IN THE SUPREME COURT OF IOWA

No. 22-1010

CORY BURNETT

Plaintiff-Appellant,

vs.

PHILLIP SMITH AND STATE OF IOWA

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
HONORABLE LARS ANDERSON, JUDGE

APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because it presents "substantial constitutional questions" that are fundamental issues of broad public importance requiring ultimate determination. Iowa R. App. P. 6.1101(2)(a) and (d).

STATEMENT OF THE CASE

NATURE OF THE CASE: This action comes before this Court on a grant of summary judgment. The case arises out of the wrongful arrest of Cory Burnett by Phillip Smith, an Iowa Motor Vehicle Enforcement officer.[1] Burnett alleges that Smith misunderstood the law and his arrest of Burnett for Interference with Official Acts in violation of Iowa Code §719.1(1)(B) was without legal support and therefore unconstitutional.

Burnett withdrew his common-law claims and submitted only his Iowa Constitutional tort claims. (App. 7).

COURSE OF PROCEEDINGS: On November 19, 2020, Burnett filed suit against Smith. (App. 5). On February 23, 2022, Smith filed a Motion for Summary Judgment. (App. 15). On March 4, 2022, Burnett filed his own

[1] Burnett will refer to the Defendants collectively as "Smith."

Motion for Partial Summary Judgment with supporting documentation. (App. 82). On March 14, 2022, Burnett filed his resistance to Smith's Motion for Summary Judgment with the same supporting documentation. (App. 162).

On April 20, 2022, the district court granted summary judgment for Smith. (App. 205). On April 30, 2022, Burnett requested reconsideration. (App. 217). On May 16, 2022, the district court denied the motion to reconsider. (App. 240). Burnett appealed on June 13, 2022. (App. 242).

STATEMENT OF FACTS[2]

Cory Burnett is a resident of Johnson County, Iowa. (App. 85). Defendant Phillip Smith was always acting as an Iowa State Motor Vehicle Enforcement Officer, an employee of the State of Iowa. (App. 85). The State of Iowa is a governmental entity and is the owner and operator of the Iowa State Motor Vehicle Enforcement division of the Iowa Department of Transportation. (App. 85).

On November 1, 2019, at approximately 11:10am, Cory Burnett was driving a brown garbage truck owned by his employer, Waste Management, when he was pulled over by Motor Vehicle Enforcement Officer Phillip Smith

[2] The facts are taken from Burnett's Statement of Facts in resistance to the Motion for Summary Judgment.

("Officer Smith") for a "cracked windshield violation." (App. 85, 28). Officer Smith stated that he wanted to "complete an inspection of the vehicle." (App. 86, 28). The entire interaction between Ofc. Smith and Mr. Burnett was captured on video. The video has been marked by the defendants as Exhibit E. (App. 35).

Mr. Burnett had no objection to Officer Smith completing his inspection. (App. 86, 35). However, Officer Smith requested and then demanded that Mr. Burnett assist in the inspection by operating certain controls of the vehicle (e.g. lights, turn signals, headlights, inspection for oil leaks). (App. 86, 35). Mr. Burnett refused to do so, indicating that he was not required to assist. (App. 86, 35). Mr. Burnett had a constitutional right not to assist any investigation conducted by Officer Smith. (App. 86, 45). Mr. Burnett continued to decline the demands of Officer Smith, so Officer Smith "placed [Mr. Burnett] under arrest for interference with official acts" and eventually took him to the Johnson County Jail. (App. 86, 35, 28).

In his answer to interrogatory No. 1, Ofc. Smith claims that Mr. Burnett *resisted* by "refus[ing] to operate any controls of the commercial vehicle that he was driving as necessary for Ofc. Smith to complete his inspection." (App. 86-87, 39). In his answer to interrogatory No. 1, Ofc. Smith claims that Mr. Burnett *obstructed* by "not operating any of the controls of the commercial

vehicle." (App. 87, 39). In his answer to interrogatory No. 1, Ofc. Smith does not claim that Mr. Burnett *resisted* or *obstructed* by refusing to return to his vehicle. (App. 87, 39).

At no time did Mr. Burnett resist or obstruct Officer Smith from carrying out his duty to inspect the vehicle, nor did Mr. Burnett interfere with the inspection itself. (App. 87, 35). In fact, Officer Smith completed the inspection after arresting Mr. Burnett. (App. 87, 35). A bench trial was held on January 10, 2020, before Magistrate Mark Thompson in Iowa City, Johnson County. (App. 87). Officer Smith was the sole witness. Mr. Burnett did not testify. (App. 87, 100-101). At the bench trial, the defendants cited to Iowa Code §321.476(2) to support their contention that Mr. Burnett had a duty to assist in the inspection. (App. 87, 90). After listening to Ofc. Smith's testimony, Magistrate Thompson dismissed the case. (App. 88, 36). The dismissal of the charge against Mr. Burnett was based on the fact that Mr. Burnett had no legal obligation to comply with the request and therefore did not interfere in any manner. (App. 88).

