ELECTRONICALLY FILED MAY 12, 2022 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. MAURICE SALLIS Defendant-Appellant	Supreme Court No. 21-1147

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE DAVID F. STAUDT (SUPPRESSION & LIMITED APPEARANCE HEARINGS), GEORGE P. STIGLER (LIMITED APPEARANCE HEARING) & DAVID P. ODERKIRK (TRIAL) , JUDGES

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 12th day of May, 2022, 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 Maurice Sallis, No. 1089801, Black Hawk County Jail, 225 East 6th Street, Waterloo, IA 50703.

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SJJ/sm/1/22
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page:

Constitutional Provisions:

Statutes & Court Rules:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN OVERRULING SALLIS' MOTION TO SUPPRESS EVIDENCE AS NEITHER A COMPLETED MISDEMEANOR, NOR STALE INFORMATION, WILL SUPPORT A FINDING OF REASONABLE SUSPICION OR PROBABLE CAUSE?

Authorities

State v. Pals, 805 N.W.2d 767, 771 (Iowa 2011)

U.S. Const. amend. IV

Iowa Const. art. I § 8

State v. Naujoks, 637 N.W.2d 101, 107 (Iowa 2001)

State v. Wilkes, 756 N.W.2d 838 (Iowa 2008)

State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996)

Whren v. United States, 517 U.S. 806, 810 (1996)

State v. Coleman, 890 N.W.2d 284, 287-88 (Iowa 2017)

State v Hoskins, 711 N.W.2d 720, 726 (Iowa 2006)

State v. Freeman, 705 N.W.2d 293, 297 (Iowa 2005)

State v. Vance, 790 N.W.2d 775, 781 (Iowa 2010)

Terry v. Ohio, 392 U.S. 1, 21 (1968)

State v. Tyler, 830 N.W.2d 288, 293 (Iowa 2013)

State v. Tague, 676 N.W.2d 197, 201)

State v. Medrano, No. 13-1941, 2015 WL 567922, at *3 (Iowa Ct. App. February 11, 2015)

State v. Waters, 538 N.W.2d 862 (Iowa Ct. App. 1995)

State v. Varvel, 436 N.W.2d 649, 651 (Iowa Ct. App. 1988)

State v. Cunningham, No. 16-0586, 2017WL104950, at *1 (Iowa Ct. App. January 11, 2017)

State v. Kinkhead, 570 N.W.2d 97, 99 (Iowa 1997)

State v. Dawdy, 533 N.W.2d 551 (Iowa 1995)

State v. Cline, 617 N.W.2d 277, 293 (Iowa 2000)(*abrogated on other grounds by* State v. Turner, 630 N.W.2d 601 (Iowa 2001))

State v. Padavich, 536 N.W.2d 743, 768 (Iowa 1995)

State v. Bean, 239 N.W.2d 556, 559 (Iowa 1976)

Commonwealth V. Farnan, 55 A.3d 113, 117 (Pa.Super.2012)

Moody v. State, 842 So.2d 754, 758 (Fla.2003)

Redmond v. Ray, 268 N.W.2d 849 (Iowa 1978)

Ex Parte Pritz, 9 Iowa 30, 32 (1858)

Iowa Const. Art. XII, § I

State v. Jones, 666 N.W.2d 142, 145 (2003)

State v. Wilson, __NW2d__, 2022 WL 127957, at 7-8 (Iowa 2022)

State v. Ochoa, 792 N.W.2d 260, 274 (Iowa 2010)

II. WHETHER THE DISTRICT COURT ERRED IN DENYING SALLIS HIS RIGHT TO ENLIST THE SERVICES OF HIS COUNSEL OF CHOICE?

Authorities

United States v. Gonzalez–Lopez, 548 U.S. 140,146, 126 S.Ct. 2557, 2562, 165 L.Ed.2d 409 (2006)

State v. Mulatillo, 907 N.W.2d 511, 517 (Iowa 1994)

U.S. Const. amend. VI

U.S. Const. amend. XIV

Iowa Const. art. I § 10

State v. Young, 863 N.W.2d 249, 256-57 (Iowa 2015)

State v. Smith, 761 N.W.2d 63, 69 (Iowa 2009)

State v. Tejeda, 677 N.W.2d 744, 749 (Iowa 2004)

Powell v. Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158, ___ (1932)

Faretta v. California, 422 U.S. 806, 819-20, 95 S.Ct. 2525, 2543, 45 L.Ed.2d 562, 573 (1975)

Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140, 148 (1988)

State v. Vanover, 559 N.W.2d 618, 628 (Iowa 1997)

Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610, 619-20 (1983)

Krogmann v. State, 914 N.W.2d 293, 316-317 (Iowa 2018)

United States v. Stein, 435 F.Supp.2d 330, 356-365 (S.D.N.Y. 2006)

Iowa Const. Art I § 9

State v. McKinley, 860 N.W.2d 874, 881 (Iowa 2015)

Iowa R. Civ. P. 1.404(3) (2021)

State v. Russell, 897 N.W.2d 717, 725 (Iowa 2017)

State v. Wise, 697 N.W.2d 489, 492 (Iowa 2005)

Iowa R. Civ. P. 1.101 (2021)

United States v. Sanchez Guerrero, 546 F.3d 328, 332 (5th Cir.2008)

III. DID THE DISTRICT COURT ERR IN FAILING TO GRANT A MISTRIAL AFTER THE STATE ELICITED TESTIMONY DEPICTING SALLIS AS A FLIGHT RISK?

Authorities

State v. Plain, 898 N.W.2d 801, 811 (Iowa 2017)

Terry v. Dorothy, 950 N.W.2d 246, 250 (Iowa 2020)

Griffin Pipe Prods. Co. v. Bd. of Rev., 789 N.W.2d 769, 772 (Iowa 2010)

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

Lee v. State, Polk County Clerk of Court, 815 N.W.2d 731, 739 (Iowa 2012)

State v. Castaneda, 621 N.W.2d 435, 440 (Iowa 2001)

State v. Wilson, 878 N.W.2d 203, 212-213 (Iowa 2016)

U.S. Const. amend. V

U.S. Const. amend VI

U.S. Const. amend XIV

Iowa Const. art. I, § 9

Iowa Const. art. I, § 10

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves two substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c) (2021).

First, can stale driving information, coupled with information regarding a completed simple misdemeanor, not observed by the officer, provide the basis for initiating a traffic stop?

