NO. A-17-675

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

STEVEN SHIFFERMILLER,

Appellant.

APPEAL FROM THE DISTRICT COURT

OF LANCASTER COUNTY, NEBRASKA

The Honorable Robert R. Otte, District Judge

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

A. Nature of the case

Shiffermiller is appealing from his convictions for possession of a deadly weapon by a prohibited person and three counts of possession of a controlled substance – for which he received an aggregate sentence of 4 years of probation. This is a direct appeal. This Court has jurisdiction.

B. Issues before the district court

For purposes of this appeal, the issue below was whether to grant or deny Shiffermiller's motion to suppress. More specifically, the issue was whether there was a lawful basis for (i) the continued detention of Shiffermiller, (ii) the pat-down of Shiffermiller, and (iii) the search of the flashlight found on his person.

C. How the issues were decided in the district court

The district court found that all three events were lawful and denied Shiffermiller's motion to suppress. Further details are provided below.

D. Scope of 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. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *State v. Baker*, 298 Neb. 216 (2017).

PROPOSITIONS OF LAW

1.

Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment. See *State v. Allen*, 269 Neb. 69 (2005), *disapproved on other grounds.* Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *State v. Au*, 285 Neb. 797 (2013). In determining whether reasonable suspicion exists, the totality of the circumstances must be taken into account. See *State v. Rohde*, 22 Neb. App. 926 (2015).

2.

When an investigatory stop occurs, the stop and inquiry must be reasonably related in scope to the justification for their initiation. See *State v. Au*, 285 Neb. 797 (2013). An investigative stop must be temporary and last no longer than necessary to effectuate the purpose of the stop. *State v. Howard*, 282 Neb. 352 (2011). 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. *Id*. Typically, this means that the officer may ask the detainee a moderate number of

questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *State v. Au, supra*.

3.

An arrest occurs when there is a highly intrusive or lengthy search or detention. See *State v. Milos*, 294 Neb. 375 (2016); *State v. Gilliam*, 292 Neb. 770 (2016). Generally speaking, "[a]n arrest is taking custody of another person for the purpose of holding or detaining him or her to answer a criminal charge." See *State v. White,* 209 Neb. 218 (1981). There are no "rigid time limitations" or "bright line rules" in distinguishing between a true investigative from a de facto arrest. See *State v. Van Ackeren*, 242 Neb. 479, 490 (1993) (citing *U.S. v. Sharpe*, 470 U.S. 675 (1985)). In determining the point at which an arrest has occurred, a court must look to the totality of the circumstances of a law enforcement officer's encounter with an individual and must view such circumstances objectively under a "reasonable person" standard. *State v. Horn*, 218 Neb. 524, 529 (1984).

4.

Warrantless seizures and searches may also be justified under the "community caretaking" exception, which, the U.S. Supreme Court has explained, is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." See *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The rationale for the exception is that there are circumstances where law enforcement is

permitted to conduct a search or seizure, independent of any criminal suspicion, to assure the safety of the public and/or the individual. See *id.* at 441-447; *Novitsky v. City of Aurora*, 491 F.3d 1244, 1253 (10th Cir. 2007).

5.

Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications. *State v. Perry*, 292 Neb. 708 (2016). The State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *Id.*

6.

When an officer has made a valid arrest based on probable cause, "a full search of the person may be made incident to that arrest." See *id.* at 713-714. This includes a search the individual as well as "any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence." See *State v. Ranson*, 245 Neb. 71, 76 (1994).

7.

Under Nebraska law, a person may be arrested without a warrant when an officer has probable cause to believe that the person has either committed a felony or a misdemeanor in the officer's presence. *State v. Perry, supra*, 292 Neb. at 714. Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *Id.* at 715. Probable cause is

reviewed under an objective standard of reasonableness, given the known facts and circumstances, and requires "less than evidence which would justify condemnation." See *id*.

8.

A search incident to arrest may occur before the arrest has actually occurred if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search. See *State v. Perry, supra*, 292 Neb. at 723.

STATEMENT OF FACTS

Suppression hearing

The evidence at the suppression hearing established that on June 6, 2016, at about 4:30 a.m., the Lincoln Police Department (LPD) received a report about two guys fighting near 31st and Sequoia Streets. (6:1-8:15) The caller reported that one of the guys was wearing camouflage pants and a tank top. (*Id*.)