Mr. Burnett has worked for his employer since approximately 2014. (App. 100). Between 2014 and immediately before November 1, 2019, Mr. Burnett's employer's vehicles had been stopped by the Iowa State Motor Vehicle Enforcement division on 69 occasions. (App. 100). Mr. Burnett had

been stopped by the same department on 4 occasions before November 1, 2019, including a previous stop performed by Ofc. Smith. (App. 100).

Mr. Burnett filed his claim with the State appeals Board pursuant to Chapter 669 of the Iowa Code on April 9, 2020. (App. 88). On October 26, 2020, the State of Iowa received Plaintiff's withdrawal of claims before the State Appeal Board. (App. 88). Mr. Burnett filed his petition with the Iowa District Court on November 19, 2020. (App. 88).

ARGUMENT

I. BURNETT WAS NOT LEGALLY OBLIGATED TO ASSIST AN IOWA MOTOR VEHICLE ENFORCEMENT OFFICER IN A COMMERCIAL MOTOR VEHICLE INSPECTION

Preservation of Error.

Notice of Appeal was filed in the district court on June 13, 2022 from an Order dated May 16, 2022 denying a Motion to Reconsider a Ruling granting Defendants' Motion for Summary Judgment and denying Plaintiff's Motion for Partial Summary Judgment filed on April 20, 2022. Burnett preserved error for review.

Standard of Review.

"We review grants of summary judgment for correction of errors at law. *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 525 (Iowa 2015). "We review the legal issues necessary for resolution of the constitutional claims presented within the context of the summary judgment proceeding *de novo*." *Godfrey v. State*, 898 N.W.2d 844, 847 (Iowa 2017). ("*Godfrey II*").

Merits.

The Iowa Supreme Court has outlined how criminal statutes are to be interpreted:

> In interpreting a criminal statute, "provisions establishing the scope of criminal liability are to be strictly construed with doubts resolved therein in favor of the accused."

> Further, as recently noted by Justice Antonin Scalia, writing for the majority in *Burrage v. United States*, a case in which the Supreme Court strictly construed a federal statute to preclude imposition of a penalty enhancement, "[t]he role of [a court] is to apply the statute as it is written—even if we think some other approach might ' "accor[d] with good policy." ' 571 U.S. 204 (2014) (quoting *Comm'r v. Lundy*, 516 U.S. 235, 252 (1996)); *see also id.* at 219 (Ginsburg, J., concurring) (agreeing with the majority that "'in the interpretation of a criminal statute subject to the rule of lenity,' where there is room for debate, one should not choose the construction 'that disfavors the defendant'"). We have repeatedly expressed a similar view.

State v. Nicoletto, 845 N.W.2d 421, 427 (Iowa 2014).

During the criminal phase of this case, the State of Iowa argued that Iowa Code §321.476(2) supported the claim that Mr. Burnett had failed to comply with Iowa law when he was requested to assist in the inspection of his commercial motor vehicle. The State did not argue any other provision of law. (App. 90-92).

That statute states as follows:

321.476 Weighing vehicles by department.

1. a. Authority is hereby given to the department to stop any motor vehicle or trailer on the highways for the purposes of weighing and inspection, to weigh and inspect the same and to enforce the provisions of the motor vehicle laws relating to the registration, size, weight, and load of motor vehicles and trailers.

> b. Authority is also hereby granted to subject to weighing and inspection, vehicles which have moved from a highway onto private property under circumstances which indicate that the load of the vehicle, if any, is substantially the same as the load which the vehicle carried before moving onto the private property.
>
> 2. Any person who prevents or in any manner obstructs an officer attempting to carry out the provisions of this section is guilty of a simple misdemeanor.

Iowa Code § 321.476

The plain language of the statute does not require that a driver must assist with an inspection. It only provides authority for the department to *stop a motor vehicle for the purpose of weighing and inspecting it*. If the Legislature wanted commercial vehicle operators to assist, it could have specifically stated such a requirement. As applied to this case, Ofc. Smith had the authority to pull the vehicle over for the purpose of weighing it or inspecting it. Ofc. Smith was not interested in weighing the vehicle but had every right to inspect the vehicle. And there was nothing that Mr. Burnett did that prevented or obstructed him from inspecting it.

During the discovery process, plaintiff issued an interrogatory to Ofc. Smith asking him to "identify the specific law, ordinance, or regulation that required Mr. Burnett to assist you in performing the tasks identified in the previous answers to Interrogatories 2 through 5". (App. 41). Ofc. Smith did

not identify any regulation or ordinance. In addition to Iowa Code § 321.476, Ofc. Smith identified two other statutes, namely Iowa Code §719.1 and Iowa Code §321.229.

Iowa Code §719.1 is the "interference with official acts" criminal statute, which provides in relevant part as follows:

> A person commits interference with official acts when the person knowingly *resists or obstructs* anyone known by the person to be a peace officer … in the performance of any act which is within the scope of the lawful duty or authority of that officer….

