APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RICHARD LEROY PARKER, Defendant.	No. 17-CR-1034-LRR **REPORT AND RECOMMENDATION**

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This matter is before the Court on defendant's Motion to Suppress Evidence. (Doc. 36). The government timely filed its resistance on November 20, 2017 (Doc. 43), and the Court held a hearing on the motion on November 29, 2017. At the hearing the government called Dubuque Police Officers Brendan Welsh, Matt Walker, Bruce Deutsch, and Dave Randall to testify. The Court also admitted without objection government exhibits 1 through 9.

For the following reasons, I respectfully recommend the Court **grant in part and deny in part** defendant's motion.

I. FACTUAL BACKGROUND

A. Summary

Shortly after midnight on April 17, 2017, Dubuque Police officers and paramedics responded to a 9-1-1 call placed by defendant reporting that a woman was not breathing. Defendant and the victim had spent the prior day and evening with Donte Richards and Ashley Ostrander in the apartment Richards and Ostrander shared on Rhomberg Avenue in Dubuque. Attempts to resuscitate the victim at the scene were unsuccessful and she was later pronounced dead at the hospital. During the first fifteen to twenty minutes at the scene, officers questioned the occupants about everyone's activities the prior day, including whether they and the victim consumed alcohol and/or controlled substances. During this interaction, defendant made incriminating statements about his and others' drug usage. After that, the officers and occupants remained in the apartment until about 2:45 AM. At that point the officers asked Richards, Ostrander and defendant to accompany them to the police department for further questioning. Richards and Ostrander declined and were ultimately taken to another residence. Defendant agreed and officers transported him to the police department. At the police department defendant waived his constitutional rights and made further incriminating statements. A short time after the interview, defendant stated he was not feeling well and paramedics took him to

the hospital. Officers arrested defendant at the hospital for a parole violation. Officers also obtained a search warrant to search defendant and his residence.

Defendant alleges that his initial questioning at the apartment violated his Fourth and Fifth Amendment rights, and thereby tainted the subsequent questioning at the police department. Defendant also alleges that probable cause did not support the search of his residence. Therefore, these events require more detailed facts.

B. Questioning At the Apartment

Officer Matthew Walker conducted the questioning of defendant at the apartment.[1] When Officer Walker first made contact with defendant, defendant was in the living room where Richards, Ostrander and another officer were present. An officer asked Richards about a statement the officer believed defendant made to another officer to the effect that defendant had choked the victim. Richards vehemently denied it, although in the video of the encounter the officer's notes about the comment are visible.

Officer Walker stepped into the living room and asked defendant's name. Defendant then left the living room, passed through the dining room, and stepped into the kitchen while Officer Walker remained in the living room. A minute or so later defendant walked back into the dining room and approached the living room, paused, and then turned to walk away again. Officer Walker stated something to the effect of "Hey, Richard, do you have a moment." Defendant turned around and Officer Walker then asked questions about defendant's date of birth and residence. Defendant answered

[1] The layout of the apartment helps to understand the movement of defendant. Because the layout is clearly visible on the officers' body camera videos (Exhibits 1 through 6), a summary description will suffice here. The apartment is on the first level of a house. At the front of the apartment is a living room, followed by a small dining room, followed by the kitchen. Off the kitchen is a bedroom, where the victim was located, and a vestibule that leads to the back door. During Officer Walker's questioning, defendant moved from the living room to the kitchen, to outside the back door, to back into the vestibule. After questioning he sat in the dining room. Richards and Ostrander generally remained in the living room for all relevant time periods.

Officer Walker, then turned away from him and walked into the kitchen where he got a drink of water from the kitchen faucet. Officer Walker followed defendant into the kitchen and asked more questions about defendant's apartment and telephone numbers. Defendant indicated he lived nearby. After getting a drink from the kitchen faucet, defendant walked past Officer Walker and into the dining room again. Officer Walker followed defendant into the dining room. Defendant indicated he had been with the victim in the bedroom and was the last to see her breathing. Officer Walker asked defendant if the victim had been drinking or taking drugs. Defendant said she had been drinking and took some cocaine about two hours before. When defendant started to move toward the kitchen again, Officer Walker said something to the effect of "I need to talk to you; kinda just stay here."

After Officer Walker conveyed the information about the victim's drug use to the paramedic, Officer Walker and defendant again spoke briefly in the dining room about the victim's drug use. On the video one can hear loud, emotional laments from Ostrander who was in the living room adjoining the dining room. One can also see other officers and paramedics occasionally walking through the dining room and between Officer Walker and defendant. Officer Walker asked defendant to go outside so they could talk without the distractions. As Officer Walker and defendant walked through the kitchen to leave the apartment they had a discussion about getting defendant a shirt as he had none on. It appeared to me on the video that defendant was sweating while Officer Walker was talking to him. The temperature outside was about 50 degrees Fahrenheit. Defendant's shirt was in the bedroom where emergency personnel were attempting to save the victim's life, however, so they were unable to retrieve defendant's shirt.

Once outside, Officer Walker continued to ask defendant questions. At first, Officer Walker asked questions to determine if defendant had assaulted the victim in any way, which defendant denied. Officer Walker then asked defendant questions about his

own drug use that day and more questions about the victim's drug use and her medical health generally, such as whether she showed signs of having difficulty breathing earlier in the night. On three occasions during this conversation defendant moved toward the house and Officer Walker asked him to stay back, including one time when it was apparent that the paramedics were entering the house with a gurney and would be leaving soon with the victim's body. Defendant complained about being cold. Officer Walker entered the apartment again to inquire about trying to get defendant's shirt. Defendant followed and moved into the vestibule on his own.

Officer Walker then stayed with defendant in the vestibule for a few minutes, continuing to ask defendant questions about the details of the evening, including whether the group went anywhere. Defendant stated that they went to a nearby store to buy beer and soda. After a few minutes, however, another officer suggested Officer Walker and defendant move because the paramedics were about to remove the victim and would have to move through the vestibule. One of the officers also suggested that defendant would be warmer in the dining room anyway. Defendant moved into the dining room. Officers gave defendant a sweatshirt, which defendant wrapped around his shoulders. Officers also retrieved an ottoman from the living room for defendant to sit on. Defendant sat on the ottoman and leaned his back against the wall. Defendant remained seated in that general posture until investigators arrived at the apartment around 2:45 AM, at one point appearing to sleep. During this time period, Officer Walker generally stayed in the dining room standing opposite defendant and, on occasion, another officer would be in the room for short periods. Although officers asked defendant a couple questions during this time period, they did not ask about defendant's criminal activity or involvement with drugs and defendant did not make any incriminating statements.

In total, Officer Walker spoke with defendant for approximately twenty minutes. Neither during this time period, nor afterwards while defendant sat in the dining room

did any officer tell the defendant he was under arrest, but they also did not tell him he was free to leave. On the other hand, defendant never asked to leave, nor did he attempt to leave the apartment.

The approximate times of these events were:

12:24 AM	Officers first arrived at the residence
12:28AM	Officer Matthew Walker began talking to defendant in the kitchen
12:31 AM	Defendant complied with Officer Walker's request to move their conversation outside where there were fewer distractions
12:46 AM	Defendant and Officer Walker continued discussion in vestibule
12:48 AM	Defendant began sitting in dining room and remains there
1:02 AM	Paramedics took victim to the hospital
1:30 AM	Officers learn of victim's death
2:45 AM	Investigator Randall Arrived at the Apartment

C. Questioning at the Police Department

At approximately 2:45 AM, Investigator Dave Randall arrived at the apartment. He was dressed in civilian clothes and, although armed, his firearm was not visible. He encountered defendant in the dining room. Another officer was present in the room.

At approximately 2:48 AM, Investigator Randall asked defendant if defendant would come down to the police department to answer questions. Defendant asked why it needed to occur at the police department. Investigator Randall replied that the police department was a better environment with fewer distractions. Defendant agreed to go to the police department. Investigator Randall told defendant he was not under arrest.

