

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 22-0037

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STATE OF IOWA,  
Plaintiff-Appellee,

vs.

DONALD MELVIN WITTENBERG,  
Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR POLK COUNTY  
THE HONORABLE BECKY GOETTSCH, JUDGE

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**APPELLEE'S BRIEF**

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THOMAS J. MILLER  
Attorney General of Iowa

**GENEVIEVE REINKOESTER**  
Assistant Attorney General  
Hoover State Office Building, 2nd Floor  
Des Moines, Iowa 50319  
(515) 281-5976  
(515) 281-8894 (fax)  
[genevieve.reinkoester@ag.iowa.gov](mailto:genevieve.reinkoester@ag.iowa.gov)

JOHN P. SARCONI  
Polk County Attorney

KRISTEN M. FORMANEK  
Assistant Polk County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

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**STATEMENT OF THE ISSUE PRESENTED FOR  
REVIEW**

**I. The district court correctly determined that Defendant was not seized.**

Authorities

*U.S. v. Clements*, 522 F.3d 790 (7th Cir. 2008)  
*U.S. v. Mabery*, 686 F.3d 591 (8th Cir. 2012)  
*United States v. Drayton*, 536 U.S. 194 (2002)  
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*State v. Wilkes*, 756 N.W.2d 838 (Iowa 2008)

## **ROUTING STATEMENT**

Because this case does not meet the criteria of Iowa Rule of Appellate Procedure 6.1101(2) for retention by the Supreme Court, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(2).

## **STATEMENT OF THE CASE**

### **Nature of the Case**

Donald Melvin Wittenberg (“Defendant”) appeals his conviction following a jury trial in which he was found guilty of one count of Operating While Intoxicated, Third Offense, in violation of Iowa Code section 321J.2(c), a class D felony. On appeal, Defendant argues he was illegally seized, so the district court erred by denying his motion to suppress.

### **Course of Proceedings**

The State accepts Defendant’s course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

### **Facts**

Around 2:23 a.m., on April 6, 2021, Defendant drove away from the Old Town Tap in Altoona. Suppr. Tr. at 4:16–5:13, 20:3–13. Officer Justin Shelburg and Officer Frederick—Officer Shelburg’s field training officer—were patrolling in the area and noticed

Defendant leave the bar then stop at a nearby stop sign.<sup>1</sup> Suppr. Tr. at 18:6–15. Officer Shelburg was directly behind Defendant at the stop sign, and instead of turning left onto the road, Defendant turned left into an adjacent parking lot and was driving at “a higher rate of speed. [Officer Shelburg] actually thought [Defendant] was going to strike the curb. Eventually [Defendant] came to an abrupt stop in the parking lot and shut off the car’s lights.” Suppr. Tr. at 5:14–6:5, 18:6–19:24. Defendant parked his vehicle partially in a parking space and partially in an area where parking is not permitted; the vehicle straddled the parking space striping. State’s Ex. 1 (Shelburg Dash Cam) at 0:00–0:30, State’s Ex. 2 (Shelburg Body Cam) at 00:45–00:57, Def. Ex. A (Edward’s Dash Cam) at 00:20–00:35.<sup>2</sup> All the businesses in this area were closed for the night. Suppr. Tr. at 32:11–24. Because of how quickly Defendant was driving in the parking lot, Officer Shelburg thought he may have meant to turn onto the road instead of into the parking lot. Suppr. Tr. at 7:20–8:8, 29:18–22.

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<sup>1</sup> Officer Frederick’s first name was not mentioned at the hearing.

<sup>2</sup> The exhibits used in this brief are from the motion to suppress hearing and can be found in the yellow envelope labeled “order concerning maintenance of exhibits,” file stamped July 13, 2021.

Officer Shelburg drove into the parking lot and parked behind Defendant, about 30–35 feet away, at an angle. Suppr. Tr. at 6:15–7:13, 21:2–8, State’s Ex. 1 (Shelburg Dash Cam) at 00:00–00:27, State’s Ex. 2 (Shelburg Body Cam) at 00:43–00:57, Def. Ex. A (Edward’s Dash Cam) at 00:14–00:30. Officer Shelburg’s squad car did not block Defendant’s car, and Defendant could have exited the parking lot. Suppr. Tr. at 7:3–13, 22:7–20, 23:6–24:8. Video footage from the dash and body cameras show that it was possible for Defendant to reverse his vehicle and drive out of the parking lot. State’s Ex. 2 (Shelburg Body Cam) at 00:43–03:33, 06:09–08:00. Officer Shelburg did not activate his overhead lights or his emergency lights, but because it was dark, he did activate his spotlight. Suppr. Tr. at 7:14–8:3, 26:1–24.

