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IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellant, v. JESSE HARBACH, Defendant-Appellee.	Supreme Court No. 22-0162

APPEAL FROM THE IOWA DISTRICT COURT
FOR DELAWARE COUNTY
HONORABLE MONICA L. ZRINYI ACKLEY, JUDGE

APPLICANT'S APPLICATION FOR FURTHER REVIEW
OF THE DECISION OF THE IOWA COURT OF APPEALS
FILED JANUARY 11, 2023

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CERTIFICATE OF SERVICE

On the 30th day of January, 2023 the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jesse J. Harbach, 404 Gay Street, Delhi, IA 52223.

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QUESTION PRESENTED FOR REVIEW

Whether the district court did not err by suppressing the evidence obtained pursuant to the faulty search warrant?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW the Defendant-Appellant and, pursuant to Iowa Rule of Appellate Procedure 6.1103 (2019), hereby makes application for further review of the January 11, 2023, decision of the Iowa Court of Appeals in State of Iowa v. Jesse Harbach, Supreme Court number 22-0162. In support thereof, Appellant states

1. The Iowa Court of Appeals erred by reversing the district court's determination that a Franks violation occurred and suppressing illegally obtained evidence. (Opinion).

2. The United States Supreme Court has held that where a defendant establishes by a preponderance of the evidence that an affiant made a false statement in a search warrant affidavit knowingly and intentionally, or with reckless disregard for the truth, the Fourth Amendment requires the statement be deleted from the affidavit and the remaining contents be scrutinized to determine whether probable cause appears. Franks v. Delaware, 438 U.S. 154, 155-56 (1978). This Court adopted the Franks analysis in State v. Groff, 323

N.W.2d 204, 207-208 (Iowa 1982).

3. The court found that there was no evidence from the body cam video to support the officer's contentions that the defendant was under the influence of alcohol. The court noted that the officer made assumptions about the reason for the accident, and that his attitude changed once he found out who the driver was: "When [the deputy] found out who the driver was, the deputy's attitude adjusted to conclude the Defendant was drinking." (Order Re Motion to Suppress) (App. pp. 15-18). The court noted that since there was no alcohol found in the defendant's blood pursuant to the warrant, it was impossible for the officer to have smelled it. The court was not convinced that the information contained in State's exhibit 3 showed the presence of alcohol, stating that the "record does not show BAC. The deputy testified he did not know if the ethanol level is the same as a BAC." (Order Re Motion to Suppress) (App. pp. 15-18). The court concluded that the accident in and of itself was not sufficient indicia of drinking and granted the motion. (Order Re Motion

to Suppress) (App. pp. 15-18). The body cam evidence makes clear that the testimony of the officer was false and that he jumped to conclusions based on the identity of the defendant. The Iowa Court of Appeals erred by substitute its judgment for that of the district court.

STATEMENT OF THE CASE

Nature of the Case: This is the State's appeal following the district court's order granting the defendant's motion to suppress in Delaware County number OWCR014367.

Course of Proceedings: On October 11, 2021, the State charged the defendant, Jesse Harbach, with operating a motor vehicle while intoxicated, first offense, in violation of Iowa Code section 321J.2 (2021), a serious misdemeanor. (Trial Information) (App. pp. 4-5). On December 13, 2021, the defendant filed a motion to suppress that was resisted by the State.[1] (Motion to Suppress, Resistance to Defendant's

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[1] The motion to suppress was filed more than 40 days following the arraignment. See Iowa R. Crim. P. 2.11(4). In it's motion to suppress, counsel for the defendant asserted that, in anticipation of the State objecting to the timeliness of the motion, counsel had only been appointed less than one week prior to the motion being filed. (Motion to Suppress) (App. pp. 11-12). The State did resist the motion in part on it being untimely. (Resistance to Defendant's Motion to Suppress) (App. pp. 13-14). The district court sided with the defense, finding that since counsel had recently been appointed, filing the motion earlier was not possible. (Order Re Motion to Suppress) (App. pp. 15-18). However, the docket reflects that previous counsel had filed a motion to extend deadlines, and that motion was granted, extending the filing deadline for 90 days. (Motion to Extend Deadlines,

Motion to Suppress) (App. 11-14). Following a hearing on January 4, 2022, the district court granted the defendant's motion. (Suppression Hrg. tr. p. 1, L. 1-25; Order Re Motion to Suppress) (App. pp. 15-18). The State filed an Application for Discretionary Review, which was granted. (Application for Discretionary Review and Motion to Stay; Order Granting Application, 2/25/2022) (App. pp. 19-31). The Iowa Court of Appeals reversed the district court on January 11, 2023. (Opinion).

