IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KYRA BAULER, Defendant-Appellant.	SUPREME COURT 22-1232

APPEAL FROM THE IOWA DISTRICT COURT
FOR PLYMOUTH COUNTY
HONORABLE JEFFREY A. NEARY, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

MELINDA J. NYE
Assistant Appellate Defender
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us

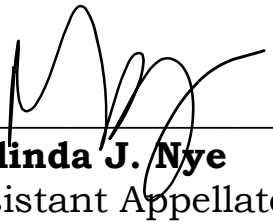
STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On the 5th day of September, 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 Kyra Bauler, 1701 Grandview Blvd., Sioux City, IA 51105.

APPELLATE DEFENDER'S OFFICE



Melinda J. Nye
Assistant Appellate Defender

MJN/lr/09/23

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STATEMENT OF THE CASE

COMES NOW the Defendant-Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's proof brief filed on July 31, 2023. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. Because Deputy Vander Berg did not have sufficient cause to stop Bauler's car, the stop violated Bauler's rights under the Fourth Amendment and article I, section 8.

A. <u>The condition of the license plate light on Bauler's car did not provide probable cause to stop her.</u> The district court made no findings whether Bauler's license plate lighting justified the stop of her vehicle—likely because the record doesn't support such a finding. Although Deputy Vander Berg testified Bauler's license plate lights constituted "a violation," and the State's questions indicate it believed the condition of her light could have justified a stop, the facts presented at the

suppression hearing and the relevant law does not support this conclusion.

Iowa law requires "[e]ither the rear lamp or a separate lamp [] be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of fifty feet to the rear." Iowa Code § 321.388. However, no evidence supports a conclusion that Bauler's license plate was inadequately lit such that it was illegible from 50 feet.

Deputy Vander Berg testified the license plate was "difficult to read." (Supp. Tr. vol. II, 8:9-22). Her testimony, however, is void of any estimate of the distance from which the plate was "difficult to read." Her written narrative disclosed that at one point she followed the car "a ways back but close enough to confirm and observe" it was the same vehicle she had seen before. (State's Ex. 3, p. 1) (Conf. App. p. 11). The dash cam footage also indicates, that at least shortly before she initiated the stop, Vander Berg was traveling at a distance significantly more than 50 feet behind Bauler. (State's Ex. 4,

at beginning). Thus, Vander Berg's own testimony does not support a finding of probable cause that the plate was illegible from 50 feet. Instead it only establishes that the plate was difficult to read at some unknown distance.

Further, any claim that the plate was illegible is undermined by the fact that Deputy Vander Berg was able to run the plates. Her testimony about when she ran the plates varied. Initially she indicated that she ran the plates while Bauler's car was in the gas station parking lot. (State's Ex. 3, p. 1) (Conf. App. p. 11) (Supp. Tr. vol. II, 10:14-19). However, when she was later questioned about why she neglected to activate her dash cam at any point during the fifteen minutes she followed Bauler from Hinton to Le Mars, she testified that it was because she was busy doing multiple tasks at the same time she was driving, including running Bauler's plates. (Supp. Tr. vol. II, 19:22-20:11).

Given this state of the evidence, its likely the district court didn't credit Vander Berg's testimony about the plate being illegible and further recognized there was no evidence to

support any conclusion about its legibility from 50 feet. See State v. Vance, 790 N.W.2d 775, 780 (Iowa 2010) (appellate court will give deference to the district court's finding of fact due to its "ability to assess the credibility of the witnesses"). See also State v. Tyler, 830 N.W.2d 288, 296–97 (Iowa 2013) (declining to credit the officer's testimony and noting that the court "examine[s] extrinsic evidence for contractions to that witness's testimony", as well as "internal inconsistencies" in the witness's testimony when making credibility determinations).

As well, an alleged violation of Iowa Code § 321.387 doesn't support the stop because a defective plate light is not a violation of section 321.387. Section 321.387 governs taillights and requires all vehicles be equipped with red lighted rear lamps visible from 500 feet to the rear. They must be maintained in working condition or replaced with equivalent equipment. Iowa Code § 321.387. This section does not address license plate lights. Thus, a stop of Bauler's vehicle for a violation of section 321.387 would have been based on a mistake of law. See United States v. Burnside, 795 F. App'x 475, 476 (8th Cir.