Another officer took defendant to the police department, having also provided defendant with a blanket with which to cover himself. At the police department, officers

placed defendant in an interview room, which was equipped with a video camera that captured the subsequent events. Officers provided defendant with a soda. Investigator Randall entered the room a short time later, at approximately 3:22 AM, and began the interview. Defendant asked if the victim was okay. Investigator Randal said something to the effect that the victim was taken to the hospital and they have officers at the hospital. Investigator Randall knew at that time that the victim was dead.

Before asking defendant any questions, Investigator Randall told defendant that he was not under arrest. Investigator Randall told defendant, however, that because he did not know exactly what happened, he was going to advise defendant of his constitutional rights. Investigator Randall then advised defendant of his constitutional rights and defendant waived those rights. Exhibit 8. Defendant then made incriminating statements.

After Investigator Randall completed the interview, he left the room. Officer Walker arrived at the police department at approximately 4:15 AM and was outside the interview room. At approximately 5:00 AM, defendant knocked on the door to the interview room. Officer Walker opened the door and defendant stated that defendant was having chest pains and wanted medical attention. Paramedics were called and took defendant to the hospital. Investigator Randall rode with defendant to the hospital. While there, defendant made more incriminating statements, such as saying he was sorry and that he had obtained a substance from his truck. The conversation was initiated by defendant, although Investigator Randall may have asked some follow-up questions.

D. Defendant's Arrest at the Hospital

Officer Walker joined defendant and Investigator Randall at the hospital. Investigator Randall left, but Officer Walker remained. Defendant requested that Officer Walker contact defendant's probation officer. Officer Walker was eventually able to reach the probation officer by phone at approximately 7:00 AM and overheard part of the conversation defendant had with his probation officer. After a brief conversation,

defendant and his probation officer spoke a second time. As a result of those conversations, or as a result of information other officers may have provided the probation officer, the probation officer decided to have defendant arrested for a parole violation. Defendant was arrested before he left the hospital.

E. Search of Defendant's Residence

Officer Brenden Welsh was tasked with the responsibility of drafting search warrants in connection with the investigation. He gathered information from other officers and drafted the application and affidavit in support of a search warrant of defendant and "[t]he residence of 511 Garfield #206, Dubuque, Iowa." The caption of the Application for Search Warrant reads "State of Iowa v. Richard Leroy Parker [date of birth], 511 Garfield #206, Dubuque, Iowa 52001." Exhibit 9. The affidavit attached to the application contains no reference to the address. There is nothing in the affidavit itself that provides facts to establish that defendant lived at 511 Garfield. For that matter, there is nothing in the affidavit stating who lived at the address. There is no indication in the affidavit of when defendant had last been present at 511 Garfield. Nor is there any reference to drug activity at the residence.

At the hearing on defendant's motion, Officer Welsh testified that he uses a template for applying for search warrants and that it is the common practice for officers to list the name of the suspect and his address in the caption of an application for a search warrant. Officer Welsh further testified that the state court judges generally understand that the caption therefore alleges that the defendant lives at the listed address. At approximately 5:00 AM, Officer Welsh submitted the application to a state court judge, who found probable cause and issued the search warrant. Officers thereafter searched defendant's residence where they seized some incriminating evidence.

II. DISCUSSION

Defendant seeks to suppress both his incriminating statements and the evidence from the search of his residence. The first issue implicates defendant's rights under both the Fourth and Fifth Amendments to the United States Constitution. The second issue implicates defendant's Fourth Amendment rights. I will address each issue in turn.

A. Defendant's Incriminating Statements

The Fourth Amendment to the United States Constitution protects individuals from "unreasonable searches and seizures" by the government. U.S. CONST. amend. IV. Officers may briefly detain persons if they are aware of "particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed." *United States v. Givens*, 763 F.3d 987, 989 (8th Cir. 2014) (citation and internal quotation marks omitted). The Fourth Amendment is not violated when a police officer who has reasonable suspicion that criminal activity is afoot briefly detains a suspect while making a reasonable investigation to confirm or dispel the officer's suspicion. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). "The existence of reasonable, articulable suspicion is determined by the totality of the circumstances, taking into account an officer's deductions and rational inferences resulting from relevant training and experience." *United States v. Horton*, 611 F.3d 936, 940 (8th Cir. 2010) (citing *United States v. Arvizu*, 534 U.S. 266, 273–74 (2002)). A *Terry* stop normally includes brief questioning "reasonably related in scope to the justification" for the stop. *United States v. Brignoni–Ponce*, 422 U.S. 873, 881 (1975).

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that an officer must advise a suspect of his constitutional rights after the person has been taken into custody. *Miranda* warnings are not generally required during *Terry* stops. *Berkemer v. McCarty*, 468 U.S.

420, 441 (1984). *Miranda* warnings are required, however, before the police engage in "custodial interrogation," which the Supreme Court defined in *Miranda* as whenever "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

A *Terry* stop may evolve into a custodial arrest where circumstances would lead a reasonable person to believe he or she has been deprived of freedom of action. "A de facto arrest occurs when the officers' conduct is more intrusive than necessary for an investigative stop." *United States v. Hill*, 91 F.3d 1064, 1070 (8th Cir. 1996) (citation and internal quotation marks omitted). In determining whether a person is in custody for purpose of requiring a *Miranda* warning, courts consider a number of factors, including (1) the duration of the encounter; (2) whether the suspect was handcuffed; (3) whether the suspect was transported or isolated; (4) whether officers advised the suspect that he was free to go or the suspect requested permission to leave; (5) whether officers told the suspect he was under arrest; (6) whether the suspect initiated contact with authorities; (7) whether officers used strong arm tactics or deceptive stratagems; (8) whether the atmosphere was police dominated; and (9) whether officers placed the suspect under arrest at the termination of questioning. *Id.*; *United States Griffin*, 922 F.2d 1343, 1349 (8th Cir. 1990). This is not an exhaustive list; rather, a court considers the totality of the circumstances. *See United States v. Czichray*, 378 F.3d 822, 827 (8th Cir. 2004) (stating that the *Griffin* factors are not means exhaustive and should not be applied "ritualistically"). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994).

Considering the totality of the circumstances, I find that defendant was not in custody while at the apartment. I find that the encounter Officer Walker had with

defendant constituted a reasonable *Terry* stop; that Officer Walker had reasonable, articulable suspicion to investigate what happened to the victim, drug activity at the apartment, and whether the drug activity had something to do with the victim's condition. Defendant conceded at argument that officers did not violate defendant's constitutional rights by asking him questions about the victim's drug use, but at some point crossed the line when they asked him about his own drug use and activities that night. The victim's drug use cannot be so easily divorced from defendant's drug use and activities. Once defendant mentioned the victim used cocaine, Officer Walker had a reasonable articulable suspicion to believe that criminal activity was afoot, not only with regard to what caused the victim to stop breathing, but also with respect to illegal drug use and possession by her and others. Officer Walker's questioning of defendant on these topics was brief—only 20 minutes—and was limited to the victim's condition and drug use. Thus, I find that defendant was not in custody during this time.

Nor do I find that the *Terry* stop evolved into a custodial arrest. Defendant initiated contact with law enforcement officers. At the hearing, defendant argued that, although he called 9-1-1, he was reporting a medical emergency and was not soliciting contact with law enforcement officers. This belies common sense. A reasonable person calling 9-1-1 for any purpose would believe that law enforcement officers would respond to the scene. Defendant could have left before officers arrived; he chose to remain.

Once officers arrived, defendant generally moved where he desired, especially during the early interaction with Officer Walker. Although defendant did not attempt to leave the apartment, defendant had the opportunity to do so. Defendant freely moved from room to room, walking past officers without restriction. Officer Walker then requested defendant to stay in the dining room so they could talk, and later requested defendant accompany Officer Walker outside, again so they could talk without interruption. Defendant never protested or refused; rather, he acquiesced to Officer

Walker's requests. Once outside, Officer Walker requested defendant stay there a few times to talk and to stay out of the way of emergency personnel. When defendant complained about the cold and Officer Walker entered the apartment to see about getting defendant a shirt, he left defendant standing outside alone. There was nothing keeping defendant from leaving; he lived nearby. Instead, defendant re-entered the apartment, stepping into the back vestibule, on his own volition. Officer Walker then spoke with him a few minutes longer in the vestibule before they both moved to the dining room. At that point, all relevant questioning ceased.

