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IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. DONALD MELVIN WITTENBERG, Defendant-Appellant.	SUPREME COURT NO. 22-0037

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

APPLICANT'S APPLICATION FOR FURTHER REVIEW
OF THE DECISION OF THE IOWA COURT OF APPEALS
FILED APRIL 26, 2023

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CERTIFICATE OF SERVICE

On the 12th day of May, 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 Donald Wittenberg, 2013 W. 1st St., #4, Ankeny, IA 50023.

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in concluding Wittenberg was not seized without reasonable suspicion or probable cause in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

Donald Wittenberg requests, pursuant to Iowa R. App. P. 6.1103, that this Court grant further review of the April 26, 2023 decision of the Court of Appeals affirming the district court's denial of his motion to suppress.

The Court of Appeals erred in concluding no seizure occurred, because a reasonable person in Wittenberg's position would not feel free to disregard the police and leave. After noticing a police vehicle was following him, Wittenberg pulled into a parking lot, parked in a parking space with a curb in front of him, and shut off his car. He committed no traffic violations. The police vehicle initially parked outside the lot some distance away, then pulled much closer, parking in the lot exit next to and behind Wittenberg's car. The driving officer fixed a spotlight directly on Wittenberg, and the driver and a second officer exited the vehicle and approached while shining flashlights at him. During that approach, the

second officer crossed directly behind Wittenberg's car, rendering it impossible for him to drive in any direction.

The Court of Appeals misstated the facts in several key respects. The officer's vehicle was parked much closer to Wittenberg's than he indicated in his testimony, which the Court of Appeals repeated without correction. The officer's vehicle was parked at an angle in the lot exit, completely preventing it from being used; the Court of Appeals' statement to the contrary was incorrect. And the Court of Appeals' statement that Wittenberg was only partially parked in a marked spot, a point never discussed by the State or the district court below, is not definitively established by the evidence (and is contradicted by the officer's repeated testimony that Wittenberg committed no infractions).

The Court of Appeals' errors regarding the facts, minimization of the blinding effect of the spotlight, and dismissal of the officer's presence immediately behind his car even though it rendered movement impossible were all in

error. The totality of these circumstances would not lead a reasonable person in Wittenberg's position to believe they could disregard the police and leave.

STATEMENT OF THE CASE

Nature of the Case

The Defendant-Appellant, Donald Melvin Wittenberg, requests further review of the April 26, 2023 decision of the Court of Appeals affirming his conviction, judgment, and sentence for the offense of operating a motor vehicle while intoxicated, third offense, a class D felony, in violation of Iowa Code § 321J.2 (2019).

Course of Proceedings

Wittenberg generally accepts as accurate the Court of Appeals' recitation of the procedural history. A detailed recitation is contained in the appellant's brief.

Facts

At around 2:00 a.m. on April 6, 2021, Altoona Police Officers Justin Shelburg and Tia Frederick were on patrol

together when Shelburg saw a vehicle pull out of a parking spot outside a bar in Altoona. (Trial Tr. p. 83 L. 17–p. 84 L. 11). Shelburg followed the vehicle, and observed it stop at a stop sign then pull into a parking lot on the other side of the cross street. (Trial Tr. p. 84 L. 13–p. 85 L. 3). The vehicle parked in a parking space, and Shelburg initially parked on the road some distance away, then pulled into the lot behind the vehicle on its driver's side, blocking one of the lot's two driveways. (Exhibit 2 Shelburg Dashcam[1] at 00:00–00:28). Shelburg shined his vehicle-mounted spotlight at the driver, Wittenberg. (Suppression Tr. p. 7 L. 17–19). When Shelburg approached and asked Wittenberg if he knew he was in a parking lot, Wittenberg responded that he did and he pulled in because Shelburg was following him. (Trial Tr. p. 86 L. 21–p.

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[1] The exhibits received by undersigned counsel include two different videos designated State's Exhibit 1, and the same is true of State's Exhibit 2. The exhibit versions contained in a folder labeled "State's 1 & 2" are edited; the exhibit versions contained in their own individual folders are unedited. References in this brief to Exhibits 1 and 2 are to the unedited versions used during the suppression hearing.

87 L. 3). Shelburg testified Wittenberg's "eyes were very red and bloodshot, and he was slurring his speech as he was speaking to me and he was chewing gum." (Trial Tr. p. 87 L. 6–8). Wittenberg acknowledged he had been drinking. (Trial Tr. p. 87 L. 12–15). Shelburg ordered Wittenberg out of his car in order to perform field sobriety tests; Wittenberg refused testing. (Trial Tr. p. 89 L. 4–10, p. 91 L. 18–20). Shelburg transported Wittenberg to the police station for further investigation. (Trial Tr. p. 92 L. 2–5). Wittenberg refused to provide a breath sample for chemical testing. (Trial Tr. p. 96 L. 9–13).

