IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 20-1549

STATE OF IOWA,
Plaintiff-Appellee

vs.

SANTOS RENE TORRES
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE BRENDAN GREINER AND HONORABLE KEVIN PARKER

DEFENDANT/APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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

Genevieve Reinkoester
Office of Attorney General
Criminal Appeals Division
Hoover State Office Building,
2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-3648
Facsimile: (515) 281-8894
Genevieve.reinkoester@ag.iowa.gov
ATTORNEY FOR APPELLEE

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Defendant-Appellant's Final Brief with the Electronic Document Management System with the Appellate Court on the 27th day of September 2021.

The following counsel will be served by Electronic Document Management System.

Genevieve Reinkoester
Office of Attorney General
Criminal Appeals Division
Hoover State Office Building,
2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-3648
Facsimile: (515) 281-8894
Genevieve.reinkoester@ag.iowa.gov
ATTORNEY FOR APPELLEE

I hereby certify that on the 27th day of September 2021, I did serve the Defendant-Appellant's Final Brief on Appellant, listed below, by mailing one copy thereof to the following Defendant-Appellant:

Santos Rene Torres
Defendant-Appellant /S/ Marlyn Ibarra .

PARRISH KRUIDENIER DUNN GENTRY BROWN BERGMANN & MESSAMER L.L.P.

BY: /S/ Benjamin D. Bergmann
Benjamin D. Bergmann AT0009469
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: bbergmann@parrishlaw.com
ATTORNEYS FOR DEFENDANT - APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

I. THE OFFICER'S SEIZURE OF MR. TORRES AS HE RETURNED TO HIS HOME WAS UNREASONABLE

II. THE STATE SUBJECTED MR. TORRES TO CUSTODIAL INTERROGATION WITHOUT A MIRANDA WARNING IN HIS OWN HOME

III. THERE WAS NOT SUFFICIENT EVIDENCE TO PROVE MR. TORRES WAS INTOXICATED

ROUTING STATEMENT

This appeal should be transferred to the Iowa Court of Appeals because it is a case presenting the application of existing legal principles in accordance with Iowa R. App. P. 6.1101(3)(a).

CASE STATEMENT

Mr. Torres's Motion to Suppress should have been granted. He was seized as soon as he tried to enter his home and there was no reasonable

articulable suspicion to stop him. In addition, he was placed into custody and subjected to custodial interrogation.

FACTUAL BACKGROUND

Carlisle Police Officer Buehrer responded to a call for child endangerment due to reports of a small child who was hanging out of a second story window. (Tr. 45:5-9). Officer Buehrer met Leonor Flores, Mr. Torres's wife, who was the mother of their three children at the home. (Tr. 45:5-9). After an investigation, Officer Buehrer arrested Leonor Flores and called in Deputy Konrad and the Department of Human Services. (Tr. 8:16-21; 17:1-7). Officers handcuffed Ms. Flores and detained her in a squad car. (Tr. 32:21-33:1) DHS worker Kate Roy responded and began her assessment. (Tr. 9:2-25). Deputy Konrad stayed outside of the residence. (Tr. 17:2-25). The reasons for the call had all but ended except for DHS finding a placement for the children. (Tr. 48:8-13). There had been no concern that the children would be unsafe with their grandmother, who was there at the time. (Tr. 49:11-13).

Mr. Torres then arrived to the scene in his vehicle. (Tr. 32:23-33:1). There was no evidence that Mr. Torres knew his children were supervised after seeing his wife arrested. (Tr. 34:9-14). Leaving his children alone could have constituted child endangerment, and there was a possibility that Mr. Torres's child could have been placed in shelter care. (Tr. 34:17-25). There

were two officers, both in uniform, there when Mr. Torres arrived home, along with two marked patrol cars, and the street was blocked off. (Tr. 36:6-16). As soon as Mr. Torres arrived, police were directing him to where he could and could not go. (Tr. 37:11-14). They told him when he could and could not speak to his wife. (Tr. 37:15-17). On three different occasions, an officer placed his hand on Mr. Torres and said "Let's go." (Tr. 38:15-18). The officer demanded that Mr. Torres speak to him and look at him. (Tr. 39:4-7). The officer followed Mr. Torres from his lawn to the patrol car and then back to his lawn, never leaving his side. (Tr. 39:10-13).