Second, can the district court refuse to allow a pro bono attorney to make a limited appearance when the defendant is represented by court-appointed counsel?

STATEMENT OF THE CASE

Nature of the Case: This is an appeal, by Maurice Sallis, following conviction and sentencing, for the offenses of (Count I) Possession of a Controlled Substance, to-wit Cocaine, With Intent to Deliver, in violation of Iowa Code §124.401(1)(c) (2015), subject to enhancement pursuant to Iowa Code § 124.411

(2015), (Count II) Drug Tax Stamp Violation, in violation of Iowa Code §453B.12 (2015), (Count III) Driving While Barred in violation of Iowa Code §§ 321.560 & 321.561 and (Count IV) Operating While Intoxicated in violation of Iowa Code § 321J.2 (2015).

Course of Proceedings: On June 16, 2016, Sallis was charged with (Count I) Possession of a Controlled Substance, to-wit Cocaine, With Intent to Deliver, in violation of Iowa Code §124.401(1)(c) (2015), subject to enhancement pursuant to Iowa Code §124.411 (2015), (Count II) Drug Tax Stamp Violation, in violation of Iowa Code §453B.12 (2015), (Count III) Unlawful Possession of a Prescription Drug, to-wit Hydrocodone, in violation of Iowa Code §155A.21 (2015), (Count IV) Driving While Barred in violation of Iowa Code §§321.560 & 321.561 and (Count V) Operating While Intoxicated in violation of Iowa Code §321J.2 (2015). (Trial Information) (App. pp. 18-20).

An amended trial information was filed on November 16, 2016. (Amended Trial Information) (App. pp. 21-23). On

December 16, 2016, an amended supplemental information was filed. (Amended Supplemental Trial Information) (App. pp. 24-25).

On January 30, 2017, Sallis filed a motion to suppress evidence. (Motion to Suppress) (App. pp. 36-40). A hearing was held on June 17, 2017 and an order denying the motion was filed on December 11, 2017. (Order Denying Motion to Suppress) (App. pp. 98-101).

Attorney Robert Montgomery sought interlocutory relief regarding the suppression ruling and the court's disqualification of his limited appearance. (01/10/18 Application for Interlocutory Appeal, 01/11/18 Supreme Court Order No. 18-0065, 01/20/18 Motion for Three Judge Panel, 02/05/18 Supreme Court Order No. 18-0065, 05/25/18 Notice of Application for Interlocutory Appeal) (App. pp. 155-214, 221-263).

On the day of trial, but prior to voire dire, the State announced that it was moving to dismiss Count III. (06/15/21 Trial Transcript p. 11 L 20-25).

The case went to trial and the jury returned verdicts of guilty on Counts I, II and III. (Verdict Forms) (App. p. 269).

Prior to the rendering of the verdicts, Sallis entered a guilty plea to the offense of Operating While Intoxicated. (06-17-21 Transcript pp. 24 L 5-25, 25-36 L 1-25, 37 L 1-23).

Following the reading of the verdicts, Sallis waived his right to trial on the habitual offender enhancement and admitted. (06-18-21 Transcript pp. 48 L 4-25, 49-53 L 1-25, 54 L 1-13).

On August 20, 2021, Sallis was sentenced to serve terms of incarceration consisting of 20 years on Count I, five years on Count II, two years on Count III and 1 year on Count IV, all terms to run concurrent to one another. (Judgement & Sentence pp. 1-2) (App. pp. 272-273).

A pro se notice of appeal was filed on August 22, 2021. (Pro Se Notice of Appeal) (App. p. 277). Sallis' attorney filed a separate notice of appeal on August 23, 2021. (Notice of Appeal) (App. p. 278).

Facts: The State called Jarid Hundley, the pastor of Revive Church of the Nazarene, in Evanston, Wyoming. (06/16/21 Transcript pp. 21 L 12-14, 22 L 3-8).

On April 23, 2016, Hundley was working as a policeman for the City of Waterloo. (06/16/21 Transcript p. 22 L 15-23). On that date, he was dispatched to a location on Mosley Street regarding a complaint of loud music coming from an automobile. Prior to arriving at the location, he was notified by another officer that the vehicle was not there. (06/16/21 Transcript p. 23 L 1-17).

He was subsequently informed that the other officer (Officer Frein) located a car matching the description, so Hundley headed to the location of the stop. (06/16/21 Transcript p. 23 L 18-25).

Upon arriving at the traffic stop, he heard Frein say that something was thrown out of the window of the car prior to the stop. In the general location of the area described by Frein, Hundley found a baggy containing a white, powdery substance. (06/16/21 Transcript pp. 24 L 12-25, 25 L 1-7).

On cross-examination, Hundley testified that the neighborhood where the stop was made is a "…fairly impoverished neighborhood and so it has a lot of social and economical (sic) concerns you would see." Hundley also said drug use was common in the area. (06/16/21 Transcript p 30 L 15-25). He also testified that it is not uncommon to see used needles and other paraphernalia. (06/16/21 Transcript p. 31 L 1-7).

Kerry Devine, is also a Waterloo Police Department employee in charge of the crime lab. (06/16/21 Transcript p. 46 L 1-24).

Devine checked the baggy discovered by Hundley for fingerprints, but found none. (06/16/21 Transcript p. 48 L 16-23).

The DCI Criminalistics Laboratory tested and weighed the substance in the baggy; the substance tested positive for cocaine salt and the substance weighed 24.23 grams. (06/16/21 Transcript p. 56 L 9-13).

The State called Thomas Frein, a third-shift patrolman for the City of Waterloo. (06/16/21 Transcript p. 64 L 8-22). On April 23, 2016, at 7:24 p.m. Frein was dispatched to investigate a call of loud music coming from a parked car in front of a residence at 123 Mosely Street. Prior to arriving at the address, the dispatcher notified Frein that the car in question had departed the Mosely Street location. (06/16/21 Transcript pp. 66 L 19-25, 67 L 1-21).

Frein continued to travel northbound on Mosely Street. He observed an automobile matching the description given to him by the dispatcher. He was able to discern the driver as Maurice

Sallis. Frein followed the vehicle and initiated a traffic stop. (06/16/21 Transcript pp. 67 L 22-25, 68 L 1-25, 69 L 1-2).

Frein testified that knew that Sallis' driving privileges were barred. Additionally, as the vehicle turned onto Adams Street, Frein observed a "…bag of white substance come out of the passenger side window." (06/16/21 Transcript 69 L 17-25, 70 L 1-10, 73 L 17-23).