Sergeant Seeman was the first officer to arrive and saw the appellant, Steven Shiffermiller, walking toward a vehicle parked near the street with its trunk open. (6:1-8:15) Sergeant Seeman got out of his cruiser and spoke with Shiffermiller, who was wearing camouflage fatigues, and saw that Shiffermiller had a ripped shirt, blood on his face and arm, and blood on his knuckles as if he had punched something. (6:1-11:15; 39:16-52:19) Sergeant Seeman also noticed that Shiffermiller appeared to be under the influence of narcotics. (8:16-11:15)

Sergeant Seeman, who is trained in identifying narcotic use, testified that Shiffermiller was sweating profusely, his eyes were watery and bloodshot, his pupils were dilated, and he was swaying and staggering to the point that he could barely stand on his own. (8:16-11:15; 15:14-17:1) He also had trouble answering questions and it appeared "his thoughts weren't clear." (8:16-10:22) He would also go from being completely emotional and crying to being just fine. (15:14-17:1) Sergeant Seeman testified that he smelled an odor of alcohol coming from Shiffermiller, but the impairment appeared to be narcotic-related. (10:23-11:15)

Due to the impairment and the fact that Shiffermiller was upset and angry, Sergeant Seeman had Shiffermiller sit down while he spoke with him. (8:16-11:15) Sergeant Seeman asked Shiffermiller if he was involved in a fight and Shiffermiller said no. (8:16-10:22) Shiffermiller said that he was out for a jog and had been boxing in the trees in Tierra Park, which was several blocks away. (10:23-11:15)

Additional officers arrived soon after that and Shiffermiller became even more agitated and started trying to leave, so the officers placed him in handcuffs and had him sit on the curb while they investigated the situation. (11:16-27:2) The officers searched the area and never found the second guy, but they did find a hat and Shiffermiller's cell phone in the middle of the street. (11:16-12:11) They also determined that the vehicle with the trunk open belonged to Shiffermiller. (*Id.*)

Given that the second guy reportedly involved in the fight was never found, the officers eventually concluded that there was no basis to further pursue an assault investigation and began trying to figure out what to do with Shiffermiller. (12:12-15:13) The officers were not comfortable letting Shiffermiller walk home in his condition, and they were also concerned that if they left him alone he might drive away in his vehicle or cause another disturbance, especially in light of his impairment and the fact that it was apparent he was just involved in some type of altercation. (12:12-34:12; 59:16-63:13; 70:14-80:18) Sergeant Seeman testified that "we would be liable" if something of that nature happened and considered it "our responsibility to find [him] a safe place to go." (17:2-34:12)

In light of these concerns, the officers wanted to make sure that they found a responsible adult to look after Shiffermiller, and the available options were a hospital, detox, or some other responsible adult. (17:2-12) They ruled out taking him to the hospital given that Shiffermiller did not appear to have injuries that needed medical attention, and they also opted to avoid detox because it was possible that the detox center would turn them away and make them take Shiffermiller to a hospital for a "fitness for confinement" examination. (17:2-46:6) The officers ultimately decided to call Shiffermiller's father, who said they could bring Shiffermiller to his house, after which they discussed this option with Shiffermiller and he was "completely fine with it." (12:12-17:12) Before doing so, however, they did a pat-down of Shiffermiller's clothing to make sure he did not have any weapons before being transported in a police cruiser. (17:13-18:15) The

pat down was for officer safety reasons, as the officers explained, because Shiffermiller had reportedly just been in a fight and the officers did not know if any weapons had been involved. (17:13-18:15; 47:14-48:6)

Officer Dean, who conducted the pat down, testified that he patted down the outside of Shiffermiller's pants and felt a bulge in the left front pocket that he immediately recognized as brass knuckles. (48:7-23) Officer Dean removed the brass knuckles, which had blood on them, and Shiffermiller was arrested for unlawfully carrying a concealed weapon. (18:16-21:23; 39:16-52:19) The officers also ran a records check on Shiffermiller and learned that he had a prior felony conviction which prohibited him from possessing deadly weapons. (21:24-23:15)