Mr. Torres did not invite officers in, but they then followed him into his house. (Tr. 39:14-19). Officers were not making an arrest of Leonor at the time, because she was already in the squad car. (Tr. 39:20-23). Once in the house officers begin telling Mr. Torres who he can talk to and when. (Tr. 41:14-16). At one point Mr. Torres went upstairs and officers followed him upstairs. (Tr. 42:11-14). The officer said he needed to go with Mr. Torres. (Tr. 42:15-17). Then the officer followed Mr. Torres from room to room. (Tr. 42:18-20). Officers then followed Mr. Torres downstairs. (Tr. 42:21-23). Mr. Torres went back upstairs and officers followed him again. (Tr. 42:24-43:2). When Mr. Torres went to the bathroom, grabbed another officer, and waited outside the bathroom while Mr. Torres finished going to the bathroom. (Tr.

43:3-18). Both officers then followed him down to his kitchen. (Tr. 43:19-21). The officers pulled Mr. Torres aside and sked him if he had anything on him. (Tr. 43:22-25). He then patted Mr. Torres down for weapons. (Tr. 44:5-7). Overall, there was about ten minutes where the officers were with Mr. Torres in his home uninvited. (Tr. 44:11-15). At no point during this time did the officers give Mr. Torres Miranda warnings. (Tr. 44:1-4).

It was at that time that Kate Roy spoke to Mr. Torres. While speaking to Mr. Torres, Ms. Roy noticed that he was blinking slowly, he did not respond to question about being under the influence of alcohol, he leaned forward during conversation, and his eyes were sort of bloodshot. (Tr. 11:10-24). Ms. Roy asked Mr. Torres if he was under the influence of anything, to which he did not respond. (Tr. 11:10-16). After Ms. Roy was done talking to him, that was when Deputy Konrad went to speak to him. (Tr. 19:9-14). At that point, Deputy Konrad noticed that his eyes were bloodshot, his speech was slurred, and that he could smell alcohol on his breath. (Tr. 19:9-14). At that point Deputy Konrad asked him to come outside for field sobriety tests. (Tr. 19:9-14). After questioning, Mr. Torres admitted that he had two beers at the restaurant before he came. (Tr. 20:1-7). It was then that the officer placed him under arrest for OWI. (Tr. 21:1-10).

When asked if he noticed that Mr. Torres was under the influence of alcohol, Officer Beuhrer claimed he had "initial thoughts" but did not clarify what caused him to have this suspicion. (Tr. 47:11-14). At the time that the officer noticed that he was also directing Mr. Torres where to park his vehicle. (Tr. 49:21-50:8). Officer Beuhrer did not investigate Mr. Torres for OWI, either at that time or ever. (Tr. 50:9-12).

COURSE OF PROCEEDINGS

Mr. Torres filed a Motion to Suppress all of the evidence obtained from the illegal seizure of his person, because the officers did not have reasonable articulable suspicion to seize him and question him before beginning their investigation for OWI, under both the United States and the Iowa Constitutions. (App. 7). He also filed a Motion to Suppress all statements he made to officers before being placed in handcuffs, because he was placed into custody and not given proper Miranda warnings, under both the United States and the Iowa Constitutions. (App. 7).

After hearing, the court ruled that the police officers' actions upon coming into contact with Mr. Torres was not an illegal seizure under the federal or Iowa Constitution. (App. 13). The court also ruled that the DHS and officer questioning did not amount to custodial interrogation under the Fifth Amendment. (App. 13).