(Emphasis added). Ofc. Smith identified the conduct that constituted resistance or obstruction as "refus[ing] to operate any controls of the commercial vehicle that he was driving as necessary for Ofc. Smith to complete his inspection" or "not operating any of the controls of the commercial vehicle." (App. 39). This statute gets us no closer to finding an obligation on the part of Mr. Burnett to assist. Smith only states a conclusion that Mr. Burnett's refusal to operate any controls constitutes resistance or obstruction. It doesn't answer the question whether he was obligated to do so. There must be an underlying statute, regulation, or ordinance that mandated such conduct.

This conclusion is further supported by the following subsection of Iowa Code §719.1:

> 3. The terms "resist" and "obstruct", as used in this section, do not include verbal harassment unless the verbal harassment is accompanied by a present ability and apparent intention to execute a verbal threat physically.

There is no doubt that Mr. Burnett made his displeasure known to Ofc. Smith but there is no claim that he acted in a physically threatening manner.

All Mr. Burnett did was *passively* refuse to cooperate. He did nothing to stop Ofc. Smith from conducting his inspection. For example, he did not lock him out of the vehicle, or refuse to provide him with the keys. He did not block his way to any part of the vehicle. Effectively, what Mr. Burnett did was turn over the vehicle to Ofc. Smith to do whatever Ofc. Smith wanted to do with the vehicle.

As Judge Reade has pointed out:

> Simply "object[ing]" or even passively "failing to cooperate" with law enforcement officers does not provide arguable probable cause under Iowa Code section 719.1(1); the statue requires proof that the defendant "active[ly] interfer[ed]" with the law enforcement officer. *State v. Smithson*, 594 N.W.2d 1, 2 (Iowa 1999) (citation and internal quotation marks omitted); *see, e.g.*, *State v. Holmes*, No. 00-950, 2001 Iowa App. LEXIS 734, 2001 WL 1577584, *2 (Iowa Ct. App. Dec. 12, 2001) (holding

> no probable cause for arrest under Iowa Code section 719.1(1), where there was no evidence of active interference).

McCabe v. Macaulay, 551 F. Supp. 2d 771, 794-795 (N. D. Iowa 2007)

In *Smithson,* an owner of a nightclub was charged with interference with official acts for "*not turning down the music at the officer's request." Id* at 3 (emphasis in original). The Supreme Court reversed his conviction stating the following of relevance to this case:

> In discussing this language, two commentators who participated in the 1978 Code revision state:
>
> > The language of [section 719.1] was chosen because it conveys the idea of active interference, with the drafting committee rejecting more passive language such as "object" or "fail to cooperate."
>
> John L. Yeager & Ronald L. Carlson, *Criminal Law and Procedure* § 422 (Supp. 1998). These authors point out that the criminal offense relating to failure to cooperate with law enforcement officers is found in Iowa Code section 719.2.
>
> Defendant asserts that he may not be convicted under section 719.1(1) based on a failure to cooperate with the police in turning the music down or off. …
>
> ***
>
> The State's theory of guilt under the trial information was based entirely on Smithson's failure to turn down the music at the officer's request. …
>
> ***
>
> Applying these principles to the present facts, we believe the State's case must rise or fall on whether Smithson's failure to turn down the music at the officer's request constituted a violation of section 719.1.

> Based upon the language of the statute, its legislative history, and the authorities that we have discussed, we conclude that it may not. Smithson's motion for a directed verdict should have been granted.

State v. Smithson at 2-3

Iowa law clearly requires active interference, not passive resistance as occurred in this case. Accordingly, Iowa Code §719.1 does not provide a legal basis for finding that Mr. Burnett had a legal obligation to assist with the inspection.

Finally, there is Ofc. Smith's belated claim that Mr. Burnett violated Iowa Code §321.229. That statute provides as follows:

> **321.229 Obedience to peace officers.**
>
> No person shall willfully fail or refuse to comply with any lawful order or direction of any peace officer invested by law with authority to direct, control, or regulate traffic.

Assuming arguendo that Ofc. Smith was controlling or regulating traffic, which is questionable, there is no legal requirement on the part of Mr. Burnett to assist him in performing his duties. Therefore, Ofc. Smith did not have the authority to demand such conduct and accordingly his request could not be considered a lawful order or a lawful direction. It should also be pointed out that neither Ofc. Smith nor the State asserted this statute as a basis for charging him with interference with official acts. Moreover, permitting the use of this

statute to replace the requirement of proof of resisting or obstructing under Iowa Code §719.1 would expand the definition of interference with official acts.

For Mr. Burnett to be charged with a crime of interference with official acts, the officer must establish that he had probable cause to believe that Mr. Burnett was resisting or obstructing as defined in Iowa Code §719.1. Since Mr. Burnett was not required to assist in the inspection of his vehicle and performed no act of resisting or obstructing as defined in the statute, his decision not to do what was requested by Ofc. Smith cannot constitute a willful failure to comply with a lawful order.

Smith points to the Commercial Vehicle Safety Alliance ("CVSA") for support for his position. According to Smith, the "CVSA is a nonprofit association comprised of local, state and federal commercial motor vehicle safety officials and industry representatives." In other words, it's not a governmental agency and has no regulatory control over anyone. In addition, there is nothing in the information provided by Smith regarding this organization that mandates a driver to assist in the inspection.