After Shiffermiller was arrested, Officer Dean continued searching him and found a flashlight in his pocket, which felt really light and it sounded as if there was a foreign object inside the flashlight. (18:16-21:23) The officers opened the flashlight and found a baggie of what appeared to be marijuana and various pills. (18:16-23:15; 39:16-52:19; 72:15-77:6) The officers ran a check on the pills, which had identifying markings, and confirmed that they were controlled substances. (18:16-23:15; 39:16-52:19; 72:15-77:6) Shiffermiller was placed under arrest for possession of a controlled substance at that point, in addition to the weapon charge. (23:16-24:20; 39:16-52:19)

Sergeant Seeman, who was at the scene the entire time, testified that the incident lasted approximately an hour. (25:3-38:16) He testified that they spent approximately 30 to 40 minutes investigating what was going on and then the

remainder of the time was spent figuring out what to do with Shiffermiller. (*Id.*) He estimated that Shiffermiller was placed in handcuffs within about 5 minutes and the arrest took place approximately 30 to 45 minutes after he was cuffed. (*Id.*) Sergeant Seeman testified that there were 4 officers, including himself, at the scene during the incident. (*Id.*)

Based on this evidence, the district court overruled Shiffermiller's motion to suppress. The district court's findings and conclusions, which it announced orally from the bench, can be summarized as follows:

- The officer's initial contact with and detention of Shiffermiller was proper and the officers were permitted to place him in handcuffs while they investigated the situation, based on *State v. Wells*, 290 Neb. 186 (2015).
- After concluding the assault investigation, the officers were justified in not releasing Shiffermiller on his own because there was a legitimate concern for his safety and welfare, as well as a concern for public safety, so the officers were "hamstrung" on what to do with Shiffermiller and were justified in detaining him until they resolved the matter.
- The pat down prior to putting Shiffermiller into a cruiser was justified as a matter of officer safety, and then after discovering the brass knuckles and finding out that Shiffermiller was a felon there was a valid basis for an arrest and the subsequent search was valid as a search incident to arrest.

(94:2-97:20)

Stipulated Bench Trial

After Shiffermiller's motion to suppress was overruled, a stipulated bench trial took place. The State's evidence consisted of police and lab reports from this case (Exhibit 1), a certified copy of Shiffermiller's prior felony conviction from 2009 in Lancaster County (Exhibit 2), as well as several stipulations. (105:1-108:16) The stipulations established that the State's witnesses would testify consistently with the information within Exhibits 1 and 2 if called to testify; that Shiffermiller is the individual identified within Exhibits 1 and 2; that there would be sufficient foundation for the admissibility of all the information in Exhibits 1 and 2; that chain of custody was satisfied for both the drugs and the brass knuckles seized in this case; and that all lab tests done in this case were performed in accordance with all policies and procedures. (107:17-108:16) The lab report in Exhibit 1, which was prepared by the Nebraska State Patrol Crime Lab, established that the controlled substances seized from Shiffermiller in this case included: (a) marijuana, a Schedule I substance, (b) alprazolam, a Schedule IV substance, (c) morphine, a Schedule II substance, (d) diazepam, a Schedule IV substance, and (e) amphetamine, a Schedule II substance. (E1 p.17)

All of this evidence was received without objection, except for Shiffermiller's renewal of his motion to suppress, and the district court found Shiffermiller guilty on all four charges. (113:10-18) Shiffermiller was subsequently sentenced to 1 year of probation on Count 1 (possession of a controlled substance), 2 years' probation on Count 2 (possession of a controlled substance), 3 years' probation on Count 3

(possession of a controlled substance), and 4 years' probation on Count 4 (possession of a deadly weapon by a prohibited person). (124:19-25) All four sentences were run concurrently. (124:25-126:1)

This appeal followed.

ARGUMENT

I. Shiffermiller's motion to suppress was properly denied

Shiffermiller claims that the district court erred by denying his motion to suppress. As assigned and argued, he claims that his motion should have been granted because the detention, the pat-down, and the subsequent search of the flashlight were all unlawful. Appellant's Brief at 3, 9-21. The State disagrees. All three events were lawful. We will discuss each event separately.

1. The detention

Shiffermiller does not dispute that police had a valid basis to detain him when they first arrived. He claims that his continued detention became unlawful, however, because it exceeded the permissible scope of a *Terry* stop and became an unlawful de facto arrest. Appellant's Brief at 10-16. This claim is without merit. The State's response, as explained below, is that the initial portion of the detention was a lawful *Terry* stop and the remaining portion of the detention was lawful under the community caretaking exception to the Fourth Amendment. We will set forth the applicable legal framework and then our analysis.