Officer Shelburg approached Defendant’s car on foot and asked him whether he “actually intended to turn on the street” and if Defendant “knew he was in a parking lot.” Suppr. Tr. at 7:20–8:8, State’s Ex. 2 (Shelburg Body Cam) at 00:44–01:20. Defendant’s window was rolled down about a quarter of the way and when asked whether he meant to turn onto the road, Defendant said “no. I just

stopped here because you were behind me.” Suppr. Tr. at 8:9–9:9, State’s Ex. 2 (Shelburg Body Cam) at 00:44–01:20.

From the beginning of Officer Shelburg’s encounter with Defendant, it is evident that Defendant was highly intoxicated. State’s Ex. 2 (Shelburg Body Cam) at 00:44–01:37. Officer Shelburg “immediately could see the bloodshot, watery eyes. When [Defendant] was speaking to [Officer Shelburg], his speech was slurred. It was slower.” Suppr. Tr. at 9:10–22. Defendant was being coy about his full name, so Officer Shelburg radioed in the information he had and discovered Defendant had a suspended license. Suppr. Tr. at 9:17–22, State’s Ex. 2 (Shelburg Body Cam) at 01:20–06:50. Officer Shelburg then detained Defendant and tried to administer field sobriety tests, but Defendant refused, and he was transported to the police station. Suppr. Tr. at 9:23–11:11, State’s Ex. 2 (Shelburg Body Cam) at 07:20–15:30.

## **ARGUMENT**

### **I. The district court correctly determined that Defendant was not seized.**

#### **Preservation of Error**

This issue was preserved by Defendant’s motion to suppress, a hearing on the motion, and the district court’s ruling on the issue. 05-



28-2021 Motion to Suppress, Suppr. Tr., 07-13-2021 Ruling on Motion to Suppress; App. 9–15.

### **Standard of Review**

A challenge to the denial of a motion to suppress on federal or state constitutional grounds is reviewed de novo. *State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011). This review requires an independent evaluation of the totality of the circumstances as shown by the entire record. *Id.* (citing *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)). While this Court gives deference to the district court’s factual findings, it is not bound by them. *Id.* (citing *State v. Lane*, 726 N.W.2d 371, 377 (Iowa 2007)).

### **Merits**

Defendant claims he was seized in the parking lot, prior to Officer Shelburg’s development of reasonable suspicion, and this seizure was unlawful. Defendant does not dispute that once Officer Shelburg spoke with him there was reasonable suspicion to further detain him to investigate whether Defendant was driving while intoxicated. Thus, the question here is simply: was Defendant seized in the parking lot prior to his conversation with Officer Shelburg?

“The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect persons from unreasonable searches and seizures.” *State v. Reinders*, 690 N.W.2d 78, 81 (Iowa 2004) (internal quotation marks and citation omitted). “Searches and seizures are unconstitutional if they are unreasonable and reasonableness depends on the facts of the particular case.” *State v. Naujoks*, 637 N.W.2d 101, 107 (Iowa 2001) (citing *State v. Roth*, 305 N.W.2d 501, 504 (Iowa 1981)).

Not every interaction between police and citizens is involuntary, and well-established precedent has routinely upheld the ability of an officer to briefly ask an individual for identification or for their purpose for being in an area. *United States v. Drayton*, 536 U.S. 194, 200–01 (2002). An officer’s simple approach to an individual to ask basic questions or initiate conversation is not a stop and does not, in and of itself, require reasonable suspicion. *See State v. Wilkes*, 756 N.W.2d 838, 843 (Iowa 2008); *see also Drayton*, 536 U.S. at 204.