Finally, Smith cites to *Hill v. Goodwin*, 2018 WL 1734913 (N.D. Miss. 2018), a case applying Mississippi law that required a driver to assist. As

noted by Burnett in his Answer to Interrogatory No. 17, the issue is not what Mississippi requires; the issue is what Iowa law requires. (App. 45). The fact that Smith must cite to a Mississippi case only highlights the lack of legal support for Smith's position.

II. OFFICER SMITH DID NOT HAVE PROBABLE CAUSE TO ARREST BURNETT FOR HIS PASSIVE REFUSAL TO ASSIST IN A COMMERCIAL MOTOR VEHICLE INSPECTION.

Preservation of Error.

See Section I. Burnett preserved error for review.

Standard of Review.

See Section I above.

Merits.

> A peace officer may make a warrantless arrest if he or she "has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person to be arrested has committed it." *Iowa Code section 804.7(3) (1983)*. … The expression "reasonable ground" is equivalent to traditional "probable cause."

Kraft v. Bettendorf, 359 N.W.2d 466, 469 (Iowa 1984) (Emphasis added).

"Probable cause, however, must be determined on the particular facts of each case. If pertinent facts relating to the existence of probable cause are in dispute, the existence of probable cause is a jury question." *Kraft* at 470.

"Once a plaintiff shows a warrantless arrest, the burden of proof shifts to the defendant to show justification for the arrest." *Children v. Burton*, 331 N.W.2d 673, 679 (Iowa 1983). *See also Fox v. McCurnin*, 205 Iowa 752, 758-59 (Iowa 1928) ("where the officer acts without a warrant, the burden of proof is upon him to justify his action.").

"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution to the belief that' an offense has been or is being committed." *Children* at 679 (Emphasis added).

In assessing whether a police officer has reasonable suspicion to stop someone, or has probable cause to arrest an individual, law enforcement should consider evidence that contradicts their perceptions:

> Like all seizures, "[t]he officer's action must be 'justified at its inception.'" "The standard takes into account the totality of the circumstances—the whole picture." *As a result, the presence of additional facts might dispel reasonable suspicion*. *Here, Deputy Mehrer possessed no exculpatory information*—let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck—and thus the stop was justified.

Kansas v. Glover, 140 S. Ct. 1183 (2020) (Emphasis added).

In order to arrest Mr. Burnett, Ofc. Smith needed to establish a factual basis to conclude that Mr. Burnett had actively resisted an official act.

> “The purpose of criminalizing conduct that interferes with official police action is *to enable officers to execute their peace-keeping duties calmly, efficiently, and without hindrance.*" *State v. Buchanan*, 549 N.W.2d 291, 294 (Iowa 1996) (emphasis added). Our supreme court has noted the language of this section was chosen because it conveys the idea of active interference. *State v. Smithson*, 594 N.W.2d 1, 2 (Iowa 1999). Passive conduct, such as failure to cooperate, is the subject of section 719.2, *id.*, an offense with which K.R. was not charged.
>
> The term "resist" has been interpreted as limited to obstructive conduct but not requiring actual violence or direct force; it is sufficient if the "person charged engaged in actual opposition to the officer through the use of actual or constructive force making it reasonably necessary for the officer to use force to carry out his [or her] duty." *State v. Donner*, 243 N.W.2d 850, 854 (Iowa 1976). The term "obstruct" has been interpreted more broadly than "resist" and "includes putting obstacles in the path of officers completing their duties." *State v. Hauan*, 361 N.W.2d 336, 339 (Iowa Ct. App. 1984). Section 719.1(3) provides the terms "resist" and "obstruct" do not include verbal harassment, unless accompanied by the ability and apparent intent to execute the threat physically.
>
> Contrary to the State's argument, we do not believe the facts in this case fit the crime charged. At best, the evidence shows no more than K.R.'s disobedience or failure to cooperate with the officer's instructions to leave the area of the group confrontation. *See, e.g., State v. Smithson*, 594 N.W.2d at 3 (mere failure to comply with officer's instructions to turn music down insufficient to convict under 719.1). Moreover, the evidence of any resulting interference is also, at best, ambiguous. Like the court in *Smithson*, we conclude the State's failure to prove K.R.'s disobedience was an active interference (or hindrance of) the officer's performance of an act within the scope of his lawful duties requires reversal of K.R.'s adjudication as a delinquent child.

In the Interest of K.R., 2008 Iowa App. LEXIS 482, *5-7 (Iowa App. Ct. 2008)

Ofc. Smith had no factual basis to conclude that Mr. Burnett did anything other than refuse to assist. At no point was the officer prevented from performing his job. There was no physical action (active conduct) by Mr. Burnett to support a charge under Iowa Code §719.1.

Even assuming that Ofc. Smith believed that he had the right to arrest Mr. Burnett for his failure to assist in the inspection of a commercial motor vehicle, the warrantless arrest was based on a mistake of law. This Court has held that a *mistake of law* is a lack of probable cause. *State v. Scheffert*, 910 N.W.2d 577, 584-585 (Iowa 2018); *State v. Tyler*, 830 N.W.2d 288, 294-296 (Iowa 2013).

