IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. MAURICE SALLIS, Defendant-Appellant.	S. CT. 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 REPLY BRIEF AND 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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STATEMENT OF THE CASE

COMES NOW Defendant-Appellant Maurice Sallis, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on April 26, 2022.

While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions made by the State.

ARGUMENT

I. The officer had neither probable cause nor reasonable suspicion to initiate a stop of Sallis' vehicle. The stop was invalid, and the new crime exception to the exclusionary rule does not save the State from its illegal search and seizure.

The State's primary argument in support of the stop of Sallis' vehicle was that Officer Thomas Frein knew Sallis personally and was aware he did not have a valid license. State's Brief pp. 20-23. In fact, Frein admitted his knowledge of Sallis' driving status was perhaps six months old, and he was also unsure whether Sallis was barred, revoked, or

suspended. (6/26/17 Supp. Tr. p. 19 L.16-p. 20 L.13, p. 21 L.11-p. 22 L.19; 6/16/21 Tr. p. 69 L.17-p. 70 L.5, p. 108 L.4-p. 109 L.3). In other words, Frein's "knowledge" of Sallis' driving status was little more than a hunch. Terry v. Ohio, 392 U.S. 1, 22 (1968).

"Once presented with reasonable articulable suspicion, officers should diligently pursue a reasonable means of investigation to verify or dispel the suspicion." State's Brief p. 18. Without conceding whether Frein's hunch was either reasonable or articulable, Frein's decision to stop Sallis was not a "reasonable means of investigation" to clarify his driving status. Frein could have easily contacted dispatch to verify Sallis' driving status before deciding whether he had grounds to initiate a stop. (6/16/21 Tr. p. 141 L.6-22). Instead, he chose to conduct a seizure first and investigate Sallis' driving status later. (6/16/21 Tr. p. 104 L.11-24). This is consistent with Frein's previous acknowledgement that he will decide who to stop first and then find grounds to justify doing

so, and inconsistent with Terry. (6/26/17 Supp. Tr. p. 26 L.3-p. 29 L.13).

Nor should any mistake of fact justify Frein's actions in this case. A mistake of fact must be an "objectively reasonable one" to justify a traffic stop. State v. Tyler, 830 N.W.2d 288, 294 (Iowa 2013). Any mistake Frein might have made was not objectively reasonable given that he could have easily confirmed any suspicions by verifying Sallis' driving status before stopping his vehicle. Furthermore, Terry itself eschewed the idea that the subjective good faith of an officer could justify such an intrusion. Terry v. Ohio, 392 U.S. at 22.

Sallis reaffirms there was no other probable cause or reasonable suspicion supporting the stop. The initial call to police involved a noise complaint, but by the time Frein found Sallis' vehicle there was no loud noise coming from it. (6/26/17 Supp. Tr. p. 25 L.15-23; 6/16/21 Tr. p. 101 L.8-10, p. 103 L.6-9, p. 107 L.10-18).

To the extent Frein claimed this was a disorderly conduct violation under Iowa Code section 723.4(1)(b), the offense was a simple misdemeanor. Likewise, a violation of Waterloo Traffic Code section 3842.417 would have been a simple misdemeanor. See Waterloo Traffic Code § 3842.417, available at https://codelibrary.amlegal.com/codes/waterlooia/latest/waterloo-traffic/0-0-0-6161 (last visited May 4, 2022).

An officer has probable cause to stop a vehicle if he observes a traffic violation. State v. Tyler, 830 N.W.2d 288, 293 (Iowa 2013). Frein did not hear the noise that led to the initial complaint, could not measure the noise, and was not sure how far the vehicle was from the complainant. (6/26/17 Supp. Tr. p. 23 L.10-p. 25 L.23, p. 30 L.17-19). Frein did not have probable cause to stop the vehicle based on a noise violation.

Nor did Frein have reasonable suspicion to stop the vehicle based on the noise complaint. A Terry stop is an

investigatory stop based on reasonable suspicion of potential criminal activity. State v. Tyler, 830 N.W.2d at 297-98. Where the stop is not capable of furthering the investigatory purpose behind the stop, the stop is not valid. Id. at 298. Given that Frein was already aware there was no noise coming from Sallis' vehicle at the time Frein stopped it, there was no valid investigatory purpose to be had.

Because the stop of Sallis' vehicle was invalid, one must consider whether the new crime exception applied to allow admission of the drugs thrown from the vehicle. It does not.

The new crime exception is a "relatively obscure and rarely invoked" exception to the exclusionary rule. State v. Wilson, 968 N.W.2d 903, 917 (Iowa 2022). The first application of the rule in Iowa was in State v. Dawdy in 1995. State v. Dawdy, 533 N.W.2d 551 (Iowa 1995). The Iowa Supreme Court held that a defendant resisting arrest following an illegal traffic stop engaged in a new crime that permitted a second search incident to arrest. Id. at 553-55. The

exception was grounded in the fact a suspect has no right to resist even an illegal arrest. Id. at 555-56.

More recently in State v. Wilson, the Iowa Supreme Court considered whether the exception applied to someone who threw drugs after police illegally entered her apartment but before she began resisting arrest. State v. Wilson, 968 N.W.2d at 917-19. The Court recognized that other jurisdictions applied a version of the Wong Sun attenuation doctrine to determine if the new crime was an intervening act that severed the link to the prior illegality. Id. at 919 (citing Wong Sun v. United States, 371 U.S. 471, 491–92 (1963)). The Court held that Wilson's resisting arrest was a new crime, but determined that the drugs were not found as a result of the new crime. Id.