2020); State v. Ohland, No. 19-1557, 2020 WL 7021717 at n. 4 (Iowa Ct. App. November 30, 2020). A mistake of law cannot justify a stop. Tyler, 830 N.W.2d at 295-96.

Further, Deputy Vander Berg's testimony on this issue was also inconsistent. Vander Berg repeatedly testified that one light was extremely bright and other was inoperable. (State's Ex. 3, p. 1) (Conf. App. 11). (Supp. Tr. vol. II, 6:17-25; 8:9-22). However, when defense counsel questioned her observations that one plate light seemed to be brighter than the other: "Isn't it true that this vehicle had just one lamp that was over the top? There wasn't two on the side?" Her response was "I can't confirm or deny." (Supp. Tr. vol. II, 16:3-9). A review of the dash cam video from the stop undermines her testimony that a plate light was malfunctioning. See State's Ex. 4 at 19:41:00-19:42:00) (Bauler's license plate is illuminated by a single bulb from the top and is illuminated in a nearly identical fashion to the other car seen on the exit).

B. Bauler's slow driving on a four-lane highway was not a violation of Iowa Code §§ 321.285 or 321.294 to

justify the stop. The district court's findings of fact concluded that Bauler's speed on Highway 75 "created a bit of a concern with the flow of traffic" and noted there was no minimum speed requirement on the highway. The court reached no legal conclusions whether her slow driving created probable cause for a violation of Iowa law.

Deputy Vander Berg's observations of the "traffic hazard" created by Bauler's driving were minimal. It is mentioned twice in her written narrative, first to acknowledge that Bauler's car stood out because it was traveling slower than other traffic and later when Vander Berg noted "it was actually created somewhat of a traffic hazard as there was a lot of traffic at the time and semis and vehicles were fighting to take the fast lane to go around" Bauler's car. (State's Ex. 3, p. 1) (Conf. App. p. 11). She testified generally that Bauler's speed caused a traffic hazard to the vehicles around her, that the traffic was busy and the faster cars were trying to get around her in the left lane. (Supp. Tr. vol. II, 5:15-16; 7:1-24). She acknowledged that the highway was busy, but not "rush hour" busy at 7:15pm on a

weeknight in late January. There was no minimum speed limit on that segment of Highway 75. Bauler was driving in the far right hand lane of a four-lane highway—where slower traffic is supposed to travel. The faster cars were able to pass her in the left lane. (Supp. Tr. vol. II, 10:10-13; 11:20-13:16). See Iowa Code § 321.297(2) ("any vehicle proceeding at less than the normal speed . . . shall be driven in the right-hand lane then available for traffic. . .").

Although Deputy Vander Berg testified Bauler was creating a hazard, her testimony is undermined by her own decision to follow Bauler for fifteen minutes, or roughly eleven miles, at the same slow speed without stopping her. (Supp. Tr. vol. II, p. 5:25 – 6:16; 14:20-24) (State's Ex. 3, p. 1) (Conf. App. p. 11). If Bauler's driving had created a real hazard, certainly Vander Berg would have seen fit to stop her sooner rather than follow her and exacerbate the hazard.[1]

[1] The discrepancies in Vander Berg's observations of Bauler's driving, the traffic conditions, and the condition of the car could have been resolved if she had activated her dash cam at some point during the fifteen minutes she followed Bauler.

These inconsistencies in Vander Berg's testimony are likely why the district court declined making a ruling on whether Bauler's slow driving alone justified the stop. See State v. Vance, 790 N.W.2d 775, 780 (Iowa 2010) (appellate court will give deference to the district court's finding of fact due to its "ability to assess the credibility of the witnesses"). See also State v. Tyler, 830 N.W.2d 288, 296–97 (Iowa 2013) (declining to credit the officer's testimony and noting that the court "examine[s] extrinsic evidence for contractions to that witness's testimony", as well as "internal inconsistencies" in the witness's testimony when making credibility determinations).