Frein handcuffed Sallis, and read him his Miranda rights. (06/16/21 Transcript pp. 79 L 6-12, 80 L 5-7). Frein then asked Sallis about the item thrown from the car and Sallis responded by asserting that he did not know what Frein was talking about. (06/16/21 Transcript pp 80 L 23-25, 81 L 1-2).

Frein searched Sallis and seized money from him, counted the money, but allowed him to keep it. (06/16/21 Transcript pp. 81 L 3-25, 82 L 1-6). The money consisted of ten 100 dollar bills and one 20 dollar bill. (06/16/21 Transcript p. 92 L 8-12).

Sallis admitted to not having a valid license. (06/16/21 Transcript p. 82 L 10-24).

Frein searched the vehicle and found a partially full bottle of Remy Martin[1] on the front passenger seat. (06/16/21 Transcript pp. 84 L 2-25, 85 L 1-9).

He detected an odor of alcohol on Sallis' breath and noted that Sallis' eyes were bloodshot and watery. (06/16/21 Transcript pp. 92 L 13-25, 93 L 1-10).

Frein admitted that the cocaine salt was not packaged in individual bags which would indicate the intent to sell or distribute the substance. (06/16/21 Transcript pp. 138 L 21-25, 139 L 1-5).

The State produced another Waterloo policeman, Sergeant Spencer Gann. Gann was previously on the violent crimes team (VCAT) in 2011-2012. (06/16/21 Transcript pp. 147 L 14-25, 148 L 1-3, 149 L 6-13).

On April 23, 2016, Gann was called to the scene to take photographs. (06/16/21 Transcript p. 150 L 17-25).

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1 Remy Martin is a distiller of cognac, brandy and champagne.

Amid the testimony of Officer Ryan Muhlenbruch, Sallis made the decision to plead guilty to the OWI charge and did so. (06/17/21 Transcript pp. 16 L 1-13, 23 L 20-25, 24-36 L 1-25, 37 L 1-17).

Officer Nick Berry, of the Waterloo Police Department, is an investigator assigned to the Tri-County Drug Enforcement Task Force and works for the FBI. (06/17/21 Transcript p. 46 L 6-22).

Berry testified that the amount of cocaine seized in this case is not consistent with personal use. (06/17/21 Transcript p. 58 L 7-13).

After the verdicts were returned, Sallis waived his right to a jury trial on the enhancement on Count I and admitted to a prior narcotics conviction. (06/18/21 Transcript pp. 42 L 18-25, 43-54 L 1-25, 55 L 1-13).

Additional relevant facts will be discussed below.

ARGUMENT

I. THE DISTRICT COURT ERRED IN OVERRULING SALLIS' MOTION TO SUPPRESS EVIDENCE AS NEITHER A COMPLETED MISDEMEANOR, NOR STALE INFORMATION, WILL SUPPORT A FINDING OF REASONABLE SUSPICION OR PROBABLE CAUSE.

Standard of Review: Search and seizure issues are constitutional in nature, Sallis asserts that the denial of his motion to suppress constitutes a breach of his rights under amendments IV and XIV to the United States Constitution and article I § 8 of the Iowa Constitution, therefore, review is de novo. State v. Pals, 805 N.W.2d 767, 771 (Iowa 2011).

Preservation of Error: Error was preserved by virtue of Sallis' motion to suppress, seeking the exclusion of the evidence seized under the Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution, the subsequent hearing and the court's adverse ruling. (01/30/17 Motion to Suppress, 12/11/17 Ruling on Motion to Suppress, 02/06/17 Order) (App. pp. 36-40, 53-54, 98-101).

Discussion: The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution both protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I § 8; see also State v. Naujoks, 637 N.W.2d 101, 107 (Iowa 2001) (*citation omitted*). The Fourth Amendment of the U.S. Constitution applies to the states through incorporation by the Fourteenth Amendment. State v. Wilkes, 756 N.W.2d 838 (Iowa 2008) (*citation omitted*). "When the police stop a car and temporarily detain an individual, the temporary detention is a 'seizure"' which is subject to the requirement of constitutional reasonableness. State v. Predka, 555 N.W.2d 202, 205 (Iowa 1996) (*citing* Whren v. United States, 517 U.S. 806, 810 (1996)); State v. Coleman, 890 N.W.2d 284, 287-88 (Iowa 2017) (*citation omitted*).

Unless an exception to the warrant requirement exists, warrantless searches and seizures are per se unreasonable.

State v Hoskins, 711 N.W.2d 720, 726 (Iowa 2006) (*citing* State v. Freeman, 705 N.W.2d 293, 297 (Iowa 2005)).

The State bears the burden of proving, by a preponderance of the evidence, that such an exception applies. Hoskins, 711 N.W.2d at 726 (*citation omitted*). "One well-established exception allows an officer to briefly stop an individual or vehicle for investigatory purposes when the officer has a reasonable, articulable suspicion that a criminal act has occurred, is occurring, or is about to occur." State v. Vance, 790 N.W.2d 775, 781 (Iowa 2010) (*citations omitted*). Reasonable suspicion exists when law enforcement has "specific and articulable facts that, taken together with rational inferences from those facts, would lead the officer to reasonably believe criminal activity is afoot." Vance, 790 N.W.2d at 781 (Iowa 2010) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)).

In distinguishing between a probable cause and reasonable suspicion, this Court noted that when a member of law enforcement observes a traffic violation, probable cause to

stop a motorist exists. State v. Tyler, 830 N.W.2d 288, 293 (Iowa 2013) (*citing* State v. Tague, 676 N.W.2d 197, 201).

The existence of probable cause is not always a prerequisite for stopping a vehicle as "'…police may stop a moving automobile in the absence of probable cause to investigate a reasonable suspicion that its occupants are involved in criminal activity.'" State v. Tyler, 830 N.W.2d 288, at 298 (*quoting* State v. Pals, 805 N.W.2d 767, 771 (Iowa 2011)).

The main difference between probable cause and reasonable suspicion consists of purposes of each. A Terry stop allows criminal investigation. The purpose of a probable cause stop is to seize an individual, or individuals, responsible for committing a crime. *Id.* at 293.

At the suppression hearing, Officer Frein testified that he was dispatched to investigate a complaint of loud music coming from "…a black vehicle, possibly a Kia Soul…" driven by a "…black male with a backwards baseball cap." (06/26/17 Suppression Hearing pp. 3 L 16-18, 6 L 8-14).