> We choose to analyze the mistake-of-law question under the Iowa Constitution. We have previously considered mistake-of-law claims under the Iowa Constitution. *See State v. Tyler*, 830 N.W.2d 288, 294-96, 298 (Iowa 2013). The State has the burden of proof to show the officer was justified in stopping the vehicle. *Id.* at 293. We held in *Tyler* that a mistake of law is not sufficient to meet the State's burden to justify a stop. *Id.* at 294.

State v. Scheffert, 910 N.W.2d 577, 584-585 (Iowa 2018)

> Our precedent is clear that a mistake of fact may justify a traffic stop. …
>
> However, we have elected not to extend this permissiveness to mistakes of law, holding a mistake of law is not sufficient to justify a stop. "[E]vidence derived from a stop based on a law enforcement officer's mistake of law must be suppressed." *Louwrens*, 792 N.W.2d at 650.
>
> ***

> Recognizing that Officer Lowe's understanding of the law regarding license plate covers was flawed, the State attempted to justify the stop with other laws…Under the facts of this case, neither of these other laws has been shown by the State to provide Officer Lowe with probable cause to justify his seizure of Tyler. Consequently, we conclude that a mistake of law occurred. Unless the State can demonstrate alternate justification for the stop, any evidence derived from the stop must be suppressed.

State v. Tyler, 830 N.W.2d 288, 294-296 (Iowa 2013).

Whether viewed as either 1) a lack of a factual basis for the arrest for interference with official acts under Iowa Code §719.1; or 2) as a mistake of law, Officer Smith had no probable cause to arrest Mr. Burnett.

One additional point needs to be made. At the criminal trial, Ofc. Smith participated as the sole witness to testify. Mr. Burnett did not testify. Since there was no dispute regarding the facts, and there was no evidence offered by Mr. Burnett to contradict the officer's testimony during the criminal proceedings, the dismissal by the district court was based on a principle of law. The State argued the application of Iowa Code §321.476 and the district court rejected that argument and issued a dismissal. Accordingly, the issue of whether there was a statute, regulation, or ordinance that mandated Mr. Burnett to assist in the inspection of his commercial motor vehicle was decided as a matter of law by the District Court in favor of Mr. Burnett.

Therefore, that issue is final, and the Court cannot revisit that issue. In essence, there is claim preclusion on that claim.

> To prove claim preclusion, the moving party must establish three elements:
>
> (1) the parties in the first and second action are the same parties or parties in privity, (2) there was a final judgment on the merits in the first action, and (3) the claim in the second suit could have been fully and fairly adjudicated in the prior case (i.e., both suits involve the same cause of action).
>
> *Id.* at 836 (citing *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002)). "A second claim is likely to be barred by claim preclusion where the acts complained of, and the recovery demanded are the same or where the same evidence will support both actions." *Id.* In essence, claim preclusion prevents a party from taking a "second bite" at litigation to recover for the same wrong. Thus, this defense is a bar "*not only to matters actually determined in an earlier action but to all relevant matters that could have been determined*."

Jackson v. FYE Excavating, Inc., 967 N.W.2d 362 (Iowa Ct. App. 2021) (emphasis added).

All 3 elements of claim preclusion exist here. First, the parties were the same or were in privity.

> While we no longer require mutuality between the parties, we generally restrict its use only against a party, or one in privity with a party, to the prior suit. *See Hunter [v. Des Moines]*, 300 N.W.2d at 126 ("[T]he absence of mutuality will no longer invariably bar the offensive application of issue preclusion . . . if it is determined that *the party sought to be precluded was afforded a full and fair opportunity to litigate* the issue in the action relied upon . . . ."

(emphasis added)); *see also Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 104 (Iowa 2011) ("When used in an offensive manner, the plaintiff in the second action relies upon a *former judgment against the defendant* to establish an element of his or her claim . . . irrespective of the parties' mutuality or privity." (emphasis added).

As with defensive use of issue preclusion, privity for these purposes exists when:

> the party against whom issue preclusion is invoked was "so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution."

Dettmann [v. Kruckenberg], 613 N.W.2d at 244 .

Clark v. State, 955 N.W.2d 459, 465 (Iowa 2021)

In the criminal case, the State was the plaintiff and Ofc. Smith was its sole witness. In this case, the State is the defendant and Ofc. Smith is a party and its sole witness. There is little doubt that Ofc. Smith was *in privity* with the prosecution during the criminal case.

Second, the dismissal was a final judgment and was not appealed. Third, “the claim [was Mr. Burnett required to assist?] in the second suit could have been fully and fairly adjudicated in the prior case.” In fact, whether Mr. Burnett was required to assist was fully and fairly adjudicated in the criminal case. In its ruling, the Court focuses on the lawsuit brought by the plaintiff for damages, but the purpose for the application of claim preclusion is on whether Mr. Burnett was required to assist, which was the

specific issue to be resolved by the Court in determining whether Mr. Burnett had resisted or obstructed the inspection.