The court ruled that the officers were engaged in bona fide community caretaking or exigent circumstances in entering Mr. Torres's home, continuing even after Ms. Flores was taken into custody and the children were home with their grandmother. (App. 16). The court also ruled that the officers had reasonable suspicion that Mr. Torres was under the influence of alcohol when he began his interaction with officers. (App. 17).

The court found that Ms. Roy's interviewing of Mr. Torres, asking if he was under the influence of alcohol, did not rise to the level of custodial interrogation, and was analogous to roadside questioning, as he was in his own home and came to the scene voluntarily. (App. 17).

Mr. Torres later waived his right to a jury trial and stipulated to a trial on the minutes of testimony. (06.08.2020 Transcript). The evidence admitted at this trial was that Ms. Roy could smell alcohol coming from Mr. Torres, and then the officer could see that Mr. Torres has bloodshot watery eyes, a heavy odor of alcohol from his person, and slurred speech. (Conf. App. 15). Mr. Torres refused to consent to sobriety tests and advised he was going to refuse all tests. (Conf. App. 15). Mr. Torres admitted he had two beers from drinking at the restaurant before he went to the house. (Conf. App. 15). He later also refused the DataMaster Test. (Conf. App. 15).

The court found him guilty of Operating While Intoxicated, Second Offense in violation of Iowa Code § 321J.2(2)(b). (App. 20). The court sentenced Mr. Torres to 7 days in jail with credit for time served. (App. 20). Mr. Torres timely filed a Notice of Appeal. (App. 27).

ISSUES

I. THE OFFICER'S SEIZURE OF MR. TORRES AS HE RETURNED TO HIS HOME WAS UNREASONABLE

A. Error Preservation and Standard of Review

Error was preserved when Mr. Torres filed a Motion to Suppress due to the unconstitutional seizure under the Iowa Constitution and the United States Constitution and the court overruled the Motion to Suppress. (App. 13).

The Motion to Suppress involves the constitutional rights of Mr. Torres, so review is de novo. State v. Tague, 676 N.W.2d 197, 203-04 (Iowa 2004). The court looks at the totality of the circumstances in reviewing the trial court. Id. (citing State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001)). The court gives deference to the trial court concerning the credibility of witnesses, but the court is not bound by the trial court's findings. Id. (citing State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001); State v. Liggins, 524 N.W.2d 181, 186 (Iowa 1994)).

B. Applicable Law

"A stop and subsequent detention--even though temporary and for a limited purpose--is a 'seizure' within the Fourth Amendment." State v. Kreps, 650 N.W.2d 636, 641 (Iowa 2002) (citing Whren v. United States, 517 U.S. 806, 809-10 (1996)). The United States Constitution's Fourth Amendment and the State of Iowa's Constitution both require searches and seizures, including brief detentions, be founded on an objective justification in order to prevent prohibited pre-textual detentions. See United States v. Mendenhall, 456 U.S. 544, 551 (1980); United States Const., Amend. IV, Iowa Const., Art. I, Section 8. The Fourth Amendment guarantee against unreasonable searches and seizures is made applicable to the states under the Fourteenth Amendment to the United States Constitution. Mapp v. Ohio, 367 U.S. 643, 655 (1961). Warrantless searches and seizures are *per se* unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. State v. Lovig, 675 N.W.2d 557, 563 (Iowa 2004).

A seizure occurs if "there is a governmental termination of freedom of movement through means intentionally applied." Brower v. Inyo County, 489 U.S. 593, 597 (1989). In California v. Hodari D., 499 U.S. 621, 629 (1991), the Court held that "[a]n arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority." "A stop and subsequent detention--even though temporary and for a limited purpose--is a 'seizure'

within the Fourth Amendment." State v. Kreps, 650 N.W.2d 636 (Iowa 2002). A person is considered seized for Fourth Amendment purposes if a reasonable person would believe he or she is not free to leave. United States v. Mendenhall, 446 U.S. 544, 554 (1980). Whether a Fourth Amendment violation has occurred, however, turns on an objective assessment of the officer's actions in the light of the facts and circumstances encountered by the officer. Maryland v. Macon, 472 U.S. 463, 470-41 (1985). Applying the aforementioned law to the facts existing in the present case, there was a seizure for Fourth Amendment purposes.

