NO. A-17-675

IN THE
NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

STEVEN F. SHIFFERMILLER,

Appellant.

APPEAL FROM THE DISTRICT COURT

OF LANCASTER COUNTY, NEBRASKA

Honorable Robert Otte, District Judge

BRIEF OF APPELLANT

Respectfully submitted:

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STATEMENT OF THE BASIS OF JURISDICTION

Steven Shiffermiller "Shiffermiller" was charged by an Information filed on September 15, 2016 with Count I, Possession of a Controlled Substance, a Class IV Felony; Count II, Possession of a Controlled Substance, a Class IV Felony; County III, Possession of a Controlled Substance, a Class IV Felony; and Count IV, Possession of a Deadly Weapon by a Prohibited Person, a Class III Felony. (T37) Shiffermiller entered a plea of not guilty. (T34-35) A hearing on the motion to suppress was held before the Lancaster County District Court on March 8, 2017. (4:8-97:20) The motion to suppress was overruled by the Lancaster County District Court on March 8, 2017. (97:19-20)

On April 25, 2017, the matter came for stipulated bench trial before the Honorable Robert Otte in Lancaster County District Court. After evidence was submitted, the Honorable Judge Robert Otte returned a verdict of guilty of the Information on April 25, 2017. (T58)

On June 1, 2017, the Lancaster County District Court sentenced Shiffermiller to Count I, one (1) year probation; Count II, two (2) years of probation; Count III, three (3) years of probation; and Count IV, four (4) years of probation (T60-64) Shiffermiller timely filed his Notice of Appeal on June 30, 2017. (T66-67) This Court has exclusive jurisdiction to hear this appeal pursuant to Neb. Rev. Stat. §25-1912 Reissue 2007.

STATEMENT OF THE CASE

1. Nature of the case.

This is a direct appeal by Shiffermiller following the Lancaster County District Court overruling Shiffermiller's motion to suppress evidence and statements, conviction, and sentence. On September 15, 2016, an Information was filed charging Shiffermiller with Count I, Possession of a Controlled Substance, a Class IV Felony; Count II, Possession of a Controlled Substance, a Class IV Felony; County III, Possession of a Controlled Substance, a Class IV

Felony; and Count IV, Possession of a Deadly Weapon by a Prohibited Person, a Class III Felony. (T37) On September 2, 2016, Shiffermiller had filed a Written Arraignment and Waiver of Physical Appearance. (T34-35) Shiffermiller filed a Motion to Suppress Evidence and Statements on November 11, 2016. (T51-52) The motion to suppress was heard on March 8, 2017.

The motion to suppress was overruled by the Lancaster County District Court on March 8, 2017. The matter was tried to a stipulated bench trial on April 25, 2017.

Shiffermiller was convicted in Lancaster County District Court and the court deferred sentencing pending the completion of a Presentence Report. (T58) On June 1, 2017, Shiffermiller was sentenced to Count I, one (1) year probation; Count II, two (2) years of probation; Count III, three (3) years of probation; and Count IV, four (4) years of probation (T60-64). Shiffermiller timely filed his notice of appeal to this Court on June 30, 2017. (T66-67).

2. Issues tried in the court below.

A. Whether Shiffermiller was arrested without probable cause and therefore evidence and statements should have been suppressed as fruit of the poisonous tree.

3. How the issues were decided and what judgment was entered by the trial court.

A. The District Court overruled Shiffermiller's motion to suppress and allowed statements and evidence that was seized into evidence.

4. Scope of Court of Appeals' review.

In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. *State v. Woldt*, 293 Neb. 265 (2016). Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's

determination. *Id.* The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *Id*

ASSIGNMENTS OF ERROR

I. The Trial Court erred in failing to suppress the evidence because government exceeded the permissible scope and duration of a Terry stop.

2. The trial court erred in failing to suppress the evidence because the warrantless search of the defendant violated the Fourth amendment.

   a. Law enforcement did not have reasonable suspicion that Shiffermiller was armed and dangerous.

   b. There is no basis in law to justify the search of the interior of the flashlight.

PROPOSITIONS OF LAW

1) Every person has the right to possession and control of his own person, free from all restraint of inference, unless by clear and unquestionable authority of law. *Terry v. Ohio,* 392 U.S. 1 (1968), citing *Union Pacific R. Co. v. Botsford,* 141 U.S. 250, 251 (1891).

2) Whenever law enforcement accomplishes any search or seizure without the benefit of warrant the government has the burden of justifying its agent's actions. *Chimel v. California*, 89 S.Ct. 2034 (1969); *Coolidge v. New Hampshire*, 91 S.Ct. 2022 (1971).