Facts: The defendant was involved in a rollover vehicle accident on May 21, 2021, in Delaware County, Iowa. (Minutes of Testimony) (Conf. App. pp. 5-14). The State alleged that when the defendant crashed the vehicle he was driving, he was under the influence of alcohol or illegal drug. (Trial Information) (App. pp. 4-5). When police arrived at the scene of the accident, the defendant was being taken care of by medical personnel. (Minutes of Testimony) (Conf. App. pp.

11/22/2021; Order, 12/1/2021) (App. pp. 6-10). The motion to suppress was filed 12 days following that order. The motion, therefore was timely filed.

5-14). The defendant was on a backboard and wearing a neck brace. The officer's body cam footage shows injuries and abrasions on the defendant's face. (State's Ex. 4, 0:00:24- 0:00:40).

Witnesses at the scene told officers that the accident happened because the defendant lost control after trying to avoid hitting an Amish buggy. (State's Ex. 4, 0:02:14- 0:02:55). The buggy did not stay at the scene to talk to officers. These witnesses told officers that the injured driver was Jesse Harbach. Once the officers on the scene were informed of this, their attitude changed and focused on whether Harbach had been drinking prior to the accident. (State's Ex. 4, 0:03:03-0:03:10; 0:04:50; 0:07:10-0:07:16; Order Re Motion to Suppress) (App. pp. 15-18). One of the officers commented that Harbach had "probably" been drinking, but could not smell alcohol on him at the time because he could only smell gasoline at the accident scene. (State's Ex. 4, 0:03:03-0:03:10; 0:04:50). The officer later went inside the ambulance when the defendant was placed in

it and began asking him questions about whether he had been drinking and where he had been driving from. The defendant told the police it hurt to talk and was eventually able to answer "no" to the question about whether he had been drinking. (State's Ex. 4, 0:10:57-0:11:44). The officer was in the way of medical personnel and he stepped out. (State's Ex. 4, 0:10:30-0:10:38). The defendant was later air lifted to Cedar Rapids for treatment. (Minutes of Testimony) (Conf. App. pp. 5-14). Police officers applied for and received a search warrant for the defendant's blood. (State's Ex. 1, 2) (App. pp. 4-11). The results showed positive results for methamphetamine, but negative for alcohol. (Minutes of Testimony) (Conf. App. pp. 5-14). The defendant was thereafter charged with operating a motor vehicle while under the influence of an alcoholic beverage or other drug or while any amount of a controlled substance is present in the person. (Trial Information) (App. pp. 4-5).

Further facts will be discussed below.

ARGUMENT

The district court did not err by suppressing the evidence obtained pursuant to the faulty search warrant.

A. <u>Preservation of Error and Standard of Review</u>: The defendant agrees with the State that error was preserved. The Court reviews constitutional issues de novo. State v. Randle, 555 N.W.2d 666, 668 (Iowa 1996); State v. Groff, 323 N.W.2d 204, 209 (Iowa 1982).

B. <u>Discussion:</u> In the application for a search warrant, the police officer stated that the probable cause consisted of bloodshot, watery eyes, slurred and mumbling speech, and the smell of alcoholic beverage coming from the defendant. (State's Ex. 1) (App. pp. 4-10). In its motion to suppress, the defendant alleged that there was no probable cause to support the warrant, and that the defendant included false allegations that he smelled of alcohol. (Motion to Suppress) (App. pp. 11-12).