The Terry standard applies if the police want to detain Mr. Torres. "Terry established the legitimacy of an investigatory stop in situations where the police may lack probable cause for an arrest." Id. at 786 (citing Terry v. Ohio, 392 U.S. 1, 24 (1968)). The United States Supreme Court first approved of what is colloquially known as Terry stops on a basis of "the narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause." United States v. Place, 462 U.S. 696, 702 (1983). The court approved that a seizure of a person without a warrant was reasonable so long as it was a limited search for weapons or "frisk", and "the officer has reasonable,

articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." Id.

However, "reasonable suspicion of criminal activity generally justifies only a narrow deviation from the Fourth Amendment's requirement for a warrant. Id. If a seizure is justified by reasonable suspicion, it must be minimally intrusive and carefully tailored to its underlying justification. Id.

The State has the burden to show that the officer had reasonable, articulable, and specific belief of criminal activity. State v. Kinkead, 570 N.W.2d 97, 100 (Iowa 1997). If the State does not carry their burden, the court suppresses the evidence obtained through the seizure. Id. An officer has reasonable suspicion sufficient to make a stop without a warrant if the police officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968)); see also In re S.A.W., 499 N.W.2d 739, 741 (Iowa Ct. App. 1993). Circumstances merely giving rise to suspicion or curiosity will not suffice. In re S.A.W., 499 at 741. Most importantly, and perhaps most relevant to the facts of the instant case, an inchoate or *generalized suspicion* will not serve to uphold a warrantless investigatory stop of a vehicle. Alabama v. White, 496 U.S. 325, 329 (1990).

C. Mr. Torres was seized

A reasonable person in Mr. Torres's position would have believed they were not free to leave long before the DHS worker noticed he was intoxicated. A seizure occurs if "there is a governmental termination of freedom of movement through means intentionally applied." Brower v. Inyo County, 489 U.S. 593, 597 (1989). A person is considered seized for Fourth Amendment purposes if a reasonable person would believe he or she is not free to leave. United States v. Mendenhall, 446 U.S. 544, 554 (1980).

Officers seized Mr. Torres as soon as he arrived, when officers were directing him to where he could and could not go. (Tr. 37:11-14). On three different occasions, an officer placed his hand on Mr. Torres and said "Let's go." (Tr. 38:15-18). An officer did not ask, but in fact demanded that Mr. Torres speak to him and look at him. (Tr. 39:4-7). The officer followed Mr. Torres from his lawn to the patrol car and then back to his lawn, never leaving his side. (Tr. 39:10-13). A reasonable person would not believe

It was not even possible for Mr. Torres to escape from an unwanted interaction with law enforcement by retreating into the safety and security of his home. Mr. Torres did not invite officers in, but they then followed him into his house. (Tr. 39:14-19). Even after Mr. Torres retreated into his home, officers began telling Mr. Torres who he can talk to and when. (Tr. 41:14-16). When Mr. Torres tries to find some privacy and use the bathroom at his house,

officers followed him upstairs and wanted for him to finish using the bathroom. (Tr. 43:3-18). They even subjected him to a traditional weapons patdown as part of a Terry stop. (Tr. 44:5-7).

D. Officers did not have reasonable articulable suspicion for the seizure

When asked if he noticed that Mr. Torres was under the influence of alcohol, Officer Beuhrer claimed he had "initial thoughts" but did not clarify what caused him to have this suspicion. (Tr. 47:11-14). At the time that the officer noticed that he was also directing Mr. Torres where to park his vehicle. (Tr. 49:21-50:8). Officer Beuhrer did not investigate Mr. Torres for OWI, either at that time or ever. (Tr. 50:9-12).