III. OFFICER SMITH WAS NOT ENTITLED TO QUALIFIED IMMUNITY WHEN HE LACKED PROBABLE CAUSE TO ARREST MR. BURNETT FOR REFUSING TO ASSIST HIM IN INSPECTING A COMMERCIAL MOTOR VEHICLE

Preservation of Error.

See Section I. Burnett preserved error for review.

Standard of Review.

See Section I above.

Merits.

The District Court concluded that, as a matter of law, Smith had acted with "all due care." (App. 210). It was error for the District Court to reach such a conclusion.

In *Baldwin I*, this Court held that "a government official whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care *to conform to the requirements of the law*." *Baldwin I* at 280-81 (emphasis added). A minimum requirement for a peace officer is to know the law. Since Officer Smith made a mistake of law, he had no probable cause. One cannot act with all due care when misapplying the law, regardless of whether you had a good faith belief or acted with reckless disregard. Either way, it is your job,

as a peace officer, to know the law. It cannot be a defense to such conduct to claim innocence of the law. Imagine if a physician could say "I didn't know that was the standard of care", or a driver could say "I didn't know that was a traffic violation." Ignorance of the law should not be sanctioned with the grant of qualified immunity.

The District Court's conclusion that he did not act with bad faith or malice is not the standard for applying qualified immunity. The question is whether he acted with all due care to conform to the law. If he is misapplying the law or misunderstanding the law, then he cannot, by definition, be acting with all due care.

Moreover, Iowa law requires "active interference." Smith fails to identify any active interference. Therefore, he had no factual basis to conclude that Mr. Burnett actively interfered, a prerequisite to the filing of a criminal charge for interference with official acts. It was error for the District Court to grant qualified immunity to Ofc. Smith.

IV. MR. BURNETT WAS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON HIS IOWA CONSTITUTIONAL TORT CLAIMS

Preservation of Error.

See Section I. Burnett preserved error for review.

Standard of Review.

See Section II.

Merits.

Mr. Burnett limited his claims to those permitted under the Iowa Constitution.[3] He is entitled to partial summary judgment on his article I, §8 claim.

A. Law on Iowa Constitutional Claims:

The Iowa Supreme Court has recognized a "tort claim *under the Iowa Constitution* when the legislature has not provided an adequate remedy." *Godfrey v. State*, 898 NW2d 844, 880 (Iowa 2017) (emphasis added) ("*Godfrey II*").[4] In *Godfrey II*, the Court allowed claims for violations of article I, §§6 and 9. *Godfrey II* at 871-72. The court stated "[w]hen a constitutional violation is involved, more than mere allocation of risks and compensation is implicated. The emphasis is not simply on compensating an individual who may have been harmed by illegal conduct, but also upon deterring unconstitutional conduct in the future." *Id.* at 877. "The focus in a constitutional tort is not compensation as much as ensuring effective enforcement of constitutional rights." *Id.*

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[3] Common law claims for false arrest, false imprisonment, and malicious prosecution are prohibited against State employees. Iowa Code §669.14(4).

[4] The shortcut names for *Godfrey* and *Baldwin* follow the numbering system utilized by the Supreme Court in *Wagner v State of Iowa*, 952 N.W.2d 843 (Iowa 2020). This numbering system is different than the system the Court used in *Baldwin I*.

In *Godfrey II*, the Court made the following statement:

> For the reasons expressed below, a majority of the court concludes that *Bivens* claims are available under the Iowa Constitution and that the claims raised by plaintiff in Counts VI and VII were improperly dismissed.

Id at 847. The reference to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). That case involved a Fourth Amendment claim for *unlawful search and seizure*. The United States Supreme Court concluded that an individual alleging a violation of the search and seizure provisions of the United States Constitution can assert a claim against a Federal official:

> The Fourth Amendment provides that:
>
> > "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."
>
> In *Bell* v. *Hood*, 327 U.S. 678 (1946), we reserved the question whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

Bivens at 389.

Iowa's version of the Fourth Amendment is art. I, §8. Accordingly, a claim for the violation of an individual's right to be free from improper search or seizure is a claim akin to *Bivens* and therefore self-executing. It would be incongruent to conclude that *Godfrey* claims for violation of art. I, §8 are not

cognizable as *Bivens*-type claims when the *Bivens* claims itself was for the same violation.

In *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018) (*"Baldwin I"*), the Court found that *Godfrey II* claims applied to article, I, §§1 and 8, subject to an affirmative defense of qualified immunity. *Baldwin I* at 260-61. The Court summarized its holding and the basis for its holding as follows:

> We believe instead that qualified immunity should be shaped by the historical Iowa common law as appreciated by our framers and the principles discussed in *Restatement (Second) of Torts section 874A*.
>
> This means due care as the benchmark. Proof of negligence, i.e., lack of due care, was required for comparable claims at common law at the time of adoption of Iowa's Constitution. And it is still the basic tort standard today. See Restatement (Second) of Torts § 874A (discussing reliance on analogous tort standards).
>
> Because the question is one of immunity, the burden of proof should be on the defendant. Accordingly, to be entitled to qualified immunity a defendant must plead and prove as an affirmative defense that she or he exercised all due care to comply with the law.
>
> We find support for our approach in a recent and thoughtful critique of *Harlow*. See John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013). Professor Jeffries notes, "The basic and essential remedy for most constitutional rights is the opportunity to assert them defensively against government coercion." Id. at 242. Nevertheless, Professor Jeffries concludes that "damages are appropriate to the vindication of constitutional rights, absent countervailing concerns, of which the most important and obvious would be superseding remedial legislation." Id. at 259 (footnotes omitted). "[C]onstitutional tort actions are presumptively appropriate." Id.