Subsequently, the dispatcher advised Frein the vehicle had departed. Frein had not yet arrived at the location to which he was dispatched. (06/26/17 Suppression Hearing p 7 L 7-16).

Frein continued driving and he observed a black Kia Soul about five blocks from the location from which the complaint derived. (06/26/17 Suppression Hearing pp. 7 L 17-25, 8 L 1-3).

Frein was at an intersection when he saw the Kia which was to his left. Frein was able to see that the driver was black and was wearing a cap that was turned backwards. (06/26/17 Suppression Hearing pp. 9 L 7-25, 10 L 1-15). He testified that he was able to identify the driver as Maurice Sallis and knew that Sallis did not have a valid license. (06/26/17 Suppression Hearing pp. 11 L 7-25, 12 L 1-25, 13 L 1-18).

According to Frein, the reasons justifying the stop were violation of a city noise ordinance and Sallis' driving status. (06/26/17 Suppression Hearing p. 23 L 3-9).

On cross-examination, Frein admitted, regarding his check of Sallis' driving privileges, that it may have been six months prior to the incident. He did not check the status of Sallis' license prior to pulling him over. (06/26/17 Suppression Hearing pp. 19 L 16-25, 20 L 1-13). He stated "I believed he was barred, but was unable to confirm." (06/26/17 Suppression Hearing p. 21 L 18-23).

Frein gave previous sworn testimony in a deposition wherein he stated he believed that Sallis license was barred, but it may have been revoked or suspended. (06/26/17 Suppression Hearing p. 22 L 9-13).

Frein did not observe the baggie being thrown from the window until after he activated his lights. (06/26/17 Suppression Hearing p. 20 L 14-16).

Frein was confronted with a video from a prior narcotics case, State v. Morehead in which he sought cooperation from the defendant in future drug investigations. He stated if Morehead were to provide information about someone in

possession of narcotics or guns, that he would then find a reason to initiate a stop. (06/26/17 Suppression Hearing pp. 26 L 3-25, Defendant's Exhibit 1 Video Interview of Teondis Morehead 08:54-08:55:10[2]).

Sallis argued that the probable cause emanating from Frein's belief that Sallis' license was barred is stale and that Frein did not personally hear the alleged noise ordinance violation and the noise ordinance requires a measurement of decibels to determine whether a violation occurred and a charge of Disorderly Conduct mandates a finding of "raucous noise" which is not defined. Additionally, there is a question of whether police may initiate a stop on the basis of a completed misdemeanor. (06/26/17 Suppression Hearing pp. 37 L 8-25, 38-45 L 1-25, 46 L 1-5).

Sallis also called into question Frein's credibility by producing the above-referenced DVD showing Frein talking to a defendant who he is trying to enlist to work for him. In the DVD,

[2] All times are approximate

Frein expresses a desire for the defendant to give him inculpatory information following which Frein would find a reason to pull the suspect over for some infraction of the law. Defendant's Exhibit 1 Video Interview of Teondis Morehead 08:54:50-8:55:10).

Sallis offered the DVD to demonstrate the officer's lack of credibility as one who would look for a reason to pull a motorist over and his bias. (Suppression Hearing p. 28 L 9-23). The court did not even address Sallis' assertions or the video in its ruling.

Sallis asserts that Frein had no basis for initiating a stop under the circumstances present at the time. Frein's reason for stopping Sallis was to investigate a completed misdemeanor that he did not observe.

Frein testified that he stopped Sallis based upon Iowa Code § 723.4(1)(b) (2015). Disorderly Conduct, which prohibits "… loud and raucous noise in the vicinity of any residence or public building which intentionally or recklessly causes

unreasonable distress to the occupants thereof." (Suppression Hearing p. 23 L 3-25).

The Iowa Supreme Court has yet to rule definitively on whether a completed misdemeanor, not observed by law enforcement, gives rise to reasonable suspicion upon which to base a traffic stop. S*ee* State v. Tyler, 830 N.W.2d 288, 298 (Iowa 2013). However, the Court of Appeals has opined that it did not believe that "…our supreme court will find that reasonable suspicion of a completed misdemeanor not observed by the officer is sufficient to effectuate a traffic stop amounting to a seizure." State v. Medrano, No. 13-1941, 2015 WL 567922, at *3 (Iowa Ct. App. February 11, 2015).

At the suppression hearing, the State cited to State v. Waters, 538 N.W.2d 862 (Iowa Ct. App. 1995) for the proposition that reasonable suspicion had been established. However, in Waters, the police observed erratic driving in addition to receiving citizen complaints. State v. Waters, 538 N.W.2d 862 at 864).

The State cited additional cases for the same proposition. The first case involved unusual driving and furtive movements by the defendant. State v. Varvel, 436 N.W.2d 649, 651 (Iowa Ct. App. 1988).

The second case involved an indictable crime (OWI) and even though a silver Cadillac was reported as the suspect vehicle, the gold Buick was the only "light colored" automobile in the area in which the police were searching. State v. Cunningham, No. 16-0586, 2017WL104950, at *1 (Iowa Ct. App. January 11, 2017).

A third case addressed whether a stop was legal in a situation wherein the officer mistakenly believed that the defendant's muffler was excessively loud. State v. Kinkhead, 570 N.W.2d 97, 99 (Iowa 1997).

The final case deals with search incident to arrest and has no relevance to the instant matter. State v. Dawdy, 533 N.W.2d 551 (Iowa 1995).

In denying the motion to suppress, the district court found that "An officer is able to stop a motor vehicle concerning criminal activity that has occurred or is occurring." (Order Denying Motion to Suppress Evidence p. 2) (App. p. 99). However, the district court's determination is contradicted by the language in State v. Medrano noting that the existence of a completed misdemeanor, which is not observed by the officer, does not provide the reasonable suspicion necessary to effectuate a stop. State v. Medrano, No. 13-1941, 2015 WL 567922, at *3.

Neither did Frein's recognition of Sallis while believing that he was without a valid driver's license provide reasonable suspicion or probable cause to stop him because the information was stale.

The district court found that "Most barments are for from two to six years and as such the officer had a reasonable belief the defendant would remain barred even 60 days after the last time he checked the official record." (12/11/17 Order Denying

Motion to Suppress p. 2) (App. p. 99). The court's expressed belief regarding the amount of time that elapsed between Frein's check on Sallis' license and the date of the stop is incorrect. Frein testified that it may have been six months prior to the incident. (06/26/17 Suppression Hearing pp. 19 L 16-25, 20 L 1-13).