Rather, when agents of the State first noticed that Mr. Torres was intoxicated was when Ms. Roy was talking to him. (Tr. 11:10-24). After Ms. Roy was done talking to him, that was when Deputy Konrad went to speak to him. (Tr. 19:9-14). At that point, Deputy Konrad noticed that his eyes were bloodshot, his speech was slurred, and that he could smell alcohol on his breath. (Tr. 19:9-14).

An officer has reasonable suspicion sufficient to make a stop without a warrant if the police officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968)); see also In re S.A.W.,

499 N.W.2d 739, 741 (Iowa Ct. App. 1993). Circumstances merely giving rise to suspicion or curiosity will not suffice. In re S.A.W., 499 at 741. Most importantly, and perhaps most relevant to the facts of the instant case, an inchoate or *generalized suspicion* will not serve to uphold a warrantless investigatory stop of a vehicle. Alabama v. White, 496 U.S. 325, 329 (1990).

Not only are Officer Beuhrer's "initial thoughts" not credible testimony, they are insufficient for reasonable articulable suspicion. It is not credible to believe that Officer Beuhrer saw Mr. Torres, thought he was intoxicated, then directed him to park his vehicle. (Tr. 49:21-50:8). It is not credible that Officer Beuhrer saw Mr. Torres, thought he was intoxicated, then did not immediately begin investigating him for OWI. The most reasonable explanation is that Officer Beuhrer is telling a bit of a big fish story about when he first noticed the sign of intoxication on Mr. Torres.

In addition, the standard is not that the officer was suspicious. The standard is reasonable articulable suspicion. Officer Beuhrer testified that he had some initial thoughts, but never clarified that with descriptive testimony of what objective facts led him to have these suspicions, leaving the court completely unable to uphold suspicion based on facts that were never testified to.

E. Community caretaking and exigent circumstances did not apply

While not argued by the State or testified to by officers, the court found that officers were engaged in community caretaking by seizing Mr. Torres and in entering Mr. Torres's home, continuing even after Ms. Flores was taken into custody and the children were home with their grandmother. (App. 16). As part of their community caretaking functions officers may act reasonably to give aid to a person in distress and finding what caused the distress. State v. Mitchell, 498 N.W.2d 691, 693 (Iowa 1993). When an officer is giving emergency aid, "the officer has an immediate, reasonable belief that a serious, dangerous event is occurring." State v. Coffman, 914 N.W.2d 240, 245 (Iowa 2018). The State has the burden of showing specific and articulable facts that show the officer's actions were proper. State v. Kurth, 813 N.W.2d 270, 277 (Iowa 2012). Officer actions under the community caretaking exception must be limited to the justification, and "the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance."

When an officer is acting as a public servant, the officer believes that there is an issue requiring the officer's general assistance. Id. The application of the exception asks whether there was a seizure, whether it was bona fide community caretaker activity, and if the public need and interest outweighs the intrusion upon the privacy of the citizen. Id.

Any community caretaking function had ended by the time that Mr. Torres arrived. There was no child hanging out of a window. There was no concern that the children would be unsafe with their grandmother, who was there at the time. (Tr. 49:11-13). In fact there was no concern that the children would be unsafe with their father, who had just arrived. Mr. Torres did not even arrive to the scene before the perpetrator behind any child endangerment had already been arrested and placed into the back of a squad car. (Tr. 32:23-33:1; 34:9-14). Officers did not need to instruct Mr. Torre on everything he could and could not do, follow him into his home, follow him while used the restroom, and otherwise detain him.

Likewise, there were no exigent circumstances. Exigent circumstances usually require danger of violence to officers or others, risk of escape, or the destruction of evidence. State v. Watts, 801 N.W.2d 845, 851 (Iowa 2011). The circumstances must be supported by specific articulable grounds. Id. By the time that Mr. Torres came to the home, police had already secured the area and there was no indication that Mr. Torres was a threat to officers or a threat in his own home.