3) "The burden is on the State to demonstrate that the detention was sufficiently limited in scope and duration to satisfy the conditions of an investigative stop." *United States v. Seelye*, 815 F.2d 48, 50 (1987). *Florida v. Royer*, 460 U.S. 491, 500 (1983).

4) The scope of an investigatory detention under *Terry v. Ohio* is limited. *United States v. Aquino*, 674 F.3d 918, 923 (8th Cir. 2012).

5) Officers must employ the least intrusive means of detention and duration that are reasonably necessary to achieve the purpose of the Terry stop. *United States v. Navarrete-Barron,* 192 F.3d 786, 790 (8th Cir. 1999), *United States v. Seelye*, 815 F.2d 48, 50 (1987), *United States v. Jones*, 759 F.2d 633, 636 (8th Cir.), cert. denied, --- U.S. ----, 106 S.Ct. 113, 88 L.Ed.2d 92 (1985).

6) Where an officer exceeds the permissible scope of *Terry*, the investigatory detention is transformed into an arrest." *United States v. Aquino*, 674 F.3d 918, 923 (8th Cir. 2012).

7) A Terry stop that becomes an arrest must be supported by probable cause." *United States v. Aquino*, 674 F.3d 918, 923 (8th Cir. 2012), *United States v. Smith*, 648 F.3d 654, 659 (8th Cir. 2011); *United States v. Newell*, 596 F.3d 876, 879 (8th Cir. 2010); *United States v. Navarrete-Barron,* 192 F.3d 786, 790 (8th Cir. 1999).

8) An investigative detention may turn into an arrest if it lasts for an unreasonably long time. *United States v. Maltais*, 403 F.3d 550, 556 (8th Cir. 2005), *United States v. Navarrete-Barron,* 192 F.3d 786, 790 (8th Cir. 1999).

9) Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), *State v. Illig*, 237 Neb. 598, 602, 467 N.W.2d 375, 380 (1991).

10) Officers may search an individual for the protection of himself or others nearby in order to discover weapons if he has a reasonable, articulable suspicion that the person may be armed and presently dangerous. *United States v. Muhammad*, 604 F.3d 1022 (8th Cir. 2010). *United States v. Roggeman*, 279 F.3d 573, 577 (8th Cir. 2002).

11) A protective frisk or pat-down search, however brief, is both a search and a seizure for Fourth Amendment purposes. *Terry v. Ohio*, 392 U.S. 1, 19, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). *United States v. Davis*, 202 F.3d 1060, 1061 (8th Cir. 2000).

12) Scope must be confined to a search reasonably designed to discover concealed weapons." *United States v. Muhammad*, 604 F.3d 1022, 1026 (8th Cir. 2010).

13) Officers may also "seize other evidence discovered during a pat-down search for weapons as long as the search 'stays within the bounds marked by *Terry*.'" *United States v. Muhammad*, 604 F.3d 1022, 1026 (8th Cir. 2010). *United States v. Hanlon*, 401 F.3d 926, 930 (8th Cir. 2005).

14) This scope has been further clarified to the standard that the search must be "carefully limited" to a search for weapons and that a search for both weapons and controlled substances is beyond the scope of a permissible Terry search. *State v. Williams*, 249 Neb. 582, 544 N.W.2d 350 (1996).

15) An item's incriminatory nature is only immediately apparent if the officer at that moment had probable cause to associate the property with criminal activity. *United States v. Craddock*, 670 F. App'x 444 (8th Cir. 2016).

16) An officer may not further manipulate the object to further ascertain its incriminatory nature. *United States v. Craddock*, 670 F. App'x 444 (8th Cir. 2016).

STATEMENT OF FACTS

[Where possible, the Appellant has complied with Neb. App. R. § 2-109(C)(3), but has otherwise identified evidence by reference to the specific exhibit and sub-section by description and page of the bill of exceptions from the County Court when more practical for the court to identify evidence in that manner.]

I. Procedural Background

The Defendant-Appellant, Steven Shiffermiller "Shiffermiller" was charged with Count I, Possession of a Controlled Substance, a Class IV Felony; Count II, Possession of a Controlled Substance, a Class IV Felony; County III, Possession of a Controlled Substance, a Class IV Felony; and Count IV, Possession of a Deadly Weapon by a Prohibited Person, a Class III Felony arising out of an incident that occurred on June 6, 2016 in Lancaster County, Nebraska. (T2-5). A preliminary hearing was held August 31, 2016 and the matter was bound over to the Lancaster County District Court. (T30). Shiffermiller filed a Written Arraignment and Waiver of Physical Appearance on September 2, 2016. (T34-36).