At no point during this encounter did defendant request permission to leave, albeit no officer told him he was free to leave either.[2] Nor did defendant attempt to leave the apartment. No officer told defendant that he was under arrest. Neither defendant, nor anyone else in the apartment, was placed in handcuffs.

Officer Walker did not use any strong arm or coercive tactics. Officer Walker never touched defendant. Nor did Officer Walker use deceptive stratagems. Officer Walker did not allege to have information he did not have, nor fail to disclose pertinent information he did have. Officers did question Richards about whether defendant choked the victim. This was not part of a deceptive stratagem. I find that officers had reasonable grounds to believe that Donte Richards initially said something about defendant choking the victim. This is borne out by the notes that are visible during the interchange with Richards in the living room when he denied making such a claim. Whether the officer misunderstood Richards, or Richards made the statement but later retracted it, there is

[2] Although at one point an officer can be heard telling the other occupants that "we can't let anyone wander around in the house [right now]" due to the investigation and resuscitation attempts (Exhibit 5), this statement is insufficient to create a custodial statement at the relevant time. This statement was not made until after defendant made the incriminating statements and, thus, could not have led defendant to believe he was in custody at the time he made the statements.

no indication that officers fabricated the allegation in an effort to mislead defendant. Moreover, I find that the evidence did not show that Officer Walker knew the victim had died at the time he spoke with defendant. At some later time that evening and before defendant went to the police department, some officers at the apartment learned the victim had died. There is, again, no evidence that officers intentionally withheld this information from defendant in an effort to manipulate him into making incriminating statements.

Further, I do not find that the atmosphere was police-dominated. There were, of course, several police officers in the apartment. At some points, there appeared to be as many as six police officers present, along with emergency personnel. This was, after all, a life-threatening event. No officer brandished a firearm or any other weapon. Officers did not raise their voices or attempt to dominate the atmosphere verbally. A few of the officers were focused on the victim and had little or no contact with the other occupants of the home. After the victim was removed from the home, officers remained but did little more than stand around while the occupants sat and slept. Given the medical emergency that caused defendant to call for assistance, the atmosphere at the time Officer Walker spoke to defendant was dominated by the efforts to save the victim's life and find out what caused her to stop breathing. Moreover, at the time defendant made the incriminating statements at the apartment, only Officer Walker was interacting with him, and they were often alone; indeed, at one point they were outside where no other officers were present. Finally, officers did not arrest defendant at the conclusion of the questioning.

Defendant voluntarily agreed to accompany officers to the police department afterwards to answer more questions. He was explicitly advised at that time he was not under arrest. Richards and Ostrander declined going to the police department and the

officers did not arrest them. Rather, they gave them a ride to another location, explaining that they could not remain during the search.

After defendant arrived at the police department, the only incriminating statements he made occurred after he waived his constitutional rights. The government bears the burden of proving by a preponderance of the evidence that a defendant's waiver of *Miranda* rights was an intentional, voluntary, knowing, and intelligent relinquishment or abandonment of a known right or privilege. *United States v. Black Bear*, 422 F.3d 658 (8th Cir. 2005). *See also United States v. Jones*, 23 F.3d 1307, 1313 (8th Cir. 1994) (holding that a *Miranda* waiver must be voluntary, knowing, and intelligent, and "the product of a free and deliberate choice rather than intimidation, coercion, or deception," and the suspect must have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (citations and internal quotation marks omitted)). Whether a waiver was voluntary, knowing, and intelligent is determined by the "'totality of circumstances surrounding the interrogation.'" *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The determination of whether a waiver is voluntary for *Miranda* purposes is determined by the same standard used to determine whether a statement is voluntary for Fifth Amendment due process purposes. *United States v. Makes Room for Them*, 49 F.3d 410, 414 (8th Cir. 1995). Statements made after a knowing and voluntary waiver of *Miranda* rights are admissible unless there were earlier, unwarned statements resulting from coercion or a calculated effort to undermine the suspect's free will. *United States v. Briones*, 390 F.3d 610, 613-14 (8th Cir. 2004).

Defendant has not specifically alleged his waiver was involuntary, but I will address this issue *sua sponte* because some of the cross examination of witnesses at the hearing bore on this issue. Defendant came to the police department voluntarily. Before any questions were asked of him, defendant asked if the victim was okay. Investigator Randall knew at that time that the victim had died, but avoided answering defendant's

question. In doing so, however, Investigator Randall did not lie to the defendant or engage in deceptive tactics. Investigator Randall then told the defendant that he was not under arrest. Then Investigator Randall advised defendant of his constitutional rights and defendant agreed to waive his rights, in writing. Exhibit 5.

Under the totality of circumstances, I find defendant's waiver voluntary. Knowing the victim had died may have impacted defendant's assessment of the wisdom of waiving his rights and speaking with the police. Nevertheless, "a valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might . . . affec[t] his decision to confess.'" *Colorado v. Spring*, 479 U.S. 564, 576 (1987) (quoting *Moran*, 475 U.S. at 422) (omission in original). The Supreme Court has "never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Spring*, 479 U.S. at 576–77 (citation and internal quotation omitted). Where additional information would "affect only the wisdom of a *Miranda* waiver, not its voluntary and knowing nature," the waiver is not invalid. *See id.*, at 577.

As noted, sometime after Investigator Randall finished questioning defendant at the police department, defendant requested medical attention and was taken to the hospital. There, he made additional incriminating statements. Defendant has not specifically alleged that those statements were obtained in violation of his constitutional rights other than derivatively as a result of allegedly violating his rights by questioning him at the apartment. Regardless, I find these statements were made by defendant after he had been advised of his constitutional rights. Further, defendant was not under arrest at the time he made these statements. He was at the hospital and, although an officer remained with him, he was not confined, handcuffed, or in any other way restrained. Finally, defendant volunteered the statements, and they were not made in response to questioning initiated by law enforcement officers.

In the event that a reviewing court finds defendant was in custody at the apartment and therefore officers violated defendant's Fifth Amendment rights, it will be necessary to consider whether defendant's Fifth Amendment rights from that point forward should also be suppressed. Therefore, I will consider this issue.

To break the causal chain between a constitutional violation and a statement given later, the statement must be "'sufficiently an act of free will to purge the primary taint.'" *United States v. Ramos*, 42 F.3d 1160, 1164 (8th Cir. 1994) (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)). In determining whether defendant's later statements retain the taint of an earlier violation of his constitutional rights, the Court must consider four factors: (1) the giving of *Miranda* warnings; (2) the temporal proximity of the illegal search and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. *United States v. Riesselman*, 646 F.3d 1072, 1080 (8th Cir. 2011). The government has the burden of showing that defendant's later statements were sufficiently purged of the taint of the previous constitutional violation. *See Riesselman*, 646 F.3d at 1079 (citing *Alderman v. United States*, 394 U.S. 165, 183 (1969)).

In this case, Investigator Randall provided defendant with *Miranda* warnings before any questioning at the police department. Although *Miranda* warnings alone do not act "talismanically to purge the taint of prior illegalities," they are an important factor. *Oregon v. Elstad*, 470 U.S. 298, 336 (1985). *See also Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (stating that giving a *Miranda* warning is an important factor, albeit not by itself sufficient); *Brown v. Illinois*, 422 U.S. 590, 603 (1975) (same).

Approximately three hours passed between the initial questioning of defendant by Officer Walker and the questioning of defendant at the police department. That is not such a short time as to render defendant's later statements involuntary. *See United States v. Becker*, 333 F.3d 858, 862–63 (8th Cir. 2003) (holding that a forty-nine minute lapse

of time was not so short as to render the defendant's statements involuntary); *United States v. Ball*, No. 13-cr-2013-LRR, 2014 WL 2866131, at *6 (N.D. Iowa Jun. 24, 2014) (finding a ninety minute lapse of time was not so short as to render the defendant's statements involuntary).