Legal Framework

i. Detentions & Arrests

It is well established that under *Terry v. Ohio*, 392 U.S. 1 (1968), police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment. See *State v. Allen*, 269 Neb. 69 (2005), *disapproved on other grounds.* Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *State v. Au*, 285 Neb. 797 (2013). In determining whether reasonable suspicion exists, the totality of the circumstances must be taken into account. See *State v. Rohde*, 22 Neb. App. 926 (2015).

When an investigatory stop occurs, the stop and inquiry must be reasonably related in scope to the justification for their initiation. See *State v. Au*, 285 Neb. 797 (2013). An investigative stop must be temporary and last no longer than necessary to effectuate the purpose of the stop. *State v. Howard*, 282 Neb. 352 (2011). 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. *Id.* Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *State v. Au, supra.* Officers are also allowed to take steps to protect their personal safety and

maintain the status quo, such as handcuffing a suspect, so that the investigatory stop may be achieved. See e.g., *State v. Wells*, 290 Neb. 186 (2015); *U.S. v. Jones*, 759 F.2d 633 (8th Cir. 1985); see also *United States v. Hensley,* 469 U.S. 221, 235 (1985) (explaining that officers are "authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.").

An arrest occurs when there is a highly intrusive or lengthy search or detention. See *State v. Milos*, 294 Neb. 375 (2016); *State v. Gilliam*, 292 Neb. 770 (2016). Generally speaking, "[a]n arrest is taking custody of another person for the purpose of holding or detaining him or her to answer a criminal charge." See *State v. White,* 209 Neb. 218 (1981). There are no "rigid time limitations" or "bright line rules" in distinguishing between a true investigative from a de facto arrest. See *State v. Van Ackeren*, 242 Neb. 479, 490 (1993) (citing *U.S. v. Sharpe*, 470 U.S. 675 (1985)). In determining the point at which an arrest has occurred, a court must look to the totality of the circumstances of a law enforcement officer's encounter with an individual and must view such circumstances objectively under a "reasonable person" standard. *State v. Horn*, 218 Neb. 524, 529 (1984). Several issues and circumstances are deemed relevant to the analysis, including the law enforcement purposes served by the detention, the diligence with which the police pursue the investigation, the scope and intrusiveness of the detention, and the duration of the detention. See *State v. Van Ackeren, supra*, 242 Neb. at 490.

ii. Community Caretaking

Warrantless seizures and searches may also be justified under the "community caretaking" exception, which, the U.S. Supreme Court has explained, is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." See *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The rationale for the exception is that there are circumstances where law enforcement is permitted to conduct a search or seizure, independent of any criminal suspicion, to assure the safety of the public and/or the individual. See *id*. at 441-447; *Novitsky v. City of Aurora*, 491 F.3d 1244, 1253 (10th Cir. 2007).

In *Cady,* the U.S. Supreme Court held that Wisconsin police officers who had arrested a Chicago police officer for driving while intoxicated did not violate the Fourth Amendment in searching the suspect's automobile for a service revolver which the arresting officers believed Chicago police officers were required to carry at all times. The Court concluded that the warrantless search of the disabled vehicle was "constitutionally reasonable" because it was incident to the community caretaking function of the arresting officers to protect "the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." See *Cady v. Dombrowski, supra*, at 447. The Court went on to explain that "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." See *id*. The rationale, as the Court explained, is that

> [l]ocal police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Id. at 441.

Since *Cady*, federal courts have applied the community caretaking exception in upholding various seizures of individuals who appeared to be intoxicated. See e.g., *United States v. Rideau*, 949 F.2d 718, 720 (5th Cir.1991) (upholding the detention of an individual standing in the middle of the road at night and apparently intoxicated); *Winters v. Adams,* 254 F.3d 758 (8th Cir. 2001) (upholding detention of an individual who was either mentally impaired or under the influence of a controlled substance and in need of medical assistance); *Samuelson v. City of New Ulm,* 455 F.3d 871 (8th Cir. 2006) (upholding the detention and transportation of an individual who appeared to be hallucinating to a hospital); *Novitsky v. City of Aurora*, 491 F.3d 1244 (10th Cir. 2007) (upholding the detention of an individual lying in the fetal position in the back of a parked car who was potentially intoxicated).