Shiffermiller then filed a Motion to Suppress Evidence and Statements seeking to suppress all evidence seized by police in the stop and subsequent search for the reason that law enforcement violated Shiffermiller's constitutional rights under the Fourth Amendment to be free from unreasonable searches and seizures. (T51-53). The trial court conducted a hearing into the motion on March 8, 2017 and the court, by oral decision from the bench, denied Shiffermiller's motion. (97:19).

On April 25, 2017 a stipulated trial was held and the court found Shiffermiller guilty on all counts. (113:10-18). On June 1, 2017 the court withheld sentence and placed Shiffermiller on probation for Count I, one (1) year probation; Count II, two (2) years of probation; Count III, three (3) years of probation; and Count IV, four (4) years of probation to run concurrently. (124:19-25; 125:1).

Shiffermiller timely filed a Notice of Appeal on June 30, 2017. (T66-68).

II. Factual Background

On June 6, 2016 at approximately 4:30 am, the Lincoln Police Department received a report that two individuals were involved in an altercation near south 31st and Sequoia Drive in

Lincoln, Nebraska. (7:22-25). Sergeant Benjamin Seeman "Seeman" was the first to arrive at the scene and made contact with Shiffermiller at approximately 4:32 am. (Ex. 1, p. 9; 25:6-8). As Seeman pulled onto the scene in his marked police cruiser, Shiffermiller was walking toward a vehicle that was parked on the north side of Sequoia Drive (8:4-9; 8:16-17). Shiffermiller appeared to have a torn shirt and blood on his face and left arm. (8:14-15). Seeman then approached Shiffermiller and asked whether Shiffermiller was injured and that there was a report of an altercation between two individuals. (9:11-22). Shiffermiller denied involvement in the reported incident and stated that he had been running and shadow boxing trees in Tierra Park. (11:1-6).

Shortly after, at least four other uniformed officers arrived at the scene. (25:23-25; 26:1). According to officers, Shiffermiller was agitated, angry, and wanted to leave. (26:11). Officer Eliker then placed Shiffermiller in handcuffs and Shiffermiller was informed that he was not free to leave. (26:3-6; 26:16-18). Shiffermiller was placed in handcuffs less than five minutes after Seeman arrived upon the scene. (26:3-6). Shiffermiller was then placed on the curb while officers conducted an investigation into the alleged altercation. (26:25; 27:1-2; 10:2-11). Shiffermiller continued to inquire about leaving and was told by officers that he could not leave. (27: 6-24). Officers were unable to find any other individual who was involved in the alleged altercation and no individual ever came forward to report an assault. (28:25; 29:1-8). The officers resolved their investigation into the alleged assault. (70:8-13).

Despite the conclusion of their investigation, officers continued to hold Shiffermiller. In testimony, Seeman stated that he was concerned about Shiffermiller being under the influence of some kind of mind altering substance and the injuries he appeared to have. (12:12-16). Shiffermiller rejected medical attention and indicated to officers that he wished to walk home. (13:3; 84:23-25). However, Seeman determined that Shiffermiller should not be left alone due to

his behavior. (; 31:15-18). No field sobriety tests were conducted to determine whether Shiffermiller was intoxicated, nor did officers ask Shiffermiller whether he was intoxicated. (57:12-19). Officers relied solely upon their observations to determine that Shiffermiller was intoxicated and therefore unsafe to be left alone.

Officers first attempted to obtain contact information for Shiffermiller's roommate. However, they were ultimately unable to contact that individual. (45:4-9). Officers then contacted Shiffermiller's father, David Shiffermiller, and asked whether they could transport Shiffermiller to his parents' home. (45:9-13). Shiffermiller's father agreed that Shiffermiller could come to his home. (85:1-3). Shiffermiller was given no other option to leave or go elsewhere. While officers were making these determinations, Shiffermiller remained in handcuffs.

Once it was determined that Shiffermiller was to be taken to his parents' home, Officers Dean and Eliker conducted a pat search of Shiffermiller's person. (19:15-17). Officer Dean felt an object that was shaped like brass knuckles. (48:11-13). Officer Dean removed that object and it was brass knuckles. (48:18-19).Within 10-15 seconds, Officer Eliker reached into Shiffermiller's other pocket and removed a flashlight and keys. (61:23-25; 62:1-2). Shiffermiller was, according to officer testimony, officially under arrest within 10-15 seconds after the brass knuckles were discovered. (50:24-25; 51:1). Officer Eliker then opened the flashlight and found what appeared to be marijuana and several types of prescription medications. (74:17-25; 75:1).