Between these events, defendant remained in the apartment, and never sought to leave, while one or more police officers remained in the room with him. Also, and importantly, defendant was twice told that he was not under arrest, once at the apartment and a second time at the police department. *See United States v. Ellis*, 910 F. Supp.2d 1008, 1020 (W.D. Mich. 2012) (finding intervening circumstances, including advising defendant he was not under arrest, removed any taint from a later confession); *United States v. Lawrence*, No. CRIM. 05-333(MJD/RLE), 2006 WL 752920, at *6 (D. Minn. Mar. 23, 2006) (in concluding the defendant's statements were not tainted by an earlier constitutional violation, the court noted the intervening fact that officers told the defendant he was not under arrest).

Finally, the government's alleged misconduct was not flagrant. The Eighth Circuit Court of Appeals has found this factor as the "most important factor because it is directly tied to the purpose of the exclusionary rule-deterring police misconduct." *United States v. Simpson*, 439 F.3d 490, 496 (8th Cir. 2006). As the Eighth Circuit has noted, courts will find "purposeful and flagrant conduct where: (1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional but engaged in it nevertheless; and (2) the misconduct was investigatory in design and purpose and executed 'in the hope that something might turn up.'" *Simpson*, 439 F.3d at 496 (citations omitted). In this case, there was nothing about Officer Walker's initial questioning of defendant at the apartment that suggested that Officer Walker or any other officer knew or believed the questioning was obviously unconstitutional. And, although the questioning was investigatory in nature, there are no

facts suggesting it was designed or undertaken for the purpose of evading defendant's constitutional rights.

Therefore, I respectfully recommend the Court find the questioning of defendant at the apartment did not violate his constitutional rights and that defendant waived his constitutional rights for any statements made at the police department and hospital. I further respectfully recommend that, even if the Court finds that Officer Walker's questioning of defendant at the apartment violated defendant's constitutional rights, the Court find any taint from that violation was purged such that defendant's later statements at the police department and hospital should not be suppressed. In short, I respectfully recommend the Court deny defendant's motion to suppress his statements.

B. The Search Warrant

Defendant asserts that the search of his residence was not supported by probable cause in the application and affidavit submitted in support of the search warrant. In particular, defendant argues that the affidavit fails to articulate facts that establish probable cause to believe any evidence would be found in his residence.

"Whether probable cause to issue a search warrant has been established is determined by considering the totality of the circumstances." *United States v. Grant*, 490 F.3d 627, 631 (8th Cir. 2007). If an affidavit in support of a search warrant "sets forth sufficient facts to lead a prudent person to believe that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place,'" the warrant establishes probable cause to search the place. *United States v. Warford*, 439 F.3d 836, 841 (8th Cir. 2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "The determination of whether or not probable cause exists to issue a search warrant is to be based upon a common-sense reading of the entire affidavit." *United States v. Sumpter*, 669 F.2d 1215, 1218 (8th Cir. 1982) (citations and internal quotation marks omitted).

Here, defendant's name is listed in the caption of the affidavit and below it is an address. In the description of the place to be searched, the application states "[t]he person of Richard Leory Parker" and "[t]he residence of 511 Garfield #206, Dubuque, Iowa." The application does not explicitly describe that address as defendant's residence. Nothing in the attached and incorporated affidavit references the address at all. I find that this application lacks probable cause because there is no assertion of fact that defendant lived at the address, and there are no facts in the affidavit establishing that fact or even making reference to the address. *See United States v. Brack*, 188 F.3d 748, 755 (7th Cir. 1999) (refusing to accept portions of an affidavit that contained only conclusions when they lacked factual support); *United States v. Dickerson*, 975 F.2d 1245, 1249-50 (7th Cir. 1992) (concluding it was "doubtful" that probable cause to search suspect's house existed when affidavit alleged no facts that evidence of robbery could be found inside house; affidavit alleged only that robber drove away in a car with a license plate number registered to defendant at his house).

The government argues that the listing of the address below defendant's name in the caption is an assertion of fact stating that is defendant's address. At best, however, that is only an inference one may draw from the caption. The officer's testimony that it is his understanding that including such information in the caption is generally understood by the judges to be an assertion of fact is not evidence this Court can consider; whether probable cause exists must depend on what is contained within the four corners of the application.

Defendant argued that the search warrant application lacked probable cause because it did not contain any facts establishing a "nexus between the events at Rhomberg and 511 Garfield" and "is totally devoid of any showing of suspicious activity in and around 511 Garfield." (Doc. 36-1, at 8). The affidavit does, however, establish probable cause to believe defendant was involved in the distribution of controlled substances. The

government is correct that the case law would support a common sense conclusion that a drug dealer is likely to keep incriminating evidence at his or her residence. *United States v. Carpenter*, 341 F.3d 666, 671-72 (8th Cir. 2003). Therefore, my conclusion that the warrant lacks probable cause is premised on the lack of facts connecting defendant to that residence; were there facts alleged in the affidavit linking him to the residence, I would find probable cause existed for searching the residence.

The government argues in the alternative that, if the Court finds the search warrant application lacked probable cause, that the Court should still not suppress the evidence because the officers acted in a good faith reliance on a judge's authorization of the search. In *United States v. Leon*, the Supreme Court held that evidence obtained by "officers reasonably relying on a warrant issued by a detached and neutral magistrate" is admissible. *Leon*, 468 U.S. 897, 913 (1984). Under the *Leon* good faith exception to the exclusionary rule, suppression of evidence seized pursuant to an invalid warrant is required only if: (1) the affiant misled the issuing judge with a knowing or reckless false statement; (2) the issuing judge wholly abandoned her judicial role; (3) the supporting affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" or (4) the warrant was "so facially deficient" that the executing officer could not reasonably presume its validity. *Leon*, 468 U.S. at 923 (internal citations and quotation marks omitted).

When issuing a search warrant, a judge may "draw reasonable inferences concerning where the evidence referred to in the affidavit is likely to be kept, taking into account the nature of the evidence and the offense." *See United States v. Singleton*, 125 F.3d 1097, 1102 (7th Cir. 1997). In some cases, courts have applied the *Leon* good faith exception to save search warrants where the issuing judge could have made inferences to fill in the missing facts that would link the residence to be searched with the defendant. *See*, *e.g.*, *United States v. Hunter*, 86 F.3d 679, 681-82 (7th Cir. 1996) (finding *Leon*

good faith exception applied where affidavit established that the defendant resided at the address in question because the affidavit referred to "Hunter's residence," described the address to be searched as a "residence," and made no reference to any other location connected to the defendant); *United States v. Moultrie*, Nos. 99-2199, 99-2200, 99-2866, 2000 WL 133813, at *3 (7th Cir. Feb. 2, 2000) (unpublished) (finding *Leon* good faith exception applied where defendant's address was listed only in the caption and was not referenced in the affidavit because "it was not unreasonable for the magistrate to have inferred that 1027 Emery Street was Stanley's residence, given that the affidavit concluded this and that it also listed 1027 Emery Street underneath Stanley's name at the top.).

I think in this case such an inference is a bridge too far. In both *Hunter* and *Moultrie*, there was at least an assertion that the address was the defendant's address. This is not a case, such as the government cites, involving a mere typographical error. (Doc. 43-1, at 12-13 n.7 (citing *United States v. Butler*, 594 F.3d 955, 961-62 (8th Cir. 2010)). Here, one may draw only an inference that the address listed in the caption below defendant's name was his address. Nothing in the application asserted that fact, let alone established that fact. I find the search warrant so facially deficient that I do not believe any police officer could reasonably believe it established probable cause to search the residence, regardless of whether a judge signed the warrant. *Leon*, 468 U.S. at 923. Therefore, I respectfully recommend that the Court suppress the evidence seized from defendant's residence.

III. CONCLUSION

For the foregoing reasons, I respectfully recommend that defendant's motion be **DENIED IN PART AND GRANTED IN PART**. Specifically, I recommend the Court **deny** defendant's motion to suppress as to all statements he made, but **grant** defendant's motion to suppress evidence seized from his residence. Objections to this Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and FED. R. CRIM. P. 59(b) must be filed within fourteen (14) days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* FED. R. CRIM. P. 59. Failure to object to the Report and Recommendation waives the right to *de novo* review by the district court of any portion of the Report and Recommendation as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

IT IS SO ORDERED this 6th day of December, 2017.