The district court was also mistaken as to Frein's certainty regarding the status of Sallis' license. Frein stated "I believed he was barred, but was unable to confirm." (06/26/17 Suppression Hearing p. 21 L 18-23).

Previous testimony taken from Frein indicates at the time of the stop he thought that Sallis license was barred, but it that may have been revoked or suspended. (06/26/17 Suppression Hearing p. 22 L 9-13).

After the stop was made, Frein asked Officer Hundley to run Sallis' license. After Hundley ran the license, Frein asked Hundley "Is he barred", indicating the fact that he did not know. (Suppression Hearing pp. 20 L 8-25, 21 L 1-23).

Frein's good-faith belief will not rectify his failure to verify Sallis' driving status. State v. Cline, 617 N.W.2d 277, 293 (Iowa 2000)(*abrogated on other grounds by* State v. Turner, 630 N.W.2d 601 (Iowa 2001)).

Regarding the use of allegedly stale information, this Court has held:

> "In determining whether the lapse of time has been unreasonable, heavy reliance will often be placed upon the nature of the alleged offense, a greater lapse of time being permissible where the activity is of a continuous nature as distinguished from an isolated violation."

State v. Padavich, 536 N.W.2d 743, 768 (Iowa 1995) (*quoting* State v. Bean, 239 N.W.2d 556, 559 (Iowa 1976)).

There is nothing in the record to suggest that Sallis' illegal driving was continuing in nature.

In Commonwealth v. Farnan, the Superior Court found that a 30-day lapse between the time the officer obtained information of the defendant's suspension and the time of the stop did not render the information stale. Commonwealth V. Farnan, 55 A.3d 113, 117 (Pa.Super.2012).

A period of one to three years between an officer becoming aware of a defendant's suspended license and having him stopped for that reason was deemed too stale to justify the stop and subsequent search of the defendant's automobile. Moody v. State, 842 So.2d 754, 758 (Fla.2003).

The State Constitution holds:

> This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this constitution into effect.

Iowa Const. Art. XII, § I.

Ascertaining the framer's intent is this Court's purpose when construing a provision of the state constitution. Redmond v. Ray, 268 N.W.2d 849 (Iowa 1978) (citing Ex Parte Pritz, 9 Iowa 30, 32 (1858)).

It is appropriate for this Court to analyze this as under the Iowa Constitution. The State constitution mandates:

> This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this constitution into effect.

Iowa Const. Art. XII, § I.

Ascertaining the framer's intent is this Court's purpose when construing a provision of the state constitution. Redmond v. Ray, 268 N.W.2d 849 (Iowa 1978) (citing Ex Parte Pritz, 9 Iowa 30, 32 (1858)).

Both Article I § 8 of the Iowa Constitution and Amendment IV to the U.S. Constitution serve the purpose of imposing "…a standard of 'reasonableness' upon the exercise of discretion by government officials … in order 'to safeguard the privacy and security of individuals against arbitrary invasion."' State v. Jones, 666 N.W.2d 142, 145 (2003).

There were no exigent circumstances present in this case. *See* State v. Wilson, __NW2d__, 2022 WL 127957, at 7-8 (Iowa 2022).

Reliance on information that is as much as six months old is unreasonable as Sallis could have had his license restored, or could have obtained a temporary restricted license. Frein

could have verified Sallis' driving status prior to stopping him, but chose not to make the effort.

A stop based upon a completed misdemeanor, not observed by police, is not reasonable. If this is allowed to stand, the potential for abuse by law enforcement, e.g. citizens calling the police to report having witnessed a parking violation, which is then used as the basis for a stop, is immense.

The framers of the Iowa Constitution "…placed considerable value on the sanctity of private property…" and emphasized the importance of individual liberties by placing the Iowa Bill of Rights at the beginning of the constitution." State v. Ochoa, 792 N.W.2d 260 at 274. Documents relating to the state constitutional conventions stress "…the need to restrain arbitrary government power." *Id.*

Because the traffic stop was based upon a completed misdemeanor which was not observed by the police and because the information regarding Sallis' driving record was stale, this

matter should be reversed and remanded with directions to grant Sallis' motion to suppress.

II. THE DISTRICT COURT ERRED IN DENYING SALLIS HIS RIGHT TO ENLIST THE SERVICES OF HIS COUNSEL OF CHOICE BASED UPON THE STATE'S REQUEST TO REMOVE ATTORNEY MONTGOMERY FROM HIS CASE.

Standard of Review: An infringement upon the defendant's right to select counsel of his choice is constitutional in nature and so review is de novo. *See* United States v. Gonzalez–Lopez, 548 U.S. 140,146, 126 S.Ct. 2557, 2562, 165 L.Ed.2d 409 (2006); State v. Mulatillo, 907 N.W.2d 511, 517 (Iowa 1994).

Preservation of Error: Error was preserved by virtue of hearings involving this subject and the subsequent adverse rulings. (12/19/16 Notice of Limited Appearance, 02/03/17 Motion for Expanded Findings, 02/06/17 Order Denying Motion for Expanded Findings, 02/24/17 Motion to Withdraw, 03/03/17 Defendant's Motion to Reconsider Order Compelling Withdrawal of Counsel, 04/19/18 Order Denying Application

for Limited Appearance, 01/10/18 Application for Interlocutory Appeal, 01/20/18 Motion for Three Judge Panel, 02/05/18 Supreme Court Order No. 18-0065, 05/25/18 Notice of Application for Interlocutory Appeal, 12/20/17 Transcript of Proceedings, 02/20/17 Transcript of Proceedings, 06/28/21 Defendant's Combined Post Trial Motions, Sentencing Transcript pp. 4 L 16-25, 5-6 L 1-25, 7 L 1-21) (App. pp. 26-27, 43-82, 155-176, 177-212, 213-263, 270-271).

The parties stipulated that Sallis desired that Mr. Montgomery represent him pursuant to the limited appearance he filed. (12/20/17 Transcript of Proceedings pp. 59 L 20-25, 60 L 1-10,).

Discussion: Both the United States and Iowa Constitutions provide criminal defendants with the assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I § 10; State v. Young, 863 N.W.2d 249, 256-57 (Iowa 2015); State v. Smith, 761 N.W.2d 63, 69 (Iowa 2009). The right to counsel under the Sixth Amendment is made applicable to the States

pursuant to the Fourteenth Amendment. State v. Tejeda, 677 N.W.2d 744, 749 (Iowa 2004).