Shiffermiller was ultimately arrested for three counts of possession of a controlled substance and possession of a deadly weapon by a prohibited person. According to Seeman's testimony, approximately 45 minutes to an hour had passed between the initial stop and Shiffermiller's arrest. (31:1-4; 37:18-21). David Shiffermiller testified that he received a second

call from officers around 5:30 am stating that Shiffermiller was being arrested and would not be brought to his parents' home. (85:16-25; 86: 1-15).

SUMMARY OF THE ARGUMENT

Shiffermiller appeals to this Court after a finding of guilty following a stipulated trial convicting him of three counts of Possession of a Controlled Substance in violation of §28-416(3) and Possession of a Deadly Weapon by a Prohibited Person in violation of §28-1206(1)(3)(A). (T37) Before the stipulated trial, Shiffermiller filed a Motion to Suppress Evidence and Statements seized by law enforcement. (T51) Shiffermiller's motion was overruled by the Lancaster County District Court. (97:19-20) At the beginning of the stipulated trial, Shiffermiller renewed his motion to suppress which was, again, overruled by the Lancaster County District Court. (105:21-24; 106:107:4; 109:8-11; 111:12-18; T58).

At the conclusion of the stipulated trial, the Lancaster County District Court entered an order finding Shiffermiller guilty of the counts in the Information. (T58) On October 6, 2016, Shiffermiller was sentenced. (T60-65) Shiffermiller then perfected his appeal to this Court. (T66-79)

ARGUMENT

Law enforcement violated Shiffermiller's Fourth Amendment right to be free from unreasonable search and seizure. The Fourth Amendment guarantees '[t]he right of people to be secure in their persons, houses, papers and affects against unreasonable searches and seizures." Thus, every person has the right to "possession and control of his own person, free from all restraint or inference," unless by clear and unquestionable authority of law. *Terry v. Ohio*, 392 U.S. 1 (1968), citing *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). The Nebraska

Constitution in Article I § 7 provides similar guarantees against unreasonable searches and seizures . *State v. Woldt*, 293 Neb. 265 (2016).

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will "uphold the trial court's findings of fact unless those findings are clearly erroneous." *State v. Van Ackeren*, 242 Neb. 479, 482, 495 N.W.2d 630, 634 (1993). To determine "whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh evidence or resolve conflicts therein, but takes into consideration that the trial court has observed the witnesses testifying in regard to the motion to suppress." *Id.* The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Woldt*, 293 Neb. 265 (2016)

In general, whenever law enforcement accomplishes any search or seizure without the benefit of warrant, as it did here, the government has the burden of justifying its agent's actions. See, e.g., *Chimel v. California*, 89 S.Ct. 2034 (1969); *Coolidge v. New Hampshire*, 91 S.Ct. 2022 (1971). In this case, the government cannot legitimize the encounter with Shiffermiller as a consensual encounter or a valid warrantless search and seizure because law enforcement exceeded the permissible duration and scope of a *Terry* stop and searched Shiffermiller without probable cause or a warrant.

I. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE BECAUSE THE GOVERNMENT EXCEEDED THE PERMISSIBLE SCOPE AND DURATION OF A TERRY STOP.

Law enforcement exceeded the permissible scope and duration of a *Terry* stop, and therefore, the lower court erred in denying the Defendant's motion to suppress all evidence

recovered by police. There are three tiers of police-citizen encounters. *State v. Van Ackeren*, 242 Neb. 479 at 486 (1993) (citing *United States v. Armstrong*, 722 F.2d 681, 683-84 (11th Cir. 1984)).

The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but rather the voluntary cooperation of the citizen is elicited through non-coercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth amendment protection. The second category, the investigative stop, is limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a "seizure" sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. The third type of police-citizen encounter, arrests, are characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime. *Id* at 486-7. Clearly this case does not fall within the first two categories, but within the third.