C.J. Williams
Chief United States Magistrate Judge
Northern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RICHARD LEROY PARKER, Defendant.	No. 17-CR-1034-LRR **ORDER**

TABLE OF CONTENTS

I. INTRODUCTION

The matters before the court are Defendant Richard Leroy Parker's Objections ("Defense Objections") (docket no. 58), Defendant's Pro Se Objections ("Pro Se Objections") (docket no. 58-2) and the government's Objections ("Government

Objections") (docket no. 59) to United States Chief Magistrate Judge C.J. Williams's Report and Recommendation (docket no. 47), which recommends that the court grant in part and deny in part Defendant's "Motion to Suppress Evidence" ("Motion") (docket no. 36).

II. RELEVANT PROCEDURAL BACKGROUND

On August 24, 2017, a grand jury returned an Indictment (docket no. 2) charging Defendant with one count of distribution of a controlled substance near a protected location resulting in death in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(C), 851 and 860(a), and two counts of possession with intent to distribute a controlled substance near a protected location in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(C), 851 and 860(a). *See* Indictment at 1-4. On November 13, 2017, Defendant filed the Motion. On November 20, 2017, the government filed a Resistance (docket no. 43). On November 29, 2017, Judge Williams held a hearing on the Motion. *See* November 29, 2017 Minute Entry (docket no. 45). Defendant appeared in court with his attorney, Melanie Keiper. Assistant United States Attorney Dan Chatham represented the government. On December 6, 2017, Judge Williams issued the Report and Recommendation, which recommends that the court grant in part and deny in part the Motion. On December 20, 2017, Defendant filed the Defense Objections and the Pro Se Objections. On that same date, the government filed the Government Objections. The matter is fully submitted and ready for decision.

III. STANDARD OF REVIEW

When a party files a timely objection to a magistrate judge's report and recommendation, a "judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge must consider de novo any objection to the magistrate judge's recommendation."); *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003) (noting that a district judge must

"undertake[] a de novo review of the disputed portions of a magistrate judge's report and recommendations"). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions."). It is reversible error for a district court to fail to engage in a de novo review of a magistrate judge's report when such review is required. *Lothridge*, 324 F.3d at 600. Accordingly, the court reviews the disputed portions of the Report and Recommendation de novo.

IV. RELEVANT FACTUAL BACKGROUND[1]

On April 17, 2017, at approximately 12:30 a.m., officers from the Dubuque Police Department and paramedics arrived at a residence on Rhomberg Avenue (the "Rhomberg Residence") in response to a 911-call regarding an unresponsive woman. Attempts to resuscitate the woman, who was identified as E.M., were unsuccessful and she was later pronounced dead at the hospital. When officers first arrived at the scene, they gathered personal and contact information from Defendant, Ashley Ostrander and Donte Richards. Officers then questioned the individuals about E.M.'s history and her activities throughout the day. This questioning lasted between fifteen and twenty minutes. During this interaction, Defendant made several incriminating statements about his own drug use.

Officers remained at the Rhomberg Residence with Defendant, Ostrander and Richards until approximately 2:45 a.m. At that time, officers asked if any of the individuals would accompany them to the police station for further questioning. Defendant

[1] After reviewing the Hearing Transcript (docket no. 53), the court finds that Judge Williams accurately and thoroughly set forth the relevant facts in the Report and Recommendation. *See* Report and Recommendation at 2-8. Therefore, the court shall only briefly summarize the facts here. When relevant, the court relies on and discusses additional facts in conjunction with its legal analysis.

agreed to accompany officers, and was transported to the police station. When Defendant arrived at the police station, he waived his constitutional rights and subsequently made incriminating statements in an interview conducted by Investigator David Randall. *See* Government Exhibit 8 (docket no. 46). Shortly after the interview, Defendant stated that he was having chest pains and shortness of breath. Paramedics transported Defendant to the hospital. Officers later arrested Defendant for a parole violation. On that same date, officers obtained a search warrant for Defendant and a residence on Garfield (the "Garfield Residence"). Officers conducted a search of the Garfield Residence and seized incriminating evidence.

V. ANALYSIS

A. Factual Objections[2]

Defendant objects to several of Judge Williams's factual findings. The court shall address each factual objection in turn.

1. "Two hours before"

Defendant objects to Judge Williams's finding that "Defendant said [E.M.] had been drinking and took some cocaine about two hours before." Report and Recommendation at 4. Defendant contends that he stated "he saw the victim use cocaine 'earlier' and when pressed for a specific time, he said it was 'a couple hours ago.'" Brief in Support of Defense Objections (docket no. 58-1) at 1. Although Judge Williams's characterization of "about two hours before" is not a verbatim quote, the court finds that it accurately

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[2] Defendant enumerates a number of "objections to the relevant facts and supplements the relevant facts from the record at the hearing." Brief in Support of Defense Objections at 1. Aside from what is addressed below, Defendant has not articulated specific objections to Judge Williams's factual findings. *See generally id.*; *see also* LCrR 59 ("A party in a criminal case . . . must file specific, written objections to the . . . report and recommendation . . . ."). Rather, Defendant lists a number of "supplemental" relevant facts from the record. As stated above, the court has conducted a de novo review of the record.

captures Defendant's statement. Therefore, the court shall overrule this factual objection.

2. Sweating

Defendant objects to Judge Williams's finding that, "[D]efendant was sweating while Officer Walker was talking to him." Report and Recommendation at 4. Defendant asserts that, rather, "water appears to have dripped down onto his bare chest" after he "drank out of the kitchen faucet." Brief in Support of Defense Objections at 1. Upon review of Exhibit 5, the court notes that no moisture was visible on Defendant's chest until after he drank out of the kitchen faucet. Thus, the court finds that the apparent perspiration was water that had dripped onto Defendant's chest. Therefore, the court shall sustain this factual objection.

3. Truck

Defendant objects to Judge Williams's finding that Defendant stated that "he had obtained a substance from his truck." Report and Recommendation at 7. Defendant argues that he stated "he obtained [a substance] from a truck." Brief in Support of Defense Objections at 2. After reviewing the testimony of Investigator Randall and Exhibit 7, the court finds that Defendant referred generically to "a" or "the" truck, and not "his" truck. *See* Hearing Transcript at 24; *see also* Exhibit 7. Therefore, the court shall sustain this factual objection.

B. Conclusions of Law

Defendant objects to Judge Williams's legal conclusion that Defendant was not in custody while at the Rhomberg Residence. The government objects to Judge Williams's legal conclusion that the *Leon*[3] good faith exception to the exclusionary rule does not apply. The court shall address each objection in turn.

1. Seizure

Defendant objects to Judge Williams's conclusion that Defendant "was not seized

[3] *United States v. Leon*, 468 U.S. 897 (1984).

and therefore [was] not in custody" while officers questioned him at the Rhomberg Residence. *See* Brief in Support of Defense Objections at 3. Defendant argues that he was not free to leave the apartment, his movements were contained and his movements were directed by officers. *Id*. Defendant additionally asserts that officers engaged in deceptive tactics by not revealing E.M.'s death to him. *Id*.

The Fourth Amendment to the United States Constitution protects "against unreasonable searches and seizures." U.S. Const. amend. IV. "A police officer 'may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.'" *United States v. Fields*, 832 F.3d 831, 834 (8th Cir. 2016) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). "For an investigative *Terry*-type seizure to be constitutional under the Fourth Amendment, an officer must be aware of 'particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed.'" *United States v. Donnelly*, 475 F.3d 946, 952 (8th Cir. 2007) (quoting *United States v. Martin*, 706 F.2d 263, 265 (8th Cir. 1983)). "A reviewing court must look at the totality of the circumstances, allowing 'officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.'" *United States v. Davison*, 808 F.3d 325, 329 (8th Cir. 2015) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)).