The rationale for such seizures and detentions, as the 10th Circuit explained, is that:

> Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to the desire to prosecute for crime. Indeed, police officers are not only permitted, but expected, to exercise what the Supreme

> Court has termed "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." In the course of exercising this noninvestigatory function, a police officer may have occasion to seize a person, as the Supreme Court has defined the term for Fourth Amendment purposes, in order to ensure the safety of the public and/or the individual, regardless of any suspected criminal activity. The fact that the officer may not suspect the individual of criminal activity does not render such a seizure unreasonable per se as *Terry* only requires "specific and articulable facts which ... reasonably warrant [an] intrusion" into the individual's liberty.

U.S. v. King, 990 F.2d 1552, 1560 (10th Cir. 1993) (citing *Terry v. Ohio*, 392 U.S. 1 (1968) and *Cady v. Dombrowski*, 413 U.S. 433 (1973)) (other citations omitted).

As with any other search or seizure, however, a search or seizure under the community caretaking exception is subject to the standard test of reasonableness. It must be (1) "justified at its inception," i.e., based upon specific and articulable facts which reasonably warrant an intrusion into the individual's liberty, and (2) "reasonably related in scope to the circumstances which justified the interference in the first place." See *U.S. v. King, supra*, 990 F.2d at 1557; *Storey v. Taylor*, 696 F.3d 987, 993 (10th Cir. 2012); *U.S. v. Garner*, 416 F.3d 1208, 1213 (10th Cir. 2005). In other words, regardless of whether the inquiry focuses on an investigative detention or a protective search, the reasonableness of the officer's action necessarily depends upon the justification for the action. See *U.S. v. King, supra* at 1558.

State courts have also addressed the applicability and scope of the community caretaking exception, and several of them have held that it typically justifies a pat-down of individuals prior to them being transported in a police cruiser. See e.g., *People v. Hannaford*, 167 Mich. App. 147 (1988), cert. denied, 489 U.S. 1029, 109 S.Ct. 1162 (1989); *State v. Diloreto*, 362 N.J. Super. 600 (App. Div. 2003); *Com. v. Rehmeyer*, 349 Pa. Super. 176 (1985); *State v. Lombardi*, 727 A.2d 670 (R.I. 1999); *State v. Acrey*, 148 Wash. 2d 738 (2003). The rationale, as the Michigan Court of Appeals explained in *People v. Hannaford, supra*, is that

> [t]he Fourth Amendment was surely not intended to stand for the proposition that police officers must either abandon civilians on highways at night or transport them at the risk of personal safety, rather than transport them at reduced risk of personal safety by first subjecting them to a frisk for weapons.

People v. Hannaford, *supra*, 167 Mich. App. at 152.

The community caretaking exception has not been extensively addressed in Nebraska, but our appellate courts have applied it in upholding traffic stops and detentions which were not otherwise justified as a criminal investigation. See e.g., *State v. Bakewell*, 273 Neb. 372 (2007); *State v. Rohde*, 22 Neb. App. 926 (2015), review denied; *State v. Smith*, 4 Neb. App. 219 (1995). The Nebraska Supreme Court's decision in *Bakewell* adopted the reasoning set forth in *Cady v. Dombrowski* and noted that "[m]ost jurisdictions which have considered the question of whether to adopt this exception have done so." See *Bakewell* at 376. The Court in *Bakewell* went on to explain that in determining whether the exception applies, an appellate

court applies a de novo review and assesses the totality of the circumstances, including the inferences and deductions drawn by a trained and experienced officers. See *id.* at 377. The Court also emphasized the narrow applicability of the exception, however, and noted that it should be narrowly and carefully applied in order to prevent its abuse. See *id.*

Analysis

In this case, based on the information known to police when they arrived at the scene, there was clearly a legitimate basis for an investigatory stop and detention of Shiffermiller. The question is whether, and to what extent, the continued detention was lawful. The State's position, as set forth above, is that the initial portion of the continued detention was a lawful *Terry* stop and the remaining portion of the detention was lawful under the community caretaking exception.