"The scope of an investigatory detention under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), is limited." *United States v. Aquino*, 674 F.3d 918, 923 (8th Cir. 2012). "The burden is on the state to demonstrate that the detention was sufficiently limited in scope and duration to satisfy the conditions of an investigative stop." *United States v. Seelye*, 815 F.2d 48, 50 (1987), citing *Florida v. Royer*, 460 U.S. 491, 500 (1983). Whenever, a police officer accosts an individual and restrains his freedom to walk away, he has seized that person. *Terry v. Ohio*, 392, U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). This second category of police/citizen encounter is limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning. *Id.*

Therefore, officers must employ the *least intrusive means* of detention and duration that are reasonably necessary to achieve the purpose of the *Terry* stop. *United States v. Navarrete-Barron,* 192 F.3d 786, 790 (8th Cir. 1999) (emphasis added) See also *United States v. Jones*, 759 F.2d 633, 636 (8th Cir.), cert. denied, --- U.S. ----, 106 S.Ct. 113, 88 L.Ed.2d 92 (1985) (Jones) and *United States v. Seelye*, 815 F.2d 48, 50 (1987).

In a subsequent decision the United States Supreme Court further explained the reasoning in *Terry v. Ohio*, holding that:

"Detentions may be 'investigative' yet violate the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest…

…

The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time… It is the States' burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491 499-500, 103 S.Ct. 1319 1325, 75 L.Ed.2d 229 (1983).

Furthermore, "where an officer exceeds the permissible scope of *Terry*, the investigatory detention is transformed into an arrest." *Aquino*, 674 F.3d 918 at 924. "A *Terry* stop that

becomes an arrest must be supported by probable cause." *Id.* citing *United States v. Smith*, 648 F.3d 654, 659 (8th Cir. 2011); *United States v. Newell*, 596 F.3d 876, 879 (8th Cir. 2010); *Navarrete-Barron*, 192 F.3d at 790. The permissible scope and duration of a *Terry* stop was exceeded in this case.

In *United States v. Seelye*, the United States Supreme Court outlined several factors to consider when determining whether an officer's conduct during a purported investigatory stop exceeded the scope justified under the circumstances, thereby transforming the stop into an arrest. These include: (1) the number of officers and police cars involved, (2) the nature of the crime and whether there is reason to believe the suspect is armed, (3) the strength of the officer's articulable, objective suspicions, (4) the need for immediate action by the officer, (5) the presence or lack of suspicious behavior or movement by the person under observation, and (6) whether there was an opportunity for the officer to have made the stop in less threatening circumstances. Id. at 639-40. *United States v. Seelye*, 815 F.2d 48, 50 (1987), See also *Peterson v. Plymouth*, 945 F.2d 1416, 1419-20 (8th Cir. 1991).

The third category of police-citizen encounter, commonly referred to as arrests, are characterized by highly intrusive or lengthy search or detention. *State v. Van Ackeren*, 242 Neb. 479, 486 (1993). The Fourth Amendment requires that an arrest be justified by probable cause to believe that the person has committed or is committing a crime. *Id.*

In the instant case, there were four (4) officers and four (4) cruisers, a show of significant police presence, a factor which weighs in favor of the Appellant. Shiffermiller was alone and there was never a second suspect found to be in the area, the investigation into whether or not an assault was committed was completed quickly as testified to by officer Eliker. (70:8-13). Accordingly, when considering the nature of the crime and whether there is reason to believe the suspect is armed, that factor weighs in favor of the Appellant as well.

Throughout the stop, the officers did not suspect that Shiffermiller had any weapons on him and he was not frisked until he was forced to enter the police cruiser against his desire nearly an hour after the investigation into the suspected crime was committed. Therefore, the strength of the officer's articulable, objective suspicions, and no sense of urgency upon completion of the investigation quickly in the stop, again balancing that factor in favor of the Appellant. Although agitated, Shiffermiller was compliant despite desiring to leave the stop and further detention. This demonstrated that there was no need for immediate action by the officer, weighing that factor in favor of the Appellant as well.

Following the conclusion of the investigation into the assault, the officers had alleged concern for Shiffermiller due to his peculiar mannerisms, however the articulated concern was for Shiffermiller's safety from himself, and not a concern of officer safety during the stop. The Appellant's unique behavior did not support a finding of suspicious behavior or movement that weighs against the Appellant. Upon the conclusion of the investigation, quickly after the interaction with the officers began, Shiffermiller could have and should have been allowed to walk the short distance to his home and free to leave, instead, he remained handcuffed on the side of the road for nearly an hour and was going to be forced to be transported in the police cruiser to the other side of town as decided by the officers. Upon conclusion of the investigation, there was no threat to the officers, rather, their articulated concern was for Shiffermiller's safety from himself thereby weighing the sixth factor in favor of the Appellant as well.