Defendant conceded at the hearing on the Motion that officers did not violate his constitutional rights by asking about E.M.'s drug usage. *See* Hearing Transcript at 28-29. Rather, Defendant contends that Officer Walker's inquiry into Defendant's own drug use was improper. *See id*. The court agrees with Judge Williams that E.M's "drug use cannot be so easily divorced from [D]efendant's drug use and activities." Report and Recommendation at 11. Initially, Officer Walker obtained Defendant's personal

information and asked him about E.M.'s history, health and activities earlier that day. It was not until Defendant informed officers that E.M. had used cocaine that Officer Walker asked Defendant about his own drug use. Defendant's statements regarding E.M.'s drug use permitted Officer Walker to expand the scope of the encounter to inquire about Defendant's drug use. *See United States v. Coleman*, 700 F.3d 329, 335 (8th Cir. 2012) ("If the officer develops reasonable suspicion that other criminal activity is afoot, the officer may expand the scope of the encounter to address that suspicion." (alteration omitted) (quoting *United States v. Peralez*, 526 F.3d 1115, 1120 (8th Cir. 2008))). Further, officers on the scene knew that Ostrander and Richards, who resided at the Rhomberg Residence, were crack users and also knew Richards was a crack dealer. *See* Hearing Transcript at 17; *see also United States v. Winters*, 491 F.3d 918, 921 (8th Cir. 2007) ("When a team of law enforcement officers is involved in an investigation, the issue is whether all of the information known to the team provided 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the investigative stop." (quoting *United States v. Robinson*, 119 F.3d 663, 666-67 (8th Cir. 1997))). The court finds that the information about E.M.'s drug use, particularly when coupled with the knowledge of the drug use of the other occupants at the residence, established reasonable suspicion that criminal activity may have been afoot.[4] Therefore, officers were authorized to conduct a *Terry* stop.

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[4] Defendant asserts that Judge Williams's finding that officers had reasonable suspicion that criminal activity may be afoot was not supported by the record. *See* Pro Se Objections at 4. Defendant relies on Officer Walker's testimony that he did not arrest Defendant because "you can consume drugs, but if you don't have any on your person, there's nothing you can charge them with at that time." Hearing Transcript at 8. Defendant's argument conflates Officer Walker's determination that he did not have probable cause to arrest Defendant for using drugs, with the lesser standard of reasonable suspicion that is applicable here. Therefore, the court shall overrule Defendant's objection on this point.

2. Custody

Nor does the court find that the *Terry* stop evolved into a custodial arrest. "An investigative detention may turn into an arrest if it 'lasts for an unreasonably long time or if officers use unreasonable force.'" *Donnelly*, 475 F.3d at 953 (quoting *United States v. Navarrette–Barron*, 192 F.3d 786, 790 (8th Cir. 1999)). "The ultimate question in determining whether a person is in custody for purposes of *Miranda* is whether there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *United States v. Perrin*, 659 F.3d 718, 719 (8th Cir. 2011) (quoting *United States v. Czichray*, 378 F.3d 822, 826 (8th Cir. 2004)); *see United States v. Giboney*, 863 F.3d 1022, 1027 (8th Cir. 2017) ("The Fifth Amendment requires that *Miranda* warnings be given when a person is interrogated by law enforcement after being taken into custody."). "To determine whether a suspect was in custody, we ask 'whether, given the totality of the circumstances, a reasonable person would have felt at liberty to terminate the interrogation and leave or cause the agents to leave.'" *United States v. Laurita*, 821 F.3d 1020, 1024 (8th Cir. 2016) (quoting *United States v. Vinton*, 631 F.3d 476, 481 (8th Cir. 2011)). Relevant factors include:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990). These factors are not exhaustive. *Giboney*, 863 F.3d at 1027.

The first factor is "whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest." *Griffin*, 922 F.2d at 1349. During the encounter at the Rhomberg Residence, no officer informed Defendant that the questioning was voluntary or that he was free to leave the residence. Additionally, no officer informed Defendant that he was not under arrest. However, the absence of such statements by officers is not dispositive. At no point did Defendant state that he no longer wished to speak with officers nor did he attempt to leave the Rhomberg Residence.

Defendant argues that he was not free to leave the Rhomberg Residence because Corporal Bruce Deutsch testified that "[d]uring the initital part" of the investigation Defendant would not have been free to leave and "[d]uring the back half of the investigation [Corporal Deutsch] would have had to have cleared it with [his] supervisor." *See* Hearing Transcript at 21; *see also* Pro Se Objections at 8-9. However, there is no evidence that this potential restriction was ever communicated to Defendant. This fact is significant "because the 'in custody' inquiry focuses on 'objective circumstances, not on subjective views of the participants.'" *United States v. Castillo-Martinez*, 451 F. App'x 615, 619 (8th Cir. 2012) (quoting *United States v. Muhlenbruch*, 634 F.3d 987, 996 (8th Cir. 2011)); *see also Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) ("A policeman's unarticulated plan has no bearing on the question [of] whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable [person] in the suspect's position would have understood his situation."). One officer's belief that Defendant would not have been free to leave, which was not communicated to Defendant, does not render the encounter custodial. Therefore, the court finds that this factor does not weigh in favor of finding that Defendant was in custody.

The second factor is "whether the suspect possessed unrestrained freedom of movement during questioning." *Griffin*, 922 F.2d at 1349. When officers arrived at the

Rhomberg Residence, Defendant generally moved throughout the apartment as he wished. Officer Walker accompanied Defendant as he moved throughout the apartment and, within a few minutes, asked Defendant to "just kind of stay here."[5] Report and Recommendation at 4. Officer Walker subsequently asked Defendant to step outside to talk. The court does not find that Officer Walker's statements, or that he accompanied Defendant throughout the residence, restrained Defendant to a degree associated with a formal arrest. *See Giboney*, 863 F.3d at 1028 (concluding that the defendant was not deprived of freedom of movement by the officer "merely . . . joining [the defendant] as he moved about and outside the house").

Further, paramedics were providing medical aid to E.M. in the bedroom and kitchen. Officers needed to restrict some movement of the occupants so as not to impede resuscitation efforts or disrupt the scene. *See id*. (concluding that the defendant was not in custody when law enforcement "explained to [the defendant] that he could not 'just take off and walk around the house' because of the ongoing execution of the search warrant"). Nor did officers attempt to physically restrain Defendant or prevent his exit. *See Laurita*, 821 F.3d at 1024 (concluding that the defendants' freedom of movement was not restrained to "the degree associated with formal arrest" (quoting *United States v. Williams*, 760 F.3d 811, 815 (8th Cir. 2014))); *Perrin*, 659 F.3d at 721 (finding that the defendant was not in custody where neither officer "prevented [the defendant] from exercising his right to leave—they did not physically restrain him, and nothing . . . suggests that they positioned

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[5] Defendant argues that he was seized when Officer Walker told him to "just kind of stay here." *See* Pro Se Objections at 6. As addressed above, the court has already concluded that Officer Walker had reasonable suspicion to support a *Terry* stop. However, to the extent that Defendant relies on Sixth Circuit case law to argue that "words alone may be enough to make a reasonable person feel that he would not be free to leave," *United States v. Richardson*, 385 F.3d 625, 629 (6th Cir. 2004), the court does not find that Officer Walker's words were sufficient to transform the encounter into a custodial arrest.

themselves or acted to inhibit [the defendant's] exit"). Therefore, the court finds that this factor does not weigh in favor of finding that Defendant was in custody.

The third factor is "whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions." *Griffin*, 922 F.2d at 1349. Defendant contends that he did not initiate contact with authorities by calling 911. *See* Pro Se Objections at 3. The court agrees with Judge Williams's conclusion that this contention "belies common sense." Report and Recommendation at 11. A reasonable person would understand that by calling 911 officers would respond to the scene. *See, e.g.*, *United States v. Ruhl*, No. 16-CR-0331, 2017 WL 2711416, *2 (D. Minn. June 23, 2017) (concluding that the defendant "initiated contact with authorities by calling 911 when he found an adult male unresponsive in his hotel room"). Therefore, the court finds that this factor does not weigh in favor of finding that Defendant was not in custody.