The record reflects that police received a call at 4:30 a.m. about two guys fighting and upon arrival they encountered Shiffermiller, who was wearing clothing that matched the description of one of the males, and Shiffermiller had a ripped shirt, blood on his face and arm, and blood on his knuckles as if he had punched something. (6:1-11:15; 39:16-52:19) Plus, Shiffermiller appeared to be under the influence of narcotics, to the point that he could barely stand up, and claimed he'd been out jogging and boxing in the trees in Tierra Park. (8:16-17:1) This provided ample justification for a continued detention.

The continued detention was also reasonable in terms of its scope and duration. Sergeant Seeman, who was at the scene the entire time, testified that the incident lasted about an hour. (25:3-38:16) He testified that Shiffermiller was placed in handcuffs within about 5 minutes of the officers' arrival because he was not being honest with them about what happened and he was getting angry and trying to leave while they were trying to figure out what happened. (*Id*.) The officers had Shiffiermiller sit on a curb after they handcuffed him, and then they continued their investigation and found a hat and Shiffermiller's cell phone in the street, and they also learned that the vehicle with the trunk open belonged to Shiffermiller. (*Id*.) They were unable to locate the second guy that was reportedly involved in the fight, though, so their investigation into the assault came to an end at that point and they began figuring out what to do with Shiffermiller. (*Id*.) Sergeant Seeman estimated that they spent about 30 to 40 minutes trying to figure out what was going on, and then the remainder of the time was spent figuring out what to do with Shiffermiller. (25:3-38:16)

Given the circumstances, there was nothing unreasonable about the scope or the duration of the detention. The initial portion of the detention, which lasted about 30 to 40 minutes, was valid under *Terry* because police were investigating whether Shiffermiller was involved in a crime, and the remaining portion of the detention was lawful under the community caretaking exception because police had legitimate concerns about letting Shiffermiller leave on his own unattended. The entire detention was justified and reasonable, in the State's view.

Shiffermiller claims the detention was unlawful because it amounted to a de facto arrest without the requisite probable cause. Appellant's Brief at 10-16. The State disagrees. The detention did not rise to the level of an arrest.

As set forth above, an arrest occurs when there is a "highly intrusive or lengthy search or detention." See *State v. Milos*, *supra*; *State v. Gilliam*, *supra*. In determining the point at which an arrest has occurred, a court looks to the totality of the circumstances and views such circumstances objectively under a "reasonable person" standard. See *State v. Horn*, *supra*. Factors relevant to the analysis include the purposes served by the detention, the diligence with which the police pursue the investigation, the scope and intrusiveness of the detention, and the duration of the detention. See *State v. Van Ackeren, supra*.

These factors, viewed collectively with the totality of the circumstances, establish that the continued detention did not rise to the level of an arrest. There was a legitimate purpose for the continued detention, as discussed above, both during and after the criminal investigation. The scope and intrusiveness of the continued detention was also reasonable, as discussed above, and the fact that the officers placed Shiffermiller in handcuffs was acceptable because officers are permitted to do so in order to protect their personal safety and maintain the status quo during an investigation. See e.g., *State v. Wells*, *supra*; *U.S. v. Jones*, *supra*. And the duration of the detention was also reasonable, as discussed above, especially when our appellate courts have explained that a 1-hour detention is permissible if warranted by the circumstances. See e.g., *State v. Howard*, 282

Neb. 352 (2011); *State v. Lee*, 265 Neb. 663 (2003); *State v. Kehm*, 15 Neb. App. 199 (2006).

Based on the above authority and rationale, the continued detention of Shiffermiller was lawful. The detention did not rise to the level of a de facto arrest. Shiffermiller's argument to the contrary is without merit.

2. The pat-down

Shiffermiller also takes issue with the pat-down. He claims it was unlawful because police did not have reason to believe that he was armed and dangerous, which is the required threshold in order to justify a protective frisk or pat-down under *Terry*. See Appellant's Brief at 16-19. This claim is also without merit. The pat-down of Shiffermiller, as with the continued detention after the *Terry* stop was completed, was lawful under the community caretaking exception.

As discussed above, courts have upheld various types of seizures and searches under the community caretaking exception, including pat-down searches of an individual prior to them being transported in a police cruiser for noncriminal reasons. As the Michigan Court of Appeals aptly put it, "[t]he Fourth Amendment was surely not intended to stand for the proposition that police officers must either abandon civilians on highways at night or transport them at the risk of personal safety, rather than transport them at reduced risk of personal safety by first subjecting them to a frisk for weapons." See *People v. Hannaford*, *supra*, 167 Mich. App. at 152.