C. Touching and crossing the center line dividing two lanes of traffic traveling in the same direction is not a violation of Iowa Code § 321.297(3). Deputy Vander Berg testified she observed Bauler cross the center line dividing the two lanes of northbound traffic on Highway 75. (Supp. Tr. vol. II, 6:17-21; 8:5-8; 12:16-13:10; (State's Ex. 3, p. 1) (Conf. App. p. 11). At no point did she testify Bauler crossed the median into the far left lanes of oncoming traffic, which would have

constituted a violation of Iowa Code § 321.297(3), as clarified in State v. Tague, 676 N.W.2d 197, 202-03 (Iowa 2004) (on a four-lane highway, the "center line" for purposes of section 321.297(3) is the median).

D. Conclusion. The record does not establish that Deputy Vander Berg had probable cause to believe Bauler was violating Iowa Code §§ 321.387, 321.388, 321.285, 321.294, or 321.297(3) to justify the stop of her vehicle. As argued in her opening brief, Deputy Vander Berg lacked reasonable suspicion that criminal activity was afoot. Accordingly, the stop violated both the Fourth Amendment and article I, section 8, and the district court erred by not suppressing the evidence gained from the stop. Bauler's convictions should be vacated and her case remanded for further proceedings.

II. The K9 sniff of Bauler's car violated her rights under article I, section 8 and the Fourth Amendment against unreasonable searches because the dog physically trespassed on her car in conducting the sniff.

Under existing caselaw, an external sniff of a car by trained drug dog is not a "search" under the meaning of the

Fourth Amendment and the Iowa Constitution. State v. Bergmann, 633 N.W.2d 328, 334 (Iowa 2001). Fundamental to this holding is the recognition that a person does not have a constitutionally protected interest in the odors emanating from their vehicle. See e.g., State v. Cleave, 33 P.3d 633, 636-37 (N.M. 2001) (a dog sniff "can become a search if the dog intrudes on the private space," and concluding no search occurred because the dog "neither entered nor touched" the vehicle"); United States v. Morales-Zamora, 914 F.2d 200, 205 (10th Cir. 1990) ("society does not recognize a reasonable privacy interest in the public airspace containing the incriminating odor"). However, under both the federal and the Iowa constitutions, the analysis changes when the government physically intrudes onto protected area, such as a car. See Florida v. Jardines, 569 U.S. 1, 5 (2013); United States v. Jones, 565 U.S. 400, 404 (2012); State v. Wright, 961 N.W.2d 396, 416-17 (Iowa 2021). A car is an effect and is constitutionally protected. See Jones, 565 U.S. at 404; State v. Ingram, 914 N.W.2d 794, 816-17 (Iowa 2018).

The contact with Bauler's car in this case was not incidental nor accidental. Officer Rohmiller intentionally directed the dog to sniff and touch the car by pointing and touching the car himself. The dog jumped against and touched the car as directed repeatedly and continuously as they worked their way around the car. (State's Ex. 4 at 19:53:15 – 19:54:29). Officer Rohmiller testified this behavior by both the officer and the dog was normal. He acknowledged that the closer the dog could get to the seams of the car, the better it could smell the inside of the car. (Supp. Tr. vol. I, 7:11 – 10:15; 11:15 – 12:14; 12:24 – 13:16). Although caselaw does not require the physical trespass to damage the effect at issue, the record supports a finding that the dog scratched the car as it repeatedly jumped against it. (State's Ex. 5 at 19:52:00-19:54:19) (Bauler protesting that dog is scratching her car with its claws as it jumps on the car).

The law regarding the appropriate constitutional protection afforded vehicles, as opposed to other effects, has relied on the inherent mobility of vehicles compared with houses

and structures since the United States Supreme Court recognized the automobile exception in Carroll v. United States, 45 S.Ct. 280 (1925). See also United States v. Ross, 102 S.Ct. 2157, 2162-64 (1982). However, despite the long-recognized distinction between inherently mobile effects like cars and immovable houses, "'[t]he word 'automobile' is not a talisman in whose presence the [constitutional protection against warrantless searches and seizures] fades away and disappears.'" State v. Gaskins, 866 N.W.2d 1, 16 (Iowa 2015) (quoting Coolidge v. New Hampshire, 91 S.Ct. 2022, 2035 (1971)).