The fourth factor is "whether strong arm tactics or deceptive stratagems were employed during questioning." *Griffin*, 922 F.2d at 1349. Defendant argues that officers "engage[d] in deceptive tactics by not revealing [E.M.'s] death when asked about it." Brief in Support of Defense Objections at 3. Defendant points to no evidence in the record supporting the claim that officers intentionally withheld information about E.M.'s death from Defendant in order to manipulate him. Specifically, the court finds no evidence that Officer Walker was aware that E.M. had died at the time Defendant made the initial incriminating statements. Further, to the extent that officers at the residence withheld this knowledge from Defendant, it was not sufficient to render the encounter custodial. Therefore, the court finds that this factor does not weigh in favor of finding that Defendant was in custody.

The fifth factor is "whether the atmosphere of the questioning was police dominated." *Griffin*, 922 F.2d at 1349. Defendant argues that the atmosphere was police dominated because there were at least four uniformed officers at the Rhomberg Residence

and flashing police lights. *See* Pro Se Objections at 9. Although a number of officers were present at the scene, several were providing emergency medical assistance. Additionally, at the time Defendant made the incriminating statements he was only interacting with Officer Walker. *See United States v. Axsom*, 289 F.3d 496, 502 (8th Cir. 2002) (concluding that the interview was not police dominated where, although nine federal agents were present in the suspect's home, only two agents conducted the interview). Further, the interaction took place at the Rhomberg Residence, rather than in a police dominated environment. *See United States v. Sanchez*, 676 F.3d 627, 631 (8th Cir. 2012) (finding that the interview was police dominated where "[i]t was held in a courthouse-basement office normally used by federal prosecutors" and the defendant "was isolated with two law enforcement officers in the small, closed interview room"). Therefore, the court finds that this factor does not weigh in favor of finding that Defendant was in custody.

Defendant does not object to Judge Williams's finding that the "officers did not arrest [D]efendant at the conclusion of the questioning." Report and Recommendation at 13; *see Griffin*, 922 F.2d at 1349. Therefore, the court finds that this factors weighs in favor of finding that Defendant was not in custody.

In light of the above factors, the court finds that Defendant was not in custody while he was at the Rhomberg Residence. *See Williams*, 760 F.3d at 815 (concluding that "the conduct of the interview did not bring about a restraint on freedom of movement of the degree associated with formal arrest. [The defendant] was not physically restrained or handcuffed. He was permitted to get a glass of water and to move unsupervised through his home. [The defendant] was questioned by only a single agent for a relatively short period of thirty to forty-five minutes. The agent used no deceptive strategies or threats. At the end of the interview, [the defendant] was not arrested" (internal citation omitted)).

3. Search warrant

The government objects to Judge Williams's legal conclusion that the *Leon* good faith exception to the exclusionary rule does not apply to the officers' search of the Garfield Residence.

a. Probable cause

"Whether probable cause to issue a search warrant has been established is determined by considering the totality of the circumstances." *United States v. Notman*, 831 F.3d 1084, 1088 (8th Cir. 2016) (quoting *United States v. Grant*, 490 F.3d 627, 631 (8th Cir. 2007)). "If an affidavit in support of a search warrant 'sets forth sufficient facts to lead a prudent person to believe that there is a "fair probability that contraband or evidence of a crime will be found in a particular place,"' probable cause to issue the warrant has been established." *Id.* (quoting *United States v. Warford*, 439 F.3d 836, 841 (8th Cir. 2006)). In determining whether probable cause exists, courts "apply a common sense approach . . . considering all relevant circumstances." *United States v. Hager*, 710 F.3d 830, 836 (8th Cir. 2013) (quoting *United States v. Gleich*, 397 F.3d 608, 612 (8th Cir. 2005)). A reviewing court must "pay 'great deference' to the probable cause determinations of the issuing judge or magistrate, and limit [its] inquiry to discerning whether the issuing judge had a substantial basis for concluding that probable cause existed." *United States v. Butler*, 594 F.3d 955, 962 (8th Cir. 2010) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)). "When the [issuing judge] relied solely upon the supporting affidavit to issue the search warrant, only that information which is found within the four corners of the affidavit may be considered in determining the existence of probable cause." *United States v. O'Dell*, 766 F.3d 870, 874 (8th Cir. 2014) (alteration in original) (quoting *United States v. Solomon*, 432 F.3d 824, 827 (8th Cir. 2005)).

No party objects to Judge Williams's conclusion that the search warrant lacked probable cause to search the Garfield Residence because it lacked "facts connecting [Defendant] to that residence." Report and Recommendation at 20. For the reasons more

fully stated in the Report and Recommendation, the court finds that the search warrant lacked probable cause as to Defendant's residence.

b. Good faith exception

The court now turns to the question of whether, despite the search warrant's invalidity, the evidence obtained as a result of its execution should be excepted from the exclusionary rule under the *Leon* good faith exception. The government objects to Judge Williams's finding that the good faith exception does not apply to the search of the Garfield Residence because "the search was so facially deficient that . . . [no] police officer could reasonably believe it established probable cause to search the [Garfield Residence]." Report and Recommendation at 21. The government asserts that the good faith exception to the exclusionary rule applies, and that the evidence obtained pursuant to the search warrant should not be suppressed. *See* Government Objections at 3-7.

Evidence obtained pursuant to a search warrant that is later determined to be invalid is excepted from the exclusionary rule "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *United States v. Rodriguez*, 834 F.3d 937, 941 (8th Cir. 2016) (quoting *Leon*, 468 U.S. at 920). Courts give "'great deference' to a magistrate's determination" that probable cause existed to issue a warrant. *Leon*, 468 U.S. at 914 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). "In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *United States v. Cannon*, 703 F.3d 407, 412 (8th Cir. 2013) (quoting *Leon*, 468 U.S. at 926). The following circumstances preclude a finding that officers acted in objective good faith in executing a warrant:

> (1) when the affidavit or testimony supporting the warrant contained a false statement made knowingly and intentionally or with reckless disregard for its truth, thus misleading the issuing judge; (2) when the issuing judge wholly abandoned his

> judicial role in issuing the warrant; (3) when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when the warrant is so facially deficient that no police officer could reasonably presume the warrant to be valid.

United States v. Hopkins, 824 F.3d 726, 733 (8th Cir. 2016) (quoting *Cannon*, 703 F.3d at 412).

At issue here, is whether "the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id*. "The court must look at the objectively ascertainable question of whether a reasonably well trained officer would have known that the search was illegal despite a judge's issuance of the warrant." *United States v. Conant*, 799 F.3d 1195, 1201-02 (8th Cir. 2015) (quoting *United States v. Jackson*, 784 F.3d 1227, 1231 (8th Cir. 2015)). The court "looks to the totality of the circumstances in assessing the objective reasonableness of an officer's execution of a warrant, 'including any information known to the officer but not presented to the issuing judge.'" *Id*. at 1202 (quoting *Jackson*, 784 F.3d at 1231).

The court agrees with Judge Williams's conclusion that no "police officer could reasonably believe [that the warrant] established probable cause to search" the Garfield Residence. Report and Recommendation at 21. In this case, the search warrant affidavit contained nothing linking the Garfield Residence with Defendant. Because the affidavit lacks any factual basis linking the Garfield Residence to Defendant, a reasonably well trained officer would have known that the search was illegal. Thus, the good faith exception does not apply. *Compare United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988) (concluding that the good faith exception was inapplicable where the affidavit "d[id] not link th[e] location to the defendant") *with United States v. Murphy*, 69 F.3d 237, 240-41 (8th Cir. 1995) (distinguishing *Hove*, where "the officer's final affidavit for the search warrant did not contain any information linking [the defendant] . . . to the residence to be

searched" from the present case, where "the affidavit stated that a confidential informant had told [an officer] that [the defendant] . . . possessed firearms at his home" and provided the defendant's specific address). *See United States v. Guzman*, 507 F.3d 681, 685 (8th Cir. 2007) (rejecting the defendant's argument that "the affidavit was so lacking in indicia of probable cause to render [the officer's] reliance on it unreasonable" because "the affidavit attached to the warrant . . . established a connection between the defendant . . . and the place to be searched"); *United States v. Gonzales*, 399 F.3d 1225, 1231 (10th Cir. 2005) ("For good faith to exist, there must be *some* factual basis connecting the place to be searched to the defendant or suspected criminal activity. When this connection is wholly absent, the affidavit and resulting warrant are 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' Exclusion is appropriate in such circumstances because 'reasonably well-trained' officers, exercising their own professional judgment, will be able to recognize the deficiency." (internal citation omitted) (quoting *Leon*, 468 U.S. at 923)); *United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001) (concluding "that the executing officers reasonably relied on the issuing judge's determination that there was probable cause" where "the affidavit established a connection between [the defendant] and the [place to be searched]"); *see also United States v. Johnson*, 332 F. Supp. 2d 35, 39 (D.D.C. 2004) (finding the good faith exception did not apply because the affidavit "was so deficient that a reasonable officer's belief in the existence of probable cause was unreasonable" where "[t]he affidavit insufficiently linked the suspect . . . with the place to be searched" and "failed to state that . . . anyone . . . actually told the officer that [the suspect] lived there or had stayed there").