II. THE STATE SUBJECTED MR. TORRES TO CUSTODIAL INTERROGATION WITHOUT A MIRANDA WARNING IN HIS OWN HOME

A. Error Preservation and Standard of Review

Error was preserved when Mr. Torres filed a Motion to Suppress due to being subject to custodial interrogation under the United States Constitution and the court overruled the Motion to Suppress. (App. 13).

The Motion to Suppress involves the constitutional rights of Mr. Torres, so review is de novo. State v. Tague, 676 N.W.2d 197, 203-04 (Iowa 2004). The court looks at the totality of the circumstances in reviewing the trial court. Id. The court gives deference to the trial court concerning the credibility of witnesses, but the court is not bound by the trial court's findings. Id. The State bears the heavy burden of proving compliance with Miranda. State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975).

B. Argument

When an individual is taken into custody or otherwise deprived of his freedom by the authorities, the privilege against self-incrimination is jeopardized. State v. Miranda, 672 N.W.2d 753, 758-59 (Iowa 2003). The court thus enacted procedural safeguards to protect the privilege. Id. Defendants must be informed of their constitutional rights to remain silent, to have an attorney present during questioning, that anything they say can be used as evidence in a court of law, and that if they are indigent, they are entitled to the appointment of an attorney prior to any questioning. Id. If these

procedural safeguards are not carried out, evidence obtained as a result of a custodial interrogation is inadmissible. Id.

Miranda warnings are only necessary when there is both custody and interrogation. State v. Countryman, 572 N.W.2d 553, 557 (Iowa 1997). The appropriate test for custody is whether a reasonable person in the defendant's position would understand himself to be in custody. State v. Deases, 518 N.W.2d 784, 789 (Iowa 1994). To determine what the reasonable person would understand, the court should look to (1) the language used to summon the individual; (2) the purpose, place, and manner of interrogation; (3) the extent to which the defendant is confronted with evidence of her guilt; and (4) whether the defendant is free to leave the place of questioning. Id.

"Interrogation" is not limited to express and direct questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. State v. Peterson, 663 N.W.2d 417, 424 (Iowa 2003).

The four factors indicate that Mr. Torres was in custody. The language used to summon Mr. Torres was one of custody. Officers directed him on where to go. (Tr. 37:11-14). They told him when he could and could not speak to his wife. (Tr. 37:15-17). On three different occasions, an officer placed his

hand on Mr. Torres and said "Let's go." (Tr. 38:15-18). The officer demanded that Mr. Torres speak to him and look at him. (Tr. 39:4-7).

The purpose, place, and manner of interrogation indicated custody. The general rule is that in-home interrogations are not custodial. See State v. Evans, 495 N.W.2d 760, 762 (Iowa 1993). However, suspects may be deemed in custody even while in their own home. Orozco v. Texas, 394 U.S. 324 (1969). In this case, the fact that Mr. Torres attempted to retreat to his home and the officers followed him in there, even following him as he went to use the bathroom, indicates custody in opposition to the general rule.

The extent to which Mr. Torres was confronted with evidence of guilty supports custody. Ms. Roy directly asked Mr. Torres if he was under the influence of anything, to which he did not respond. (Tr. 11:10-16). And the final factor, whether Mr. Torres was free to leave, supports custody. There was no place for him to go. Officers followed him into his home even though he did not invite them in.

Even though Mr. Torres was subject to custodial interrogation, officers failed to provide him with Miranda warnings. All statements after he was placed in custody outside of his home must be suppressed.

III. THERE WAS NOT SUFFICIENT EVIDENCE TO PROVE MR. TORRES WAS INTOXICATED

A. Error Preservation and Standard of Review

Error was preserved when the court overruled Mr. Torres's motion for judgment of acquittal because Mr. Torres was not under the influence of alcohol. (Trial Tr. 7:17-25). Even if error was not preserved, there is no need to preserve error on a sufficiency of the evidence claim made on appeal from a criminal bench trial. State v. Anspach, 627 N.W.2d 227, 231 (Iowa 2001).

Review of sufficiency-of-evidence claims is for errors at law. State v. Leckington, 713 N.W.2d 208, 213-14 (Iowa 2006). The Due Process Clause of the Fourteenth Amendment protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364 (1970).