The district court held a hearing on the motion on January 4, 4022. (Motion to Suppress Hrg. tr. p. 1, L. 1-25). During the hearing, the State introduced the body cam video

of the responding officer who later obtained the search warrant. (State's Ex. 4). This exhibit showed that when the officer arrived, the defendant's truck was upside down in a ditch and the defendant, having been ejected during the accident, is being attended to by medical personnel. (State's Ex. 4, 0:00:24). The personnel at the scene advised the officer that the defendant dodged an Amish buggy. The defendant advised that his brakes were shot. (State's Ex. 4, 0:00:35-0:00:40). The defendant was strapped to a medical board with a head and neck support device on him. (State's Ex. 5, 0:00:40). The defendant had visible injuries around his left eye and was in obvious pain when the medical personnel moved him. (State's Ex. 4, 0:01:28-0:01:30).

The officer then spoke to witnesses at the scene, who stated they heard brakes squealing, saw the truck and an Amish buggy in the road. The Amish buggy took off. (State's Ex. 4, 0:02:14-0:02:55). These witnesses identified the driver as Jesse Harbach, and the officer appeared to be familiar with him. (State's Ex. 4, 0:03:02-0:03:10). While talking with

another officer at the scene and discussing whether he had been drinking, one officer stated he probably had, and the other said the only thing he could smell was gasoline. (State's Ex. 4, 0:04:50-0:05:00). A few minutes later, while discussing the accident with another officer, they decided the Amish buggy was not involved, and the other officer asked if he could smell the defendant, and he responded that all he could smell was gasoline but he guessed it was a "55."[2] (State's Ex. 4, 0:07:10-0:07:16).

Later the officer entered the ambulance where medical personnel were attending to the defendant, who was still in a neck brace, which strapped around and under his chin. He was also still strapped to the board. There were visible injuries above and below his left eye. (State's Ex. 4, 0:09:09). The officer began to ask him questions. Harbach was able to tell the officer his date of birth, but then told him it hurts to

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[2] Although not explained in the body cam footage, 10-55 is police code for a suspected drunk driver. See http://www.njsoa.org/pdfs/tencode.pdf (last visited 8/11/2022).

talk. (State's Ex. 4, 0:09:30-0:09:44). Medical personnel told the officer he was in the way as they are attending to the defendant, and the officer stepped out of the ambulance. (State's Ex. 4, 0:10:26-0:10:38). Seconds later the officer reentered the ambulance and questioned the defendant. The defendant did not answer and told the officer to leave him alone and he cannot talk because it hurts to talk. One of the medical people told the officer he could meet them at the hospital and he was putting an IV into the defendant. (State's Ex. 4, 0:10:57- 0:11:44). However, this did not deter the officer, who continued to question the defendant about whether he had been drinking. The defendant, clearly in pain answered "no," and the officer left the ambulance. (State's Ex. 4, 0:11:50-0:12:02).

The video does not show bloodshot eyes. His left eye was tearing a little; however, he had visible injuries to the area around the eye and was obviously in considerable pain. The officer said nothing about smelling alcohol on him while he was in the ambulance, nor did any of the medical personnel.

The defendant’s speech was not slurred, but it should be noted that he had a strap around his chin, which appeared to make it more difficult to talk, as did the fact that he was in pain when he did talk. Nonetheless, the officer prepared a search warrant application for the defendant’s blood that stated the defendant had bloodshot eyes, watery eyes, slurred speech, mumbling speech, and the smell of an alcoholic beverage. Additionally, the search warrant application noted that he refused a preliminary breath test and refused to answer questions. (State’s Ex. 1) (App. pp. 4-10).

The search warrant application stated that the defendant was involved in a motor vehicle accident, but failed to mention that the defendant was strapped to a board with a neck collar strapped to his head. It does not state that the defendant was in pain. The application does not state that the alleged odor of alcohol was detected inside an ambulance where all manner of alcohol related smells may have come from, including hand sanitizers or other disinfectants. (State’s Ex. 1) (App. pp. 4-10).

The State entered into evidence during the hearing a document obtained from the hospital that indicates an ethanol level of 42. (State's Ex. 3) (App. p. 12). This information was not included in the search warrant application. Additionally, there was no testimony or evidence of what that ethanol level meant and how it would convert to a blood alcohol level that is usually used to determine intoxication, if it would convert at all.[3] There was no testimony if that exhibit meant that the defendant had been drinking alcohol or if that ethanol level could have been from some other source. More importantly, there was no testimony or evidence that this ethanol would have been detectable in the environment in which the officer interacted with the defendant.