“A seizure occurs when an officer by means of physical force or show of authority in some way restrains the liberty of a citizen.” *Reinders*, 690 N.W.2d at 82 (internal quotation marks and citation omitted). Police are free to approach individuals in public places and

ask them questions if the person is willing to listen. *See Drayton*, 536 U.S. at 200–01. “Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.” *Reinders*, 690 N.W.2d at 82 (internal quotation marks and citation omitted). “Whether a ‘seizure’ occurred is determined by the totality of the circumstances.” *Wilkes*, 756 N.W.2d at 842 (citing *Drayton*, 536 U.S. at 207).

Factors that might suggest a seizure include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.

*Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Police coercion “must be present to convert an encounter between police and citizens into a seizure.” *Id.* at 843 (citing *Reinders*, 690 N.W.2d at 82). The Iowa Supreme Court has previously held that the “element of coercion is not established by ordinary indicia of police authority.” *Id.* Thus, the showing of a badge, the fact that an officer is in uniform, or the fact that an officer is

visibly armed “should have little weight in the analysis.” *Id.* (internal quotation marks and citation omitted).

No such coercion or show of authority happened here. First, this is not a case where Officer Shelburg initiated a traffic stop by turning on his emergency lights to signal Defendant to pull over. *See State v. Harlan*, 301 N.W.2d 717, 720 (Iowa 1981) (“Stopping a car in transit is obviously a seizure. In [defendant’s] case, there is no evidence [the officer] stopped the car.”). Instead, Officer Shelburg observed Defendant turn from a stop sign into an adjacent parking instead of the road, drive quickly through the parking lot, come to an abrupt stop in a parking space, nearly striking the curb, then immediately turn off his car’s engine and headlights. Suppr. Tr. at 5:14–6:5, 18:6–19:24. Officer Shelburg then observed Defendant’s car briefly from the road before turning into the parking lot and parking to the side of Defendant’s vehicle. State’s Ex. 1 (Shelburg Dash Cam) at 0:00–0:30. After parking, Officer Shelburg approached Defendant’s vehicle and asked him how he was doing, and whether he knew he turned into a parking lot instead of the road. Suppr. Tr. at 7:20–8:8, State’s Ex. 2 (Shelburg Body Cam) at 00:44–01:20. Officer Shelburg did not issue any commands.

Here, the evidence shows that Officer Shelburg did not significantly restrain Defendant’s movements. *See Harlan*, 301 N.W.2d at 720 (“[The officer] stood at the side of the car and did not restrain its movement.”); *see also Wilkes*, 756 N.W.2d at 844 (citing *People v. Cascio*, 932 P.2d 1381, 1386–87 (Colo. 1997)) (“[T]he court concluded that if the police car wholly blocks the defendant’s ability to leave, then an encounter cannot be considered consensual, but where egress was only slightly restricted, with approximately ten to twenty feet between the two vehicles, the positioning of the vehicles does not create a detention.”). While it is true Defendant could not have driven forward, Office Shelberg’s testimony and the video evidence show Defendant’s car was not blocked-in, and he could have reversed his car and driven out of the parking lot. *See State v. Fogg*, 936 N.W.2d at 664, 670 (Iowa 2019) (finding no seizure even when the defendant “could not have driven forward.”).

For the first time on appeal, Defendant claims that “[t]he angled orientation of the parking spaces indicates the lot is intended for one-way travel,” so Defendant’s “only option to exit the lot would have been to drive against the designated flow of traffic and out the entrance—unusual behavior which may have been deemed

‘suspicious’ and triggered another seizure.” App. Br. at 20–21. This is contrary to what Officer Shelburg testified to at the hearing. Officer Shelburg stated the parking lot has “two entrances and two ways to exit the parking lot. I pulled in through the right side of the west entrance, but there was still room to get out of that [same entrance].” Suppr. Tr. at 22:11–20. The video evidence supports Officer Shelburg’s testimony. State’s Ex. 2 (Shelburg Body Cam) at 00:43–03:33, 06:09–08:00, Def. Ex. A (Edward’s Dash Cam) at 00:14–00:30. And Officer Shelburg never testified he would have found it suspicious had Defendant tried to exit through either of the available routes.