In addition to the factors cited above, "an investigative detention may turn into an arrest if it "lasts for an unreasonably long time." *United States v. Maltais*, 403 F.3d 550, 556 (8th Cir. 2005)(citing *Navarrete-Barron*, 192 F.3d 786 at 790). Detainment is allowed for the time that the investigation is ongoing, however, there was no reason to continue the detainment beyond the investigation into the assault because the officers testified to no objective reason to believe he

was intoxicated. Although the officers testified that they believed that Shiffermiller may have been under the influence of drugs or alcohol, there was conflicting testimony by the officers regarding this and none of the officers undertook any field sobriety tests with the Appellant. Nothing was done to determine if he was in fact impaired, or whether his peculiar mannerisms and behavior were consistent with his personality and mental state.

Careful study of an often cited Nebraska Supreme Court case should further illustrate that Shiffermiller was arrested for purposes of the Fourth Amendment and the respective guarantees of the Nebraska Constitution. An arrest involves a highly intrusive or lengthy search or detention. *State v. Hedgecock*, 277 Neb. 805 (2009). The Fourth Amendment mandates that an arrest be justified by probable cause to believe that a person has committed or is committing a crime. *Id.* A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding an incident, a reasonable person would believe that he or she was not free to leave. *Id.* Besides a police officer telling someone directly that they are not free to leave, circumstances that indicate a seizure may include the **threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled**. *Id.* All of the aforementioned factors existed when Shiffermiller was seized by members of the Lincoln Police Department on June 6, 2016. Shiffermiller was eventually surrounded by four (4) police officers who had responded with emergency lights on and sirens blaring. When Shiffermiller compliantly answered their initial questions he was then commanded to place his hands behind his back and was told to sit on the curb still surrounded by police. The officers were in full uniform, with their badge affixed on the uniform with weapons on their utility belt easily accessible to the officers and they used tone and language which made it clear this was not a request but a command that Shiffermiller submit. Shiffermiller remand

handcuffed, sitting on the curb, surrounded by officers, for nearly an hour despite it being readily apparent to the officers that there was not a second suspect and Shiffermiller's repeated requests to be let go so he can go home.

The facts only lead to one conclusion, that for purposes of the Fourth Amendment, Shiffermiller was seized and under arrest. Based upon the factors with which Shiffermiller was seized, no reasonable person would have felt that they were free to leave. This was a third tier police-citizen contact.

Due to the fact that third-tier arrests are far more intrusive, the Fourth Amendment requires that the arrest must be supported by probable cause to believe that the person has committed or is committing a crime. Thus, this Court must consider what probable cause there was that a crime has been committed or being committed at the time Shiffermiller was seized. When Shiffermiller was seized, the police only had a report of two males fighting. They had no second suspect. Shiffermiller had a torn shirt and some minor injuries. For sure in an hours' time, they could have developed some probable cause, but yet here it was lacking. Hardly enough at that point to rise to the level of probable cause to justify a warrantless seizure or arrest. A warrantless arrest made without probable cause is illegal. Illegal arrests and evidence seized as a result of the illegal arrest shall be suppressed and in this case that would be the brass knuckles and pills found in the flashlight seized by police.

II. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE BECAUSE THE WARRANTLESS SEARCH OF THE DEFENDANT VIOLATED THE FOURTH AMENDMENT.

The search of Shiffermiller violated his constitutional right to be free from unreasonable searches. The central test in determining whether a search violates the Fourth Amendment is whether it is reasonable. Generally, "searches conducted outside the judicial process, without

prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment." *State v. Illig*, 237 Neb. 598, 602, 467 N.W.2d 375, 380 (1991) (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). However, there are exceptions to this presumption. Relevant to this case, officers may search an individual for "the protection of himself or others nearby in order to discover weapons if he has a reasonable, articulable suspicion that the person may be armed and presently dangerous." *United States v. Muhammad*, 604 F.3d 1022 (8th Cir. 2010) (citing *United States v. Roggeman*, 279 F.3d 573, 577 (8th Cir. 2002)). Furthermore, an officer may search an individual incident to arrest or as an inventory search. Neither exception is applicable in the present case and therefore the lower court erred in overruling the motion to suppress.

a. Law enforcement did not have reasonable suspicion that Shiffermiller was armed and dangerous.