The district court issued a written ruling following the hearing. The court found that the officer made false statements, finding he left out important information such as

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[3] The hospital document simply says the value was "42." There is no reference to what the 42 referred to. There was no mention to any blood alcohol level. (State's Ex. 3) (App. p. 12).

the medical condition of the defendant, the fact that he was in a neck collar and in pain. The court found that there was no evidence from the body cam video to support the officer's contentions that the defendant was under the influence of alcohol. The court noted that the officer made assumptions about the reason for the accident, and that his attitude changed once he found out who the driver was: "When [the deputy] found out who the driver was, the deputy's attitude adjusted to conclude the Defendant was drinking." (Order Re Motion to Suppress) (App. pp. 15-18). The court noted that since there was no alcohol found in the defendant's blood pursuant to the warrant, it was impossible for the officer to have smelled it. The court was not convinced that the information contained in State's exhibit 3 showed the presence of alcohol, stating that the "record does not show BAC. The deputy testified he did not know if the ethanol level is the same as a BAC." (Order Re Motion to Suppress) (App. pp. 15-18). The court concluded that the accident in and of itself was not sufficient indicia of drinking and granted the motion.

(Order Re Motion to Suppress) (App. pp. 15-18).

The United States Supreme Court has held that where a defendant establishes by a preponderance of the evidence that an affiant made a false statement in a search warrant affidavit knowingly and intentionally, or with reckless disregard for the truth, the Fourth Amendment requires the statement be deleted from the affidavit and the remaining contents be scrutinized to determine whether probable cause appears. Franks v. Delaware, 438 U.S. 154, 155-56 (1978). This Court adopted the Franks analysis in State v. Groff, 323 N.W.2d 204, 207-208 (Iowa 1982). Typically, the defendant must make a substantial preliminary showing the statements were false and if the false statement was necessary to the finding of probable cause, and then a hearing would be held. Id. at 155-156. However, in situations where no preliminary showing is made and the State fails to object, and the court rules on the issues, this Court will consider the merits of the claim. Groff, 323 N.W.2d at 209. In this case, as in Groff, the State did not object to the procedure set out in Franks, and the merits were

contested and argued in a hearing with testimony and evidence presented, and the court made an informed ruling. The court ruled correctly. It is plainly obvious from the video itself that the officer was focused exclusively on obtaining evidence of intoxication based upon his assumption that alcohol had to be involved. (Order Re Motion to Dismiss) (App. pp. 15-18). When he did not find any, he made up the evidence. He failed to tell the judge of the circumstance of the defendant's condition, which entirely informs the context surrounding the information conveyed in the boxes the officer checked in the application.

In its brief, the State suggests that the district court should not have considered information outside of the application of the search warrant such as subsequent information obtained pursuant to that warrant. Specifically, it takes issue with the fact that the district court stated that "[i]t begs the question . . ., how could one smell what is not present?" (Order Re Motion to Suppress) (App. pp. 15-18). The defendant is allowed to present evidence to the court as to

evidence it has to show that the officer was not truthful in the application for the search warrant. In People v. Benjamin, 77 Cal. Rptr. 2d 520, 575 (Cal. Ct. App. 1999), the court found that "while probable cause for a search warrant cannot be supported by the results of the search, there is no reason why the results of the search cannot support the truthfulness of the statements made in a search warrant affidavit by an affiant whose credibility is under attack." The court went on to give the example that if an affiant swore he had smelled marijuana in that case, but none had been found, the defendant could reasonably argue that the affiant's statements would have been false. Id.

There was no smell of alcohol in this case because no alcohol was present, and there is no information contained in the body cam video to indicate the smell of alcohol. The only discussion of the smell of alcohol was among the officers who simply assumed that the defendant had been drinking, because the defendant happened to be Jesse Harbach. The district court was correct in its factual findings and legal

analysis and properly suppressed the evidence obtained pursuant to this faulty warrant.

CONCLUSION

For these reasons the Appellant requests the Court affirm the court's ruling on the defendant's motion to suppress.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $2.91 and that amount has been paid in full by the Office of the Appellate Defender.

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

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

> [X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,040 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

<u>/s/ Maria Ruhtenberg</u> Dated: *<u>1/30/23</u>*

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