> In the end, Professor Jeffries condemns *Harlow* as "an overly legalistic and therefore overly protective shield," but advocates for a more straightforward "protection for reasonable error." Id. at 258-60. "The problem with current law is its implicit equation of reasonable error with the space between decided cases." Id. at 260.
>
> We agree. Constitutional torts are torts, not generally strict liability cases. Accordingly, with respect to a damage claim under *article I, sections 1 and 8,* a government official whose conduct is being challenged will not be subject to damages liability if she or he pleads and proves as an affirmative defense that she or he exercised all due care to conform to the requirements of the law.

Baldwin I at 280-81.

In so holding, the Court made the following statement regarding the application of immunities in Iowa Constitutional claims:

> Iowa's tort claims acts already protect government officials in some instances when they exercise due care. See, e.g., Iowa Code § 669.14(1)…; § 670.4(1)(c)…. *The problem with these acts, though, is that they contain a grab bag of immunities reflecting certain legislative priorities. Some of those are unsuitable for constitutional torts*.

Baldwin I at 279-280. (emphasis added).

The Supreme Court's most recent pronouncement on issues related to Iowa Constitutional claims is *Wagner v. State*, 952 N.W.2d 843 (Iowa 2020). Once again, the Court was asked to answer certified questions. *Wagner* at 847. In beginning its discussion of the certified questions, the Court took the time to summarize the case law involving Iowa Constitutional claims:

> In 2017, in *Godfrey II*, our court ruled that direct claims could be brought under the Iowa Constitution without legislative authorization.

Godfrey II did not have a majority opinion. Casting the deciding vote, a concurrence in part made clear that the court should imply damage remedies under the Iowa Constitution only when the legislative remedies were inadequate. The concurrence in part joined the plurality opinion "to the extent it would recognize a tort claim under the Iowa Constitution when the legislature has not provided an adequate remedy." The concurrence in part went on to find that the Iowa Civil Rights Act (ICRA) provided adequate remedies for Godfrey's claims of discrimination based on sexual orientation, and therefore those remedies were exclusive.

Apart from recognizing the existence of a direct constitutional claim for damages, *Godfrey II* "express[ed] no view on other potential defenses which may be available to the defendants." *Godfrey II*, as already noted, involved claims against the State and state employees acting in their official capacity.

The following term, the *Baldwin* case came before us for the first time. *Baldwin* was a federal court proceeding against a city and city officials here we were called upon to answer certified questions. In 2018, in *Baldwin I*, we addressed whether a qualified immunity defense was available for a direct constitutional claim under article I, section 8 of the Iowa Constitution. We declined to strictly follow the immunities in the Iowa Municipal Tort Claims Act (IMTCA)—or for that matter the ITCA. As we explained, "The problem with these acts . . . is that they contain a grab bag of immunities reflecting certain legislative priorities. Some of those are unsuitable for constitutional torts." Instead, we determined that an official who had exercised "all due care" should not be liable for damages, a standard that bears resemblance to one of the immunities set forth in the ITCA and the IMTCA. *Baldwin I* expressly left open whether other provisions of the ITCA and the IMTCA would apply to constitutional tort claims against public officials and public agencies.

In 2019, in *Baldwin II*, we answered that open question as to the IMTCA. We held that the IMTCA generally governs constitutional tort damage claims against municipalities and municipal employees acting in their official capacities. Summing up, we said that "the IMTCA applies to Baldwin's Iowa constitutional tort causes of action." Accordingly, we found that punitive damages and attorney fees could

> not be awarded against a municipality because the IMTCA did not allow such awards. A partial dissent disagreed, arguing "it is critical that punitive damages be available against a government entity in a proper case in order to provide an adequate remedy to the state constitutional tort."
>
> Just a few weeks later in *Venckus* [*v. City of Iowa City*, 930 N.W.2d 792 (Iowa 2019)], another 2019 case involving claims against municipalities and municipal officials, we reiterated that "[c]laims arising under the state constitution are subject to the IMTCA." Applying the IMTCA, we held in Venckus that the two-year statute of limitations in Iowa Code section 670.5 governed constitutional tort actions against a municipality and its employees acting in their official capacity.

Wagner at 851-852.