Defendant also makes much of the fact that Officer Frederick walked briefly behind Defendant’s vehicle as she approached his passenger window. App. Br. at 21–22. This argument ignores the fact that Defendant could have driven away before Officer Shelburg even entered the parking lot, before the officers exited their vehicle, or after Officer Frederick moved from behind his vehicle. The videos show Officer Frederick behind Defendant’s vehicle for perhaps a second as she walked from the squad car to Defendant’s passenger side. State’s Ex. 1 (Shelburg Dash Cam) at 00:40–01:00. Defendant’s

argument also ignores that he could have chosen not to speak to Officer Shelburg after he approached. *See State v. Smith*, 683 N.W.2d 542, 547–48 (Iowa 2004) (finding no seizure when police officer approached the passenger of a vehicle and asked for identification because “a reasonable person would have felt free to decline the deputy’s request for his ID.”). Defendant rolled down his window and engaged in conversation, but he could have simply waived them on. This is not sufficient to show a restraint on Defendant’s movements.

And the use of a spotlight did not convert the encounter into a seizure. Even the use of front emergency lights is not a per se seizure. *See U.S. v. Mabery*, 686 F.3d 591, 597 (8th Cir. 2012) (citing with approval *U.S. v. Clements*, 522 F.3d 790 (7th Cir. 2008) (“no seizure where police officers parked about fifteen to twenty feet behind suspicious vehicle, shined spotlight on it, and activated red and blue flashing lights”)). The case law suggests that the use of emergency lights may effectuate a seizure when the lights are used in conjunction with physical restraint or another considerable show of authority. *See State v. Kurth*, 813 N.W.2d 270, 272 (Iowa 2012) (finding a seizure at the point where the police officer “activated his emergency lights *and* blocked in [defendant’s] vehicle.” (emphasis added)); *State v.*

*Petzoldt*, No. 10-0861, 2011 WL 2556961, at \*2 (Iowa Ct. App. June 29, 2011) (concluding a seizure was effectuated when police officer turned on his emergency lights and blocked defendant’s vehicle in his driveway). The use of a spotlight because it was dark does not convert this encounter into a seizure.

While the State believes the district court was correct that a seizure did not occur, if this Court disagrees, the State urges the Court to find Officer Shelburg’s actions were justified because he was acting as a public servant under the community care taking doctrine. The test is an objective one: “whether the facts available to the officer at the time of the stop would lead a reasonable person to believe that the action taken by the officer was appropriate.” *State v. Tague*, 676 N.W.2d 197, 204 (Iowa 2004). Here, instead of logically turning onto the road, Defendant turned into a vacant parking lot at 2:23 in the morning, drove very quickly through the parking lot, then came to an abrupt stop in an area that straddled the park space striping, nearly hitting the curb in front. Based on these actions, Officer Shelburg said he believed Defendant mistakenly turned into the lot instead of onto the road and went to verify he was okay. Suppr. Tr. at 7:20–8:8, 29:18–22. These actions were reasonable under the circumstances of



this case. *See State v. Bakewell*, 730 N.W.2d 335, 377–378 (Neb. 2007) (finding community caretaking doctrine applied to a situation substantially similar to the one presented here).

### **CONCLUSION**

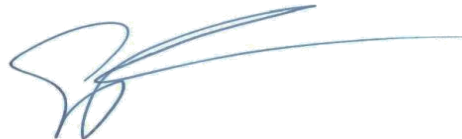
For all the reasons stated above, the State respectfully requests that this Court affirm Defendant’s conviction and sentence and deny all claims on the merits.

### **REQUEST FOR NONORAL SUBMISSION**

The State requests that this case be submitted without oral argument.

Respectfully submitted,

THOMAS J. MILLER  
Attorney General of Iowa



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**GENEVIEVE REINKOESTER**  
Assistant Attorney General  
Hoover State Office Bldg., 2nd Fl.  
Des Moines, Iowa 50319  
(515) 281-5976  
[genevieve.reinkoester@ag.iowa.gov](mailto:genevieve.reinkoester@ag.iowa.gov)

## CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,574** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: December 15, 2022



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**GENEVIEVE REINKOESTER**

Assistant Attorney General

Hoover State Office Bldg., 2nd Fl.

Des Moines, Iowa 50319

(515) 281-5976

[genevieve.reinkoester@ag.iowa.gov](mailto:genevieve.reinkoester@ag.iowa.gov)