Shelburg acknowledged he did not observe Wittenberg commit any traffic violations. (Trial Tr. p. 103 L. 21–p. 104 L. 7). Although Shelburg believed it was odd that Wittenberg pulled into the parking lot at that time of night, and characterized his driving as faster than Shelburg would expect in a parking lot, he acknowledged it was a legal place for Wittenberg to park, and reiterated he had not been speeding

or committed any other traffic violation. (Trial Tr. p. 112 L. 4–p. 113 L. 6).

ARGUMENT

The Court of Appeals erred in concluding Wittenberg was not seized without reasonable suspicion or probable cause in violation of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Iowa Constitution.

Discussion

The Court of Appeals affirmed the conclusion of the district court that no seizure occurred because a reasonable person in Wittenberg's position would have felt free to leave. Respectfully, that conclusion is incorrect.

After Wittenberg pulled into a parking lot, parked his car, and shut it off, Officer Shelburg (accompanied by passenger Officer Frederick) pulled his vehicle close to Wittenberg's at an angle, behind and on the driver's side of Wittenberg's car. Regarding these initial facts, the Court of Appeals made three errors. First, the Court stated Wittenberg "was only partially in a parking space." Opinion p. 2. This issue was first

raised by the State on appeal; the State did not argue it in district court, Shelburg did not testify to it, and the district court did not make such a finding. The video is at best unclear as to whether Wittenberg was within a parking space, and Shelburg repeatedly testified Wittenberg had committed no traffic violations. Second, the Court of Appeals repeated Shelburg's testimony that "he was parked thirty to thirty-five feet behind and to the left of Wittenberg at an angle" without any further comment. Opinion p. 2. While Shelburg did say this, the video evidence establishes it was not accurate; Shelburg initially stopped his vehicle some distance away, then pulled much closer, within feet of Wittenberg's car. (Exhibit 2 Shelburg Dashcam at 00:00–00:28). Third, the Court of Appeals stated "the dash cam footage showed room for Wittenberg to maneuver out of the parking space to exit around the patrol car without it being moved . . . ." Opinion p. 3. While the first assertion, that Shelburg's car did not completely block Wittenberg from reversing, is accurate

(although just barely), the second, if taken to mean Wittenberg could have driven around Shelburg's car to exit via the driveway Shelburg was parked in, is not. Shelburg's vehicle was parked at an angle completely blocking the lot exit.[2] (Exhibit A Edwards Dashcam at 00:21). It was not possible for Wittenberg to drive out of it, and the Court of Appeals was incorrect to state it was only "partially" blocked. The only way Wittenberg could have exited the lot would have been to drive backwards, maneuvering around Shelburg's car with a blinding spotlight shining in his face, then either turn around or drive backwards through the entire lot and exit out the entrance. Driving backwards against the designated flow of traffic and away from approaching police may have been

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[2] The Court of Appeals stated "[t]he parking lot had two exits . . . ." Opinion p. 3. This is another error in its characterization of the facts. The video evidence showing a lane through the parking lot only wide enough for one vehicle and angled parking spaces indicate the lot is intended for one-way travel, with an entrance on one end and an exit on the other. (Exhibit 1 Shelburg Dashcam at 00:38; Exhibit A Edwards Dashcam at 00:00–00:21). There were two driveways, but only one—the one Shelburg was parked in—is accurately characterized as an exit.

interpreted as suspicious or odd behavior which could have justified a subsequent seizure. An egress option which requires someone to behave suspiciously is no option at all in this context.

Additionally, there was a point during the encounter where not even that option was possible. When Shelburg and Frederick approached, Frederick walked immediately behind Wittenberg's car. (Suppression Tr. p. 27 L. 18–p. 28 L. 5); see also (Exhibit 1 Shelburg Dashcam at 00:52–00:55). When that happened, Wittenberg was completely boxed in, unable to drive in any direction. Even a momentary seizure of a person, if unsupported by reasonable suspicion or probable cause, is constitutionally forbidden. See Florida v. Royer, 460 U.S. 491, 498 (1983) (a person "may not be detained even momentarily without reasonable, objective grounds for doing so . . . ." (citing United States v. Mendenhall, 446 U.S. 544, 546 (1980)); State v. Coleman, 890 N.W.2d 284, 299 (Iowa 2017) ("[E]ven *de minimus* extensions of traffic stops [without