The appellate court will uphold a verdict if it is supported by substantial evidence. Leckington, 713 N.W.2d at 213. All the evidence presented is considered, and the record is viewed in a light most favorable to the State. Id. The court will consider not only the evidence that supports the verdict, but also that which detracts from it. State v. Petithory, 702 N.W.2d 854, 856-57 (Iowa 2005). "The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." State v. Webb, 648 N.W.2d 72, 76 (Iowa 2002). "A reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work; a finding of fact must be an inference drawn from evidence rather

than a mere speculation as to probabilities without evidence." People v. Rekte, 181 Cal. Rptr. 3d 912, 919 (Cal. App. 4th Dist. 2015). When evidence is based on an unreasonable inference, it is considered insufficient to support conviction. Com. v. Rodriguez, 925 N.E.2d 21, 26 (Mass. 2010). Even when two reasonable inferences are present, the evidence is still insufficient if one of the inferences establishes innocence. Com. v. Williams, 764 N.E.2d 889, 897 (Mass. App. 2002). "When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof." Com. v. Croft, 186 N.E.2d 468, 469 (Mass. 1962).

B. Argument

A person is under the influence for the purposes of Operating While Intoxicated if his reason or mental ability has been affected, his judgment is impaired, his emotions are visibly excited, or he has, to any extent, lost control of bodily actions or motions. State v. Dominguez, 482 N.W.2d 390, 392 (Iowa 1992). The evidence admitted at this trial was that Ms. Roy could smell alcohol coming from Mr. Torres, and then the officer could see that Mr. Torres has bloodshot watery eyes, a heavy odor of alcohol from his person, and slurred speech. (Conf. App. 15). Mr. Torres refused to consent to sobriety tests and advised he was going to refuse all tests. (Conf. App. 15). Mr. Torres

admitted he had two beers from drinking at the restaurant before he went to the house. (Conf. App. 15). He later also refused the DataMaster Test. (Conf. App. 15).

Mr. Torres's drinking of two beers and smelling like alcohol does not establish intoxication, they merely establish that he had been drinking, which is not illegal. And his agitated state and refusal to take tests likewise do not establish intoxication beyond a reasonable doubt. The other likely explanation for Mr. Torres's refusal and agitation were that his wife had just been arrested and he was not being allowed to care for his children. Even when two reasonable inferences are present, the evidence is still insufficient if one of the inferences establishes innocence. Com. v. Williams, 764 N.E.2d 889, 897 (Mass. App. 2002). Mr. Torres's emotional agitation is just as easily explained by the innocent explanation that he was justifiably emotionally upset as it is by intoxication, and thus the evidence was not sufficient to convict him of OWI 2nd offense.

CONCLUSION

The district court erred in finding that Mr. Torres was guilty of Operating While Intoxicated. The innocent explanation is just as likely as the inculpatory explanation, so the State's evidence was not sufficient to establish

that he was intoxicated. The court should reverse his conviction and remand for dismissal.

If the court does not do that, the district court erred by denying Mr. Torres's Motion to Suppress. There was not reasonable suspicion to support the officer's detention of Mr. Torres, and the community caretaking and exigent circumstances exception did not apply as they no longer existed and the officers exceed the scope of those exceptions. In addition, Mr. Torres was placed into custodial interrogation without a Miranda warning, and his statements should be suppressed. The court should overturn the district court's decision on the Motion to Suppress and remand the case to the district court for new trial.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

PARRISH KRUIDENIER DUNN GENTRY BROWN BERGMANN & MESSAMER L.L.P.

BY: /S/ Benjamin D. Bergmann
Benjamin D. Bergmann AT0009469
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: bbergmann@parrishlaw.com
ATTORNEYS FOR DEFENDANT - APPELLANT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words) because this brief contains 4,783 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

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, Times New Roman.

/S/ Alexander Smith
Dated: September 27, 2021
Alexander Smith