Conclusion. Because both Officer Rohmiller and the dog repeatedly physically intruded onto Bauler's car, the dog sniff in this case was an unauthorized search under both the Fourth Amendment and article I, section 8. The district court erred in denying Bauler's motion to suppress. Accordingly, Bauler's convictions should be vacated and her case remanded to the district court for further proceedings.

III. The search of Bauler's purse without a warrant violated her rights under article I, section 8 and the Fourth Amendment.

A. <u>Error was preserved.</u> The district court proceedings in this case were not typical, in that Bauler was charged by two separate trial informations filed two months apart and was represented by different attorneys who each filed separate motions to suppress. (Trial Information OWCR018822; Trial Information FECR018888; Motion to Suppress FECR018888; Motion to Suppress OWCR018822) (App. pp. 5-6; 9-11; 12-13; 25-26). However, the agreement between Bauler and the State sought to resolve both cases and preserve Bauler's right to appeal the suppression rulings. (Agreement) (App. pp. 42-49). At the bench trial hearing, Bauler requested the court revisit its ruling on the motion to suppress and specifically addressed the search of Bauler's purse. (Bench Tr. 7:5-23). The State did not object or indicate that a ruling on the search of Bauler's purse was not part of the intended agreement. (Bench Tr.) The court held, in its verdict, that "a renewed review of all the evidence, the Court declines to modify or reverse its ruling(s) on

the Motion to Suppress." (Verdict, p. 12) (App. p. 64). Error is preserved if "the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is "incomplete or sparse," the issue has been preserved." Lamasters v. State, 821 N.W.2d 856, 864 (Iowa 2012). Thus, the record is minimally sufficient to preserve error under these unusual procedural circumstances. However, if the court concludes error was not preserved, Bauler requests the issue be preserved for possible post-conviction relief proceedings.

B. The search of Bauler's purse was not justified by the search incident to arrest exception nor the inevitable discovery doctrine. Although Bauler was eventually arrested following the search of her car, her purse, and her mail, the search of her purse cannot be justified by a search incident to arrest or the inevitable discovery doctrine. A search incident to arrest allows a police officer to search a lawfully arrested person and the immediately surrounding area without a warrant. State v. McGrane, 733 N.W.2d 671, 676 (Iowa 2007).

This exception does not apply because Bauler was not arrested when the officers searched her purse and the purse was not in her immediate control. McGrane, 733 N.W.2d at 676 ("A search incident to an arrest must be substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest.") (cleaned up)). The purse on was on the hood of the squad car and Bauler was in the backseat. (State's Ex. 5 at 20:06:01 – 20:12:04).

As well, the search of the purse cannot be justified by the inevitable discovery doctrine on the premise that it would have been searched later when Bauler was arrested. The inevitable-discovery doctrine permits the admission of evidence obtained illegally that would have been inevitably discovered through some lawful means. See State v. Seager, 571 N.W.2d 204, 211 (Iowa 1997). At the time Bauler's purse was searched, the only contraband the officers had located was a "peculiar" pipe in a sunglasses case in Bauler's car. (State's Ex. 5 at 19:57:29 – 20:06:01). The record is void of evidence that the officers intended to arrest Bauler for the pipe. Although Bauler was

later arrested for possession of paraphernalia, this was after additional paraphernalia was discovered in her purse and in the mailing packages. (State's Ex. 3, p. 2-3) (Conf. App. pp. 12-13). See State v. Hampton, No. 18-0061, 2019 WL 476471 at *4 (Iowa Ct. App. February 6, 2019) ("Because we cannot say the deputy would have arrested Hampton based on the discovery of the straw alone, we cannot justify the intrusion into Hampton's pockets as a search incident to arrest or under the inevitable-discovery doctrine.").

C. Conclusion. Because Bauler's purse was not inside the car at the time of the dog sniff and alert, the police were not permitted to search it without a warrant under the automobile exception. The search was further not justified by the search incident to arrest exception nor the inevitable discovery doctrine. The district court erred in denying Bauler's motion to suppress. Bauler's convictions should be vacated and her case remanded for further proceedings.

ATTORNEY'S COST CERTIFICATE

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

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

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) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 2,917 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Melinda J. Nye Dated: *9/5/23*

MELINDA J. NYE
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
mnye@spd.state.ia.us
appellatedefender@spd.state.ia.us