probable cause or reasonable suspicion] are not acceptable.”). The Court of Appeals dismissed this circumstance because in its view it “was not a show of authority or coercive, but was instead an activity any private person could engage in and so does not amount to a seizure.” Opinion p. 7 (citing State v. Fogg, 936 N.W.2d 664, 669 (Iowa 2019). The court was incorrect to dismiss this circumstance as meaningless in the analysis. While Fogg did discuss similarity to private citizen behavior as one way to examine whether a seizure occurred, that is not the primary inquiry, but rather one tool for assessing the central question: whether a reasonable person in the defendant’s position would feel free to leave. See Fogg, 936 N.W.2d at 668. Just because a private citizen could engage in a behavior does not mean that behavior would have no impact a reasonable person’s assessment whether they were free to leave, particularly where the behavior made movement impossible. The Court of Appeals’ dismissal of this circumstance on the “private citizen” theory was incorrect.

The Court of Appeals also minimized the fact that Shelburg aimed his vehicle spotlight directly at Wittenberg, relying in part on the court's recent decision in State v. Cyrus, No. 21-0828, 2023 WL 152521, at *4 (Iowa Ct. App. Jan. 11, 2023) (unpublished table decision). Opinion p. 6. An application for further review was pending in Cyrus at the time the Court of Appeals issued its decision in this case, and that application was granted shortly thereafter. The rest of the cases the court cited when discussing spotlights are all easily distinguished from this one. Wilkes, Bakula, and Harlan involved headlights or flashlights (which were used by the officers in this case in addition to the spotlight), but none involved the use of a spotlight. See State v. Wilkes, 756 N.W.2d 838, 844 (Iowa 2008); State v. Harlan, 301 N.W.2d 717, 719 (Iowa 1981); State v. Bakula, No. 08-0629, 2008 WL 5005196, at *2 (Iowa Ct. App. Nov. 26, 2008) (unpublished table decision). A comparison of headlights or flashlights to spotlights is inapt. The latter is much brighter than either of

the former; while citizens may own spotlights, they are far less common than headlights or flashlights, but are common on police vehicles; and as to headlights, spotlights are far more adjustable, making it possible to fix the beam directly on a person. Spotlights are vastly different from both headlights and flashlights, and the Court of Appeals incorrectly analogized them.

The Court of Appeals also cited a case from the Oregon Court of Appeals which held no seizure was caused by an officer's use of headlights and a spotlight. Opinion p. 6 (citing State v. Calhoun, 792 P.2d 1223, 1225 (Or. Ct. App. 1990)). Notably, that case did not specify where the officer's spotlight was directed, only that he left it on along with his headlights. Calhoun, 792 P.2d at 1224. It is also noteworthy that the officer in Calhoun parked "30 feet behind" the defendant's vehicle, much further away than Shelburg parked in this case. Id. Also, in that case it was unclear if the defendant saw the headlights or spotlight initially; the court said his head was

"bobbing" and that the officer was "unable to get defendant's attention" until he knocked on his window. Id. Other jurisdictions have discussed the subject of spotlights in more detail, and concluded they are a weighty circumstance in the seizure evaluation. See e.g. People v. Kasrawi, 280 Cal.Rptr.3d 214, 219–22 (Cal. Ct. App. 2021) (surveying California cases and classifying the use of a spotlight as "a show of authority" which is a factor in determining whether a seizure has occurred). Kaswari and the cases cited therein offer a realistic evaluation of the effect of a spotlight on a reasonable person's view of their freedom to leave. While the use of a spotlight typically does not establish a seizure in itself, it is still a significant circumstance in the overall evaluation. Here, where the only potential option to leave involved driving backwards past a police vehicle parked in close proximity, the fact that a blinding spotlight was shining in Wittenberg's eyes should not be dismissed out of hand. The Court of Appeals erred by doing so.

Police followed Wittenberg, observed no traffic violations, then parked right next to his car in a parking lot, blocking the nearest driveway and only lot exit. They shined headlights, a spotlight, and flashlights at him, and at one point an officer was directly behind his car, rendering movement in any direction impossible. The Court of Appeals erred in concluding a reasonable person would have felt free to disregard the police and leave under these circumstances.

Conclusion

Wittenberg was seized, because the totality of the circumstances would not lead a reasonable person in his position to believe they were free to disregard the police and leave. This Court should grant further review, vacate the decision of the Court of Appeals, order that all evidence stemming from the unlawful seizure must be suppressed, and remand the case for further proceedings.

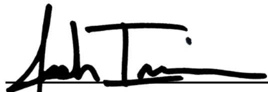
ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $2.45, 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 2,477 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).



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