Law enforcement did not have reasonable suspicion that Shiffermiller was armed and dangerous, therefore, the lower court erred in determining that the search of his person was lawful. "A protective frisk or pat-down search, however brief, is both a search and a seizure for Fourth Amendment purposes." *United States v. Davis*, 202 F.3d 1060, 1061 (8th Cir. 2000) (citing *Terry v. Ohio*, 392 U.S. 1, 19, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)). However, "a protective search for weapons is constitutional, even in the absence of traditional Fourth Amendment probable cause, 'where a police officer observes unusual conduct which leads him *reasonably to conclude* in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and *presently* dangerous.'" *Id.* The relevant inquiry is "whether a reasonably prudent man under the circumstances would be warranted in the belief that his safety or that of others was in danger." *State v. DeJesus*, 216 Neb. 907, 915, 347

N.W.2d 111, 116 (1984). Therefore, "the critical inquiry is whether the officer had reasonable suspicion." *Davis*, 202 F.3d 1060 at 1061.

Here the officers did not have reasonable suspicion to believe that Shiffermiller was presently armed and dangerous at the time he was searched. Unlike other cases which find that a stop and frisk is warranted, the case at bar includes the search of an individual who is already restrained from free movement. Furthermore, the informant made no mention that weapons were involved in the alleged assault and although agitated, Shiffermiller was compliant with officers. Although officers stated that they searched Shiffermiller due to officer safety concerns, the facts do not support this assertion.

The present case is analogous to *State v. Zemunski*, 228 Neb. 536, 423 N.W.2d 443 (1988), where the Nebraska Supreme Court found the stop and frisk of a suspect to be an unlawful violation of the Fourth Amendment. In that case the court found that "the record [was] devoid of any fact, discovered by [the officers] or communicated to them by any other officer, reasonably raising an inference that either [the defendant]...might have been armed at the time of the stop." *Zemunski*, 228 Neb. 536 at 547-8. Similarly, there were no facts which led officers to believe that Shiffermiller was armed and dangerous. As discussed at length, Shiffermiller was restrained. It is a fallacy that he would have been able to harm the officers at the time he was searched. Additionally, allegations of a physical altercation are not indicative of possession of a weapon, and specifically, the tipster made no mention of weapons involved in the alleged altercation. Finally, at the time the search was conducted there was absolutely no probable cause or reasonable suspicion to believe that an altercation had actually occurred. The investigation into the alleged assault had concluded at the point that Shiffermiller was searched and he was held against his wishes for approximately an hour. There is no basis in the facts that Shiffermiller was still under investigation at the point he was searched. Similarly, in *Zemunski*, officers did

not have knowledge that the Defendant had a weapon and there was no evidence that the Defendant had used weapons in the burglaries being investigated. *Zemunski*, 228 Neb. 536. Due to the factual similarities in the cases, the court in this case should find that the lower court erred.

Given that Officers did not have reasonable suspicion to believe that Shiffermiller was presently armed and dangerous at the time he was searched, the lower court erred in rejecting the defendant's motion to suppress. There are no facts which could have led the officers to be concerned for their safety, and therefore, the lower court erred in its determination.

b. There is no basis in law to justify the search of the interior of the flashlight.

The search of the interior of the flashlight constitutes an unreasonable search. Without admitting that Shiffermiller was not unlawfully arrested and therefore unlawfully searched as discussed above but should this Court determine that the search of Shiffermiller was a tier two Terry type police citizen encounter the search by the police officers was still unlawful. As discussed above, an individual may be searched under the *Terry* doctrine only for weapons for the officer's safety. Due to the justification of officer safety, a search's "scope must be confined to a search reasonably designed to discover concealed weapons." *United States v. Muhammad*, 604 F.3d 1022, 1026 (8th Cir. 2010). Officers may also "seize other evidence discovered during a pat-down search for weapons as long as the search 'stays within the bounds marked by Terry.'" *Id.* citing *United States v. Hanlon*, 401 F.3d 926, 930 (8th Cir. 2005). This scope has been further clarified to the standard that the search must be "'carefully limited'" to a search for weapons and that a search for both weapons and controlled substances is beyond the scope of a permissible *Terry* search. *State v. Williams*, 249 Neb. 582, 544 N.W.2d 350 (1996). Because of this standard, containers on the individual's person are not by default included in the scope of a reasonable search, but rather the scope is dependent on the apparent incriminatory nature of the

object discovered during the search. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130 (1993).

The flashlight found during the course of the unlawful search in this case did not possess the immediately apparent incriminatory nature of a pill bottle, small baggie, or other items commonly used to transport contraband. It was only after manipulating the object that the officer determined the object was suspicious. This type of manipulation has no legal basis. An item's incriminatory nature is only immediately apparent if the officer *at that moment* had probably cause to associate the property with criminal activity. *United States v. Craddock*, 670 F. App'x 444 (8th Cir. 2016). An officer may not further manipulate the object to further ascertain its incriminatory nature. *Id.* The opening of the flashlight found on Shiffermiller's person undoubtedly could be classified as further manipulation of the object.