The Sixth Amendment recognizes a right to counsel of one's own choosing. An accused must have a "fair opportunity to secure counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158, ___ (1932). A primary purpose of the Sixth Amendment is to grant defendants control over their own defense. The Sixth Amendment "grants to the accused the right to make his defense, because "it is he who suffers the consequences if the defense fails." Faretta v. California, 422 U.S. 806, 819-20, 95 S.Ct. 2525, 2543, 45 L.Ed.2d 562, 573 (1975). This includes "the right to select and be represented by one's preferred attorney." Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140, 148 (1988).

The right to counsel of choice is not absolute and "is circumscribed in several important respects." Id. at 159, 108 S.Ct. at 1697, 100 L.Ed.2d at 148. A defendant cannot insist

on representation by an attorney who is not a member of the bar, or an attorney he cannot afford or who otherwise chooses to decline representation. Id. Nor can a defendant insist upon representation by an attorney who suffers from an actual conflict of interests. Id. at 162, 108 S.Ct. at 1698, 100 L.Ed.2d at 150; State v. Vanover, 559 N.W.2d 618, 628 (Iowa 1997). Finally, a trial court has some discretion in "balancing the right to counsel of choice against the needs or fairness and against the demands of its calendar." United States v. Gonzalez-Lopez, 548 U.S. 140, 152, 126 S.Ct. 2557, 2565-66, 165 L.Ed.2d 409, 421 (2006)(citing Wheat v. United States, 486 U.S. at 159-60, 108 S.Ct. at 1697-98, 100 L.Ed.2d at 148-49 , and Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610, 619-20 (1983)).

This Court noted that a federal court found the deprivation of funds to hire counsel of choice (occasioned by the government's efforts to cause the employer to abandon it's practice of paying the defense expenses of employees charged

with crimes) is a due process violation. In United States v. Stein the Court held that due process "entitles a defendant to 'a fair shake'…" and went on to note that " '[o]ne aspect of the required fairness protects the autonomy of the criminal defendant'" and that "the government is prevented from 'interfering with the manner in which the individual wishes to present a defense'". Krogmann v. State, 914 N.W.2d 293, 316-317 (Iowa 2018) *quoting* United States v. Stein (Stein I), 435 F.Supp.2d 330, 356-365 (S.D.N.Y. 2006).

Sallis asserts that, as explained below, the State interfered with his defense by moving to have Robert Montgomery disqualified and that Sallis' due process rights were violated pursuant to the U.S. and Iowa Constitutions. U.S. Const. Am. XIV, Iowa Const. Art I §§ 9 & 10. The State's interference may not have been in the form of trying to deny Sallis of funds for the retention of counsel, but it was interference just the same.

Attorney Robert Montgomery was hired by Sallis' family to represent him in a limited capacity. The notice of limited

appearance filed by Montgomery defined his role as consisting of:

> "…pretrial proceedings including discovery/discovery depositions, and any and all motions or applications relating thereto and/or arising therefrom, and motions to continue trial and continue pretrial. This limited-in-scope appearance does not include pretrial conference, trial-related motions in limine, or trial, particularly since undersigned counsel is unavailable at times currently scheduled for pretrial and trial."

(12/19/16 Notice of Limited Appearance) (App. pp. 26-27).

Montgomery filed motions to sever and for expanded findings which were denied without reasons given for the denials. (01/30/17 Motion to Sever, 02/01/17 Order Denying Motion to Sever, 02/03/17 Motion for Expanded Findings, 02/06/17 Order Denying Motion for Expanded Findings) (App. pp. 28-35, 41-54).

Thereafter, Montgomery filed various pretrial motions. On February 8, 2017, the attorney appointed to represent Sallis, Ted Fisher of the Public Defender's Office, moved to withdraw based upon Montgomery's filed appearance. (Motion to Withdraw) (App. pp. 55-58).

A hearing was held, on February 20, 2017, to determine Sallis' indigency and to address the Public Defender's motion to withdraw. At the hearing the State requested the court to either allow Fisher to continue representing , or allow Montgomery to continue without limited appearance status. (02/20/17 Transcript of Proceedings pp. 4 L 2-25, 5 L 1-2).

The court responded to the arguments of counsel by stating "I'm going to order Mr. Montgomery to either withdraw or withdraw his limited appearance and enter a full-fledged appearance within a week and that will give him time to talk with the family and everybody else about what his intent is in this case." (Transcript of Proceedings p. 6 L 7-11). The court explained that in the future, limited appearances would not be allowed. (Transcript of Proceedings p. 6 L 7-11).

On February 24, 2017, the district court issued an order directing Montgomery to withdraw his limited appearance and either make a "full appearance" by February 27, 2017, or the

Public Defender's Office would continue to represent Sallis. (Order on Motion to Withdraw) (App. pp. 83-84).

A related order was filed by the district court on March 3, 2017 directing that Montgomery:

> "…enter a general appearance by the close of business Friday, March 3, 2017, if he intends to continue as counsel for the defendant. In any event ,his limited appearance is now null and void. Should he fail to enter a general appearance the State Public Defender shall continue to represent the defendant."

(Order) (App. pp. 83-84).

On December 8, 2017, Montgomery filed an application to make a limited appearance. (Application for Approval of Limited Appearance of Counsel of Choice) (App. pp. 90-97).

A hearing was held wherein Montgomery revealed that his retainer had been exhausted nine months prior to the hearing and that he was representing Mr. Sallis pro bono. (12/20/17 Transcript of Proceedings p. 7 L 10-21).

At the hearing, Montgomery entered evidence of a previous case in which he was allowed to make a limited appearance for the purpose of moving the court for a new trial, despite the fact

that the defendant was currently represented by the State Public Defender. Montgomery's effort was successful, a new trial was granted and he was allowed to withdraw following the entry of the court's order. (12/20/17 Transcript of Proceedings pp. 20 L 6-25, 21-22 L 1-25, 23 L 1-15, 12-20-17, Documents from State v. Holmes) (App. pp. 137-154).

Despite the fact that the same judge had previously allowed Montgomery to make a limited appearance for a criminal defendant in a case in which he prevailed, the district court entered an order denying Montgomery's application for limited appearance on April 19, 2018. (Order on Limited Appearance) (App. pp. 215-220).