This same rationale hold true here. There was nothing unreasonable about the officers doing a pat-down of Shiffermiller prior to transporting him across town in a police cruiser. Especially in light of the fact that it was around 5:30 a.m.; it was apparent that he had just been involved in a physical altercation; he was unwilling to tell the officers what happened and was uncooperative and hostile toward them – to the point that they felt it necessary to handcuff him and have him sit on the curb; and he appeared to be under the of influence of narcotics. Given these circumstances, it was reasonable to do a pat-down of Shiffermiller to make sure he did not have weapons or any other dangerous items, such as needles, which may have posed a danger to the transporting officer, Shiffermiller himself, or anyone else that might be placed into the cruiser after Shiffermiller.

Based on the above authority and rationale, the pat-down was lawful. Shiffermiller's argument to the contrary is without merit.

3. The search

Shiffermiller also claims that the search of the flashlight found in his pocket was unlawful, because it was done without a search warrant and was not justified by any of the approved warrantless search exceptions. Appellant's Brief at 19-21. This claim is also without merit. The search of the flashlight was lawful under the search incident to arrest exception.

Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications. *State v. Perry*, 292

Neb. 708 (2016). The State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *Id*.

The applicable exception here – search incident to arrest – was recently addressed by the Nebraska Supreme Court in *State v. Perry*, 292 Neb. 708 (2016). The Court reiterated and clarified in *Perry* that when an officer has made a valid arrest based on probable cause, "a full search of the person may be made incident to that arrest." See *id*. at 713-714. This includes a search the individual as well as "any evidence on the arrestee's person, even if such evidence is unrelated to the crime for which the arrest was made, in order to prevent concealment or destruction of evidence." See *State v. Ranson*, 245 Neb. 71, 76 (1994); see also *U.S. v. Robinson*, 414 U.S. 218 (1973) (concluding that, after an arrest for driving without a valid license, the search incident to arrest exception justified a search of the suspect and a cigarette package found on the suspect, which contained heroin capsules); *Maryland v. King*, 133 S. Ct. 1958, 1971 (2013) (explaining that "[t]he constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search.").

Under Nebraska law, a person may be arrested without a warrant when an officer has probable cause to believe that the person has either committed a felony or a misdemeanor in the officer's presence. *State v. Perry, supra*, 292 Neb. at 714. Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *Id*. at 715. Probable cause is reviewed under an objective

standard of reasonableness, given the known facts and circumstances, and requires "less than evidence which would justify condemnation." See *id.*

Here, during the protective pat-down of Shiffermiller, officers found brass knuckles inside the pocket of his pants. He was arrested at that point for carrying a concealed weapon, and then the officers ran a records check and saw that he has a prior felony conviction which prohibited him from possessing "deadly weapons," which, by statute, includes brass knuckles. See Neb. Rev. Stat. § 28-1206(1). (18:16-21:23; 39:16-52:19) This provided probable cause to arrest Shiffermiller, which, in turn, justified a further search of his person and the flashlight found in his pocket. *State v. Perry, supra*; *State v. Ranson, supra; U.S. v. Robinson, supra.* Therefore, the search of the flashlight was justified as a search incident to arrest.

Shiffermiller claims the search incident to arrest exception does not apply because the record reflects that the officers found and searched the flashlight within seconds of finding the brass knuckles, which, according to Shiffermiller, shows that he was not "officially" under arrest yet when the flashlight was found and searched. Appellant's Brief at 20. In other words, according to Shiffermiller, the search of the flashlight was contemporaneous with the arrest, so the search could not have been justified by the arrest. This argument is a nonstarter. The law is well-settled that a search incident to arrest may occur before the arrest has actually occurred if (1) the search is reasonably contemporaneous with the arrest and (2) probable cause for the arrest exists before the search. See *State v. Perry, supra*, 292 Neb. at 723. Both requirements were established here.

The search of the flashlight was lawful as a search incident to arrest. Shiffermiller's argument to the contrary is without merit.

CONCLUSION

For the reasons above, the State requests that this Court affirm the judgment of the district court.

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Certificate of Service

I hereby certify that on Monday, December 18, 2017 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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