Additionally, the search of the flashlight would not constitute an inventory search incident to arrest. The California Supreme Court addressed a similar matter to the case at hand in *People v. Scott* and held:

"Because the defendant was not under arrest when the pat-down search took place, the fact that the officers arguably could have arrested him does not elevate the situation to the equivalent of one in which an arrest actually occurred. In order to justify the search in these circumstances Officer Schultz must have been able to meet the requirements delineated first in *Terry* and later by this court i.e., he must have had 'reason to believe that he [was] dealing with an armed and dangerous individual, regardless of whether he [had] probable cause to arrest the individual for a crime.' But at no time has it been claimed Officer Schultz did in fact fear that defendant was 'armed and dangerous.' Indeed, as the trial court found, nothing in the evidence could have led the officers to so believe. Short of such an articulable belief, according to the Supreme Court in *Terry*, the pat-down for weapons was an impermissible intrusion."

People v. Scott, 16 Cal. 3d 242, 249, 128 Cal. Rptr. 39, 546 P.2d 327 (1976).

At the time of the search of the flashlight, there was no clear indication that Shiffermiller was under arrest. As the previous case indicates, the finding of the brass knuckles does not in itself give rise to the assumption that an arrest actually occurred. Without the basis of a lawful arrest, the search on the basis of the *Terry* stop alone was impermissible.

The government likely will contend that they completed a valid *Terry* frisk and upon finding the brass knuckles then completed a full "inventory search" of Shiffermiller's person. However, the facts do not support this assertion. Officer Dean testified that he searched Shiffermiller's pocket and found the brass knuckles, then 10-15 seconds later Shiffermiller was "officially" under arrest. His testimony is also that Officer Eliker found and opened the flashlight within 10-15 seconds after the brass knuckles were located. It is a fallacy that these searches were completed separately from one another and in fact the testimony demonstrates that Shiffermiller was not under arrest at the time the flashlight was found and subsequently opened. Therefore, the opening of the flashlight cannot constitute a valid inventory search.

A warrantless arrest made without probable cause is illegal. Illegal arrests and evidence seized as a result of the illegal arrest shall be suppressed and in this case that would be the brass knuckles and pills found in the flashlight seized by police.

As the search of the interior of the flashlight can neither be considered part of a valid Terry search or an inventory search incident to arrest, there is no legal basis to support the search. Without legal backing, the search of the flashlight found of Shiffermiller violated his constitutional rights and should have been suppressed.

CONCLUSION

This case is a clear example of a law enforcement fishing expedition in order to arrest an individual when they do not otherwise have probable cause. Officers overstepped the bounds of a

permissible *Terry* stop and after conclusion of their investigation continued to hold the Defendant in violation of his Fourth Amendment rights. Furthermore, while the Defendant was being unlawfully held, officers completed an unlawful search outside of the scope of *Terry* and current legal precedent. The Defendant-Appellant would request this court to reverse the trial court's determination on the Defendant's motion to suppress and remand for further proceedings in this case.

Respectfully submitted,

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IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,	)	CASE NO. **A-17-695**
	)	
APPELLEE,	)	
	)	
v.	)	**APPELLANT'S PROOF**
	)	**OF SERVICE**
STEVEN F. SHIFFERMILLER,	)	
	)	
APPELLANT.	)	

STATE OF NEBRASKA)
) S.S.
LANCASTER COUNTY)

I, Matthew K. Kosmicki, being first duly sworn, depose and state that a copy of the Brief of Appellant was electronically served to the Appellee at the office of the Nebraska Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509-4906, on October 17, 2017.

Matthew K. Kosmicki, #21875

Subscribed in my presence and sworn to before me this 17th day of October, 2017.

GENERAL NOTARY-State of Nebraska
DEDRA L. LITTLE
My Comm. Exp. August 2, 2019

Notary Public

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Proof of Service was electronically served on the Nebraska Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509-4906 on the 17th day of October, 2017.

Matthew K. Kosmicki, #21875

Certificate of Service

I hereby certify that on Tuesday, October 17, 2017 I provided a true and correct copy of this *Brief of Appellant Shiffermiller* to the following:

State of Nebraska represented by Douglas J Peterson (18146) service method: Electronic Service to **pat.selk@nebraska.gov**

Signature: /s/ Matthew Kosmicki (21875)