The court noted that Montgomery, and Sallis' court-appointed counsel at the time, "…were in agreement as to strategy and procedure concerning Mr. Sallis' case; that they were working well together." (Order on Limited Appearance p. 2) (App. p. 216).

The court went on to address the issue of propriety of limited appearances in criminal cases wherein counsel has been appointed by the court. The court envisioned a hypothetical situation wherein the court-appointed attorney does not agree with the other attorney's strategic decisions, or in which personalities are incompatible. "The burden of additional hearings to fire court-appointed counsel would occur." (Order on Limited Appearance pp. 2-3) (App. pp. 216-217). The court noted that court-appointed counsel cannot withdraw due to a disagreement with the defendant, and the defendant "…does not have the luxury of test running various counsel to obtain one of his or her liking." (Order on Limited Appearance p. 3) (App. p. 217).

The court posed the hypothetical question "Does the court-appointed counsel participate in the hearing in which pro bono limited appearance counsel intends to proceed?" The court asserted that court-appointed counsel "…could not be required to attend one of the aforementioned hearing as the Court would

rule independently on that issue…" The court went on to declare that the public defender system could be required to pay for court-appointed counsel to attend a hearing argued by an attorney representing the defendant on a limited basis. (Order on Limited Appearance p. 3) (App. p. 217).

The court seemed to be searching for a potential conflict of interest, but no such potential conflict of interest was apparent in the record. "A serious potential for conflict occurs when the record indicates an actual conflict is likely to arise." State v. McKinley, 860 N.W.2d 874, 881 (Iowa 2015)(*citation omitted*).

Montgomery informed the court that Sallis court-appointed attorney, at that time, Donna Smith, contacted the State Public Defender's Office and was told by a Assistant State Public Defender Rebecca Hanson "… having a limited appearance pro bono attorney is not in violation of any of their rules and is not in violation of the procedures and requirements of the state contract which allows attorneys like Miss Smith to be – private attorneys like Miss Smith to be court-appointed to

represent indigent defendants." (12/20/17 Transcript of Proceedings pp. 6 L 10-25, 7 L 1-10).

The court speculated about different scenarios including a defendant being forced to pay for additional consultations between attorneys, differences of opinion regarding strategies, the limitations of what an attorney appearing via limited appearance could discuss with the defendant, strategies urged by pro bono counsel that are not in the defendant's best interest and competing discovery strategies and schedules. (Order on Limited Appearance pp. 3-5) (App. pp. 217-219).

None of the situations and scenarios envisioned by the court came to fruition. The problems discussed by the court in its order did not happen in this case.

Montgomery, notified the court he was filing a limited appearance pursuant to Iowa R. Civ. P. 1.404(3). (12/19/16 Notice of Limited Appearance, 12/08/17 Application for Approval of Limited Appearance Counsel of Choice) (App. pp. 26-27, 90-97). That rule provides:

> " Pursuant to Iowa R. Prof'l Conduct 32:1.2(c), an attorney's role may be limited to one or more individual proceedings in the action, if specifically stated in a notice of limited appearance filed and served prior to or simultaneously with the proceeding. If the attorney appears at a hearing on behalf of a client pursuant to a limited representation agreement, the attorney shall notify the court of that limitation at the beginning of that hearing."

Iowa R. Civ. P. 1.404(3)(2021).

Despite the fact that this Court has found that "[w]hile our rules of civil procedure do not apply to criminal matters, they can still be instructive…" State v. Russell, 897 N.W.2d 717, 725 (Iowa 2017), it has also determined that "[t]he Rules of Civil Procedure have no applicability in criminal cases, unless made applicable by statute." State v. Wise, 697 N.W.2d 489, 492 (Iowa 2005).

The rules of criminal procedure are silent on the topic of limited appearances. Reliance upon the rule is appropriate as Iowa R. Civ. P. 1.101 states that "[t]he rules in this chapter shall govern the practice and procedure in all courts of the state, except where they expressly provide otherwise or statutes not

affected hereby provide different procedure in particular courts or cases." Iowa R. Civ. P. 1.101 (2021). Since the rules of criminal procedure do not address this issue, the rules of civil procedure apply.

Sallis asserts that the district court was without the authority to remove Montgomery from his representation in the limited capacity of which he gave notice. There is no provision allowing the court to remove an attorney appearing in a limited capacity, nor is there any provision allowing the district court to ban the practice of allowing attorneys to make limited appearances in criminal cases.

> Iowa R. Civ. P. 1.404(3) provides for limited appearances: "1.404(3) Limited appearance. Pursuant to Iowa R. Prof'l Conduct 32:1.2(c), an attorney's role may be limited to one or more individual proceedings in the action, if specifically stated in a notice of limited appearance filed and served prior to or simultaneously with the proceeding. If the attorney appears at a hearing on behalf of a client pursuant to a limited representation agreement, the attorney shall notify the court of that limitation at the beginning of that hearing."

Iowa R. Civ. P. 1.404(3) (2021).

Montgomery complied with the rule and should have been allowed to represent Sallis in his limited capacity. A defendant has the right to the assistance of counsel of his choice if that counsel is not court-appointed. A deprivation of this type constitutes structural error:

> "The defendant is deprived of his or her right to counsel when the court erroneously prevents the defendant from being represented by his or her counsel of choice, and no further inquiry into ineffectiveness of counsel or prejudice is required to establish a violation of the defendant's right to counsel."

State v. Mulatillo, 907 N.W.2d 511, 518 (Iowa 2018) (*citing* United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 148, 151, 126 S.Ct. 2557, 2561, 2563, 2565, 165 L.Ed.2d 409 (2006)).

The fact that Sallis enlisted Montgomery solely for pretrial matters does not mitigate his deprivation, nor does it constitute waiver of the choice of counsel issue. Even when the defendant ultimately pleads guilty, the counsel of choice issue must be considered by the court and is not subject to waiver. United States v. Sanchez Guerrero, 546 F.3d 328, 332 (5th Cir.2008).

In a case involving deprivation of the defendant's assets, which prevented him from hiring his counsel of choice and hiring a jury consultant, the Supreme Court held that "…the asset freeze in this case was unlawful under Iowa law regardless of any Sixth Amendment or article I, section 10 right Krogmann might have to spend his money on his criminal defense." Krogmann v. State, 914 N.W.2d 293, 308 (Iowa 2018).

