder cocaine, and crack cocaine are “almost invariably” packaged for sale. *Id.* Contrary to the district court’s analysis, *Carey* supported upholding the seizure.

As a final observation, the “immediately apparent” language from *Dickerson* describing the plain feel exception has led some courts astray: it has prompted them to require a higher degree of

proof to seize contraband than probable cause. But the standard to seize contraband without a warrant is probable cause, even under the plain feel exception. *Dickerson*, 508 U.S. at 375–76; *see Texas v. Brown*, 460 U.S. 730, 741 (1983) (stating, in analyzing the analogous plain view warrant exception, that "the use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary"); *People v. Champion*, 549 N.W.2d 849, 857 (Mich. 1996); *Ball v. United States*, 803 A.2d 971, 975 (D.C. 2002). The "immediately apparent" language refers to what an officer can do—pat down but not manipulate. If an officer obtains probable cause by recognizing an item doing nothing but the pat down, the officer can seize it. *Dickerson*, 508 U.S. at 376–79.

Here, the district court erred by requiring that the officer know "exactly what was in the bags" he felt. Order (10/27/2020) at 3; App.15. But the officer need only have had probable cause to believe he felt drugs in the pat down to allow the seizure. *Dickerson*, 508 U.S. at 375–76; *Banks*, 2012 WL 652444, at *4. And the officer had probable cause because he immediately knew that the defendant had

either heroin, powder cocaine, or crack cocaine packaged for sale from the feel of "hardballs" inside bags. Tr. Supp. Hr'g, 12:14 to 13:17. The officer had probable cause following the pat down so he could seize the drugs in the defendant's pocket. The district court erroneously suppressed that evidence.

## CONCLUSION

For the foregoing reasons, the State requests that this Court reverse the order suppressing the drugs found on the defendant and remand for further proceedings.

## REQUEST FOR NONORAL SUBMISSION

This case is appropriate for nonoral submission.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **1,949** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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