Tossing drugs out of a vehicle while in the process of being stopped does not qualify under the new crime exception. Frein acknowledged he turned on his lights to conduct the stop before the baggie came out of the window. (6/26/17

Supp. Tr. p. 14 L.20-p. 15 L.21, p. 20 L.14-16; 6/16/21 Tr. p. 70 L.6-p. 71 L.2, p. 73 L.17-23). He was already in the process of engaging in the illegal stop when the baggie was thrown. Had Frein not attempted to make the illegal stop, Sallis would have had no reason to throw the baggie out of his car. This act was not severed from Frein's illegal stop and therefore the new crimes exception does not apply.

The District Court erred in denying Sallis' motion to suppress. Sallis' convictions, sentence, and judgment should be vacated and his case remanded for further proceedings without the tainted evidence.

II. An indigent defendant does have a limited right to counsel of choice. Nothing in the Rules of Criminal Procedure specifically prohibit counsel of choice from filing a limited appearance.

The State incorrectly asserts "Sallis had no such right" to counsel of choice. Certainly, a defendant who can afford to retain counsel has a right to counsel of his choice, within bounds. United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006); State v. Smith, 761 N.W.2d 63, 69 (Iowa 2009); State v.

Mulatillo, 907 N.W.2d 511, 518 (Iowa 2018). But this concept also applies to defendants who can find attorneys willing to represent them *without requiring payment of state funds*. United States v. Gonzalez-Lopez, 548 U.S. at 144; State v. Smith, 761 N.W.2d at 69; State v. Jones, 707 So.2d 975, 976-77 (La. 1998). When a defendant seeks to replace court-appointed counsel with retained or pro bono counsel, the focus is on the right to counsel of one's choice. Brass v. State, 507 P.3d 208, 216 (Nev. 2022); Robinson v. Hotham, 118 P.3d 1129, 1132-34 (Colo. Ct. App. 2005). The primary concern for the district court in such cases is the likelihood of disruption to the orderly flow of proceedings. Brass v. State, 507 P.3d at 216; State v. Harper, 381 So.2d 468, 470–71 (La.1980).

The first limited appearance filed by Robert Montgomery on December 19, 2016 was more expansive than the limited appearance he filed on December 8, 2017. (12/19/16 Limited Appearance; 12/8/17 Limited Appearance)(App. pp. 26-27,

90-97). This second appearance was restricted to the motion to suppress. (12/8/17 Limited Appearance)(App. pp. 90-97). It also appears Montgomery's relationship with Sallis' first court-appointed attorney, Ted Fisher, was more contentious than his relationship with Donna Smith, who was representing Sallis at the time of the second limited appearance. (8/25/17 Motion Tr. p. 2 L.1-p. 6 L.10; 4/19/18 Order on Limited Appearance p. 2). The improvement in the relationship between Montgomery and Sallis' appointed attorney and the more restricted nature of Montgomery's second appearance should have alleviated any concerns about the flow of the proceedings.

Finally, while the Rules of Criminal Procedure may not have an explicit reference to the availability of limited appearances, the Rules also do not contain a specific prohibition against them. In addition to limited appearances being recognized by Rule of Civil Procedure 1.404(3), they are

also recognized in the Rules of Electronic Procedure and the Rules of Professional Conduct:

> Rule 16.320 Limited appearances.
>
> 16.320(1) Entry of appearance. An attorney whose role in a case is limited to one or more individual proceedings in the case must file a notice of limited appearance before or at the time of the proceeding. Upon the filing of this document, the attorney will receive electronic service of filed documents.
>
> 16.320(2) Termination of limited appearance. At the conclusion of the matters covered by the limited appearance, the attorney must file a notice of completion of limited appearance. Upon the filing of this document, the attorney will no longer receive electronic service of documents filed in the case.
>
> 16.320(3) Service on party. During a limited appearance, the party on whose behalf the attorney has entered the appearance will continue to receive service of all documents

Iowa R. Elec. P. 16.320 (2022).

> Rule 32:1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER
>
> …
>
> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
>
> (1) The client's informed consent must be confirmed in writing unless:

> (i) the representation of the client consists solely of telephone consultation;
>
> (ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit or court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or
>
> (iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

Iowa R. Prof'l Cond. 32.1(2)(c) (2022). These are the rules that permit appellate counsel to file a limited appearance in order to access the District Court record, even though no specific rule allows a limited appearance by appellate counsel. (10/11/21 Japuntich Limited Appearance)(App. p. 279).

The District Court had the authority to recognize the limited appearance filed by Montgomery. Montgomery was Sallis' counsel of choice for handling his suppression motion. Because Montgomery was initially retained by Sallis' family and then served pro bono, his involvement did not implicate state resources. And given his apparently amicable relationship with court-appointed attorney Smith, any

concerns regarding the interaction between the two attorneys were minimal. And even if they were not, the District Court could have allowed Sallis to proceed solely with Montgomery for purposes of the motion to suppress. Smith could have returned to lead the defense once the suppression ruling was issued.

The District Court abused its discretion in its handling of Montgomery's limited appearance. Sallis should receive a new trial.

CONCLUSION

For all of the reasons discussed above and in his Brief and Argument Defendant-Appellant Maurice Sallis respectfully requests this Court vacate his convictions, sentence, and judgment and remand his case to the District Court for a new trial.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.38, 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 1,964 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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