In reversing and remanding the case for a new trial, this Court took into consideration Krogmann's assertion that had he had access to his assets, and been able to hire a jury consultant, his defense would have been augmented. Krogmann v. State, 914 N.W.2d 293, at 310-311.

A criminal defendant has a constitutional right to control the defense of his case. Krogmann at 319 (citing Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 2540-41, 45 L.Ed.2d 562 (1975)). The constitutional mandate of fairness prohibits the prosecution from interfering with the defense. *Id.* (citat*ions omitted*).

Yet, in this case, Montgomery was removed at the behest of the State. In an order compelling Montgomery to withdraw, the court noted that "Mr. Westendorf has requested that the limited appearance by Mr. Montgomery be terminated." (02/24/17 Counsel Order on Motion to Withdraw, 12/20/17 Transcript of Proceedings pp. 35 L 1-25, 36 L 1-17) (App. pp. 56-58).

Sallis asserts that the district court erred and violated his right to counsel of choice under the Sixth and Fourteenth Amendments to the United States Constitution and Article I Section 10 of the Iowa Constitution.

The district court's erroneous deprivation of Sallis' right to counsel of choice entitles him to relief. State v. Smith, 761 N.W.2d 63, 70 (Iowa 2009). Sallis asks that his convictions, judgment and sentence be vacated and his case remanded to the district court for a new trial.

III. THE DISTRICT COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER THE STATE ELICITED TESTIMONY DEPICTING SALLIS AS A FLIGHT RISK.

Standard of Review: Review of claims of prosecutorial misconduct and motions for mistrial are reviewed for an abuse of discretion. State v. Plain, 898 N.W.2d 801, 811 (Iowa 2017) (*citation omitted*).

Preservation of Error: Error was preserved by Sallis' timely objection, motion for mistrial and the court's adverse ruling. (06/16/21 Transcript pp. 77 L 24-25, 78 L 1-24, 87 L 24-25, 88-89, 90 L 1-4, 06/28/18 Defendant's Combined Post Trial Motions, Sentencing Transcript pp. 4 L 16-25, 5-6 L 1-25, 7 L 1-21) (App. pp. 270-271). Although counsel did not cite to a particular rule of evidence, it was clear from his argument that he was relying on Iowa R. Evid. 5.403 as the testimony was highly prejudicial. (06/16/21 Transcript pp. 88 L 4-12, 89 L 8-18).

The court's ruling also indicates that the relevance of the complained of evidence was considered. (06/16/21 Transcript pp. 89 L 19-25, 90 L 1-4).

"Our issue preservation rules are not designed to be hypertechnical." Terry v. Dorothy, 950 N.W.2d 246, 250 (Iowa 2020) *quoting* Griffin Pipe Prods. Co. v. Bd. of Rev., 789 N.W.2d 769, 772 (Iowa 2010).

Additionally, "…the requirement of error preservation gives opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling." State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983) (*citation omitted*).

In this case, opposing counsel, i.e. the State, had the opportunity to be heard and, in fact, received a favorable ruling. Sallis should not be prevented from raising this issue based upon form over substance. *See* Lee v. State, Polk County Clerk of Court, 815 N.W.2d 731, 739 (Iowa 2012) (citing State v. Tobin, 333 N.W.2d 842, 844).

Discussion: Officer Frein testified that following the stop of Sallis' vehicle, he immediately exited the patrol car and commenced getting Sallis out of the car. He stated that he did so because he did not want to give him a chance to drive off. (06/16/21 Transcript pp. 77 L 24-25, 78 L 1-14).

The State then asked Frein "And were you concerned about Mr. Sallis being a flight risk at that time" to which Frein replied "Yes". Defense counsel then lodged an objection and requested a mistrial. (06/16/21 Transcript p. 78 L 15-19).

The court overruled the objection. (06/16/21 Transcript p. 78 L 23-24). Later, the court found that the testimony was "… directly related to the reason for this stop in light of the defendant or in light of the officer observing something being thrown from the window and being concerned that the defendant might attempt to pull away as he approached the vehicle." (06/16/21 Transcript pp. 87 L 20-25, 88-89 L 1-25, 90 L 1-4).

This evidence was irrelevant and unduly prejudicial as the jury would conclude that someone predisposed to take flight is guilty. Unfair prejudice is defined as "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." State v. Castaneda, 621 N.W.2d 435, 440 (Iowa 2001).

Frein had no knowledge indicating that Sallis was a flight risk. This court has held that a chain of inferences must be established in order for flight to be probative of the defendant's guilt:

> "(1) from the defendant's behavior to avoidance of apprehension, (2) from avoidance of apprehension to consciousness of guilt, (3) from consciousness of guilt to consciousness of guilt concerning the crime charged, and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged."

State v. Wilson, 878 N.W.2d 203, 212-213 (Iowa 2016).

None of these inferences are supported by the trial record yet, Frein was allowed to testify that Sallis was a flight risk.

In Wilson, this Court held that "…the probative value of evidence showing a defendant avoided apprehension turns on the circumstances under which the avoidance occurred." State v. Wilson, 878 N.W.2d 203 at 213. In this case no avoidance occurred, yet the possibility that Sallis may take flight was proposed to the jury without any supporting facts. Frein's testimony was elicited by the State for the express purpose of showing consciousness of guilt.

The complained of evidence has no relevance as there is nothing supporting Frein's assertion that Sallis was a flight risk. The evidence is highly prejudicial as it suggests a consciousness of guilt despite the fact that Sallis made no effort to elude or escape from law enforcement.

Sallis constitutional right to a fair trial has been violated. The prosecutor intentionally elicited Frein's claim that he considered Sallis a flight risk. "A defendant's constitutional right to a fair trial is violated if a prosecutor fails to comply with the requirements of due process at the trial, whether by virtue

of prosecutorial error or misconduct." State v. Plain, 898 N.W.2d 801, 818 (Iowa 2017); U.S. Const. amends. V, VI, XIV; Iowa Const. art. I, §§ 9–10.

This case should be reversed and remanded for retrial.

CONCLUSION

WHEREFORE, Maurice Sallis respectfully requests that this Court reverse and remand this matter with directions to vacate the judgment and sentencing order and grant Sallis' motion to suppress evidence, or, in the alternative, to vacate the judgment and sentence and remand for a new trial based upon the violation of his right to his counsel of choice and the erroneous admission of Officer Frein's opinion that Sallis was a flight risk.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $7.03, 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 BRIEFS

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 7,820 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theresa R. Wilson Dated: 5/12/22

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