In *Wagner*, the Court went on to hold that the Iowa Tort Claims Act (Chapter 669) applied to Iowa Constitutional claims against the State of Iowa but limited its application to procedural matters, including the statute of limitations:

> In *Godfrey II*, we concluded, at least implicitly, that the ITCA did not foreclose a direct constitutional damages claim against the State and state employees acting in their official capacity. The issue before us now is whether the procedural limits of the ITCA should nonetheless apply to such a claim. It is logical to hold that constitutional torts, like other torts, are subject to the procedures set forth in the ITCA. Just because the substantive barriers to liability in the ITCA do not apply, that does not mean we should dispense with the entire ITCA. ….
>
> The procedural components of the ITCA, such as the requirement to present claims for adjustment and settlement before bringing suit and the two-year statute of limitations…do not deprive a plaintiff such as Wagner of an adequate remedy. Unlike the immunities set forth in the ITCA, these procedural requirements don't go to ultimate questions of liability and damages. The legislature intended the ITCA to be the only

> path for suing the State and state officials acting in their scope of employment on a tort claim. Consistent with Godfrey II, ITCA procedures should apply to constitutional torts.

Wagner v. State, 952 N.W.2d 843, 858-859

In summary, this Court has recognized Iowa constitutional claims against the State of Iowa (and its employees). The Iowa Tort Claims Act (Chapter 669) is the vehicle by which one brings these constitutional tort claims. The immunity provisions found within Chapter 669 will not be given legal effect. Iowa Constitutional claims are tort claims and as such are subject to the tort burden of proof, namely preponderance of the evidence and the objective reasonable person standard.

B. Article I, § 8: "The arrest of a person is quintessentially a seizure." *Payton* v. *New York*, 445 U. S. 573, 585 (1980). *Baldwin I* recognized a claim against a municipality for a violation of article 1, §8 of the Iowa Constitution. *Baldwin I* at 281. *Wagner* reinforced that holding.

> *The right of the people to be secure in their persons…against unreasonable seizures… shall not be violated*; and *no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.*

Article I, §8.

The overwhelming case law regarding the analysis and application of this section of the Iowa Constitution relates to criminal law. In *State v. Ochoa*, 792

N.W.2d 260 (Iowa 2010), a unanimous Court steered directly away from a "lockstep" interpretation of article 1, §8 with U.S. Supreme Court interpretation of the Fourth Amendment to the U.S. Constitution:

> [W]e now hold that, while United States Supreme Court cases are entitled to respectful consideration, we will engage in independent analysis of the content of our state search and seizure provisions. … The degree to which we follow United States Supreme Court precedent, or any other precedent, depends solely upon its ability to persuade us with the reasoning of the decision.

Ochoa at 267.

Ochoa involved the search of a home of a parolee by a general law enforcement officer, not a parole officer. The Court held that "a parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search." *Id* at 291.

The Court had previously steered such a destination when, in *State v. Cline*, 617 N.W.2d 277 (Iowa 2000), the Court rejected the good faith exception to the exclusionary rule that had been adopted by the United States Supreme Court. There the Court stated that: "The constitutional reasonableness of a… seizure is determined by an objective standard." *Cline* at 280-81. In rejecting a good faith exception to the exclusionary rule, the Court stated:

> One of the fundamental guarantees of the Iowa Constitution is the protection of its citizens against unreasonable searches and seizures. We believe that the only effective way to ensure that this right is more than mere words on paper is to exclude illegally obtained evidence. The reasonableness of a police officer's belief that the illegal search is lawful does not lessen the constitutional violation…. This court will simply not "condone and approve a clear and known violation of a fundamental constitutional right in order to sustain a conviction that we think correct." To do so would elevate the goals of law enforcement above our citizens' constitutional rights, a result not supported by any principle of constitutional law.

*Clin*e at 292-293.

As such, any claimed "good faith" violation of article I, §8 is of no defense for these defendants. Their subjective belief is irrelevant. In this regard, a claim under the Iowa Constitution differs from the probable cause standard of "good faith, reasonable belief." The issue under the Iowa Constitution is whether a reasonable officer had probable cause to arrest Mr. Burnett.

Moreover, pursuant to *Godfrey* and *Baldwin,* law enforcement's conduct is measured by an all-due care standard. Given that the Court in *Baldwin* rejected the Federal law's expansive qualified immunity standard, analyzed other State approaches, and resolved the issue of qualified immunity on a negligence standard, the proper approach involves application of negligence principles.

Ofc. Smith charged Mr. Burnett with interference with official acts when there is no requirement that he assist in the inspection of a commercial motor vehicle and no evidentiary proof that Mr. Burnett actively resisted. As noted earlier, a mistake of law does not excuse the lack of probable cause. Moreover, a mistake of law undermines the defense of qualified immunity because the peace officer that does not know the law cannot be acting with all due care. As a matter of law, Ofc. Smith violated article I, §8 of the Iowa Constitution.

CONCLUSION

Mr. Burnett requests that the Court reverse the grant of summary judgment. Further, he requests entry of judgment in his favor on his article 1, §8 claim and that the case be remanded for trial on damages only.

REQUEST FOR ORAL SUBMISSION

Mr. Burnett requests oral argument on any issue considered by the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

The undersigned certifies a copy of this Final Brief was filed and served through the Electronic Document Management System on all counsel of record and the Clerk of Supreme Court.

_____/s/ Martin A. Diaz____

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I further certify that because of use of EDMS, there was no cost associated with the printing and reproduction of this Final Brief.

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