The government emphasizes the court's ability to look at what officers knew, but did not include in the affidavit when assessing good faith reliance. The government points to Investigator David Welsh's testimony that "he knew, and that it was 'common knowledge' to law enforcement, that the Garfield [R]esidence was [D]efendant's

residence." Government Objections at 6. However, Investigator Welsh's testimony was decidedly more equivocal. *See* Hearing Transcript at 4 ("I think at a certain point . . . that it was common knowledge, that's where he lived."). Further, the requisite analysis focuses on the knowledge of the officer that executed the search warrant. *See Jackson*, 784 F.3d at 1232 (examining whether "the actions of the deputy in executing the search warrant were taken in objectively reasonable good faith considering the deputy's knowledge and actions"); *Guzman*, 507 F.3d at 685 (examining "the objective reasonableness of the officers who executed [the] warrant"). Although Investigator Welsh may have known that Defendant resided at the Garfield Residence, he testified that he did not bring the search warrant to the Garfield Residence and that he "d[id not] remember who went to Garfield to search it." Hearing Transcript at 5. Additionally, no evidence was presented establishing who executed the search warrant and whether they had knowledge that the Garfield Residence was Defendant's residence. Because there is no evidence as to which officer executed the search warrant and what that officer knew, the court is unable to conclude that the executing officer's knowledge supports a finding of good faith. Therefore, the court shall overrule this objection.

VI. CONCLUSION

In light of the foregoing, the court **ORDERS**:

(1) The Defense Objections (docket no. 58) are **OVERRULED IN PART** and **SUSTAINED IN PART**;

(2) The Pro Se Objections (docket no. 58-2) are **OVERRULED**;

(3) The Government Objections (docket no. 59) are **OVERRULED**;

(4) The Report and Recommendation (docket no. 47) is **ADOPTED IN PART** and **MODIFIED IN PART**; and

(5) The Motion to Suppress (docket no. 36) is **GRANTED IN PART AND DENIED IN PART**.

IT IS SO ORDERED.

DATED this 9th day of January, 2018.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RICHARD LEROY PARKER, Defendant.	No. 17-CR-1034-LRR **ORDER**

I. INTRODUCTION

The matter before the court is Defendant Richard Leroy Parker's "Motion for Hearing on Miscarriage of Justice/to Reconsider Suppression Ruling" ("Motion") (docket no. 163) asking the court to reconsider its January 9, 2018 Order ("Order") (docket no. 94), which adopted in part and modified in part United States Chief Magistrate Judge C.J. Williams's Report and Recommendation (docket no. 47) and granted in part and denied in part Defendant's "Motion to Suppress Evidence" ("Motion to Suppress") (docket no. 36).

II. RELEVANT PROCEDURAL HISTORY

On August 24, 2017, a grand jury returned an Indictment (docket no. 2) against Defendant. Count 1 charged Defendant with distribution of a controlled substance near a protected location resulting in death, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(C), 851 and 860(a), and Count 2 charged Defendant with possession with intent to distribute a controlled substance near a protected location, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(C), 851 and 860(a). *See*

Indictment at 1-3.[1] On November 13, 2017, Defendant filed the Motion to Suppress. On December 6, 2017, Judge Williams issued the Report and Recommendation, which recommended that the court grant in part and deny in part the Motion to Suppress. On January 9, 2018, the court issued the Order.

On January 16, 2018, a jury trial commenced. *See* January 16, 2018 Minute Entry (docket no. 116). On January 18, 2018, the jury found Defendant guilty of Counts 1 and 2 of the Indictment. *See* Jury Verdicts (docket no. 124). On June 26, 2018, Defendant filed the Motion. On July 19, 2018, the government filed a Resistance (docket no. 168). On July 30, 2018, Defendant filed a Reply (docket no. 169). Defendant requests a hearing on the Motion, but the court finds that a hearing is unnecessary. The matter is fully submitted and ready for decision.

III. RELEVANT FACTUAL BACKGROUND

On April 16, 2017, Defendant and E.M. spent the day at the residence of Ashley Ostrander and Donte Richards, mutual friends. Shortly after midnight, Defendant called 911 to report that E.M., his girlfriend, was unresponsive and not breathing. Officers from the Dubuque Police Department and paramedics arrived at the residence. Officers knew from previous encounters that Ostrander and Richards were crack users and that Richards was a crack dealer. As paramedics attempted to revive E.M., officers spoke with Defendant, Ostrander and Richards. Officer Matthew Walker spoke with Defendant, and their conversation was recorded on his body camera.

Officer Walker spoke calmly and casually to Defendant, gathering basic information about Defendant and the circumstances that led to his finding E.M. not breathing. Defendant was cooperative and provided the requested information, but repeatedly

[1] Count 3 of the Indictment charged Defendant with possession with intent to distribute a controlled substance near a protected location, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(C), 851 and 860(a). *See* Indictment at 3-4. The court dismissed Count 3 prior to trial. *See* January 12, 2018 Order (docket no. 101).

wandered back and forth throughout the residence during the conversation. After the fourth time Defendant turned and walked into a different room, Officer Walker asked Defendant to remain in place, stating, "I just gotta talk to you, so kind of just stay here." Defendant stood still momentarily to answer Officer Walker's next question, but then again walked away towards a different room. Officer Walker followed, and asked Defendant whether E.M. had consumed anything illegal that day. Defendant turned around and answered while walking into another room, telling Officer Walker as he went that E.M. had been using narcotics earlier in the evening. At that point, Officer Walked ask Defendant to come with him to the rear of the residence, where Defendant was questioned and made incriminating statements.

IV. ANALYSIS

In the Motion Suppress, Defendant claimed that he was unlawfully seized without probable cause when officers questioned him at the rear of the residence, and that he was subjected to a custodial interrogation without being read his *Miranda* rights. *See* Brief in Support of Motion to Suppress (docket no. 36-1) at 3-7. Defendant argued that the court, therefore, was required to suppress his incriminating statements to law enforcement. *See id.* at 7. In the Order, the court found that Defendant was not subjected to a custodial arrest, and that, therefore, no suppression was warranted. *See* Order at 8-12. Rather, the court found that the questioning at the rear of the residence was a lawful *Terry* stop. *See id.* at 7; *see also Terry v. Ohio*, 392 U.S. 1, 20-22 (1968) (authorizing law enforcement to temporarily detain an individual for an investigatory stop based on reasonable suspicion that criminal activity has been, is being or is about to be committed). The court found that "the information about E.M.'s drug use, particularly when coupled with the knowledge of the drug use of the other occupants at the residence, established reasonable suspicion that criminal activity may have been afoot." Order at 7.

Defendant now argues that he was subjected to a *Terry* stop earlier in the encounter,

when Officer Walker told him to "just kind of stay here." *See* Motion at 7. Defendant points out that Officer Walker told Defendant to "just kind of stay here" before he asked Defendant about E.M.'s drug use.[2] *See id*. at 5. Defendant argues that without the information about E.M.'s drug use, Officer Walker lacked reasonable suspicion for a *Terry* stop. *See id*. at 10-11. Defendant further argues that the information about E.M.'s drug use must be suppressed, and that the court must, therefore, reverse its decision in the Order and suppress all statements Defendant made to law enforcement. Upon consideration, for the following reasons, the court shall not reverse its decision in the Order.

A. Seizure

Defendant argues that "Officer Walker seized . . . Defendant by ordering . . . Defendant to stop walking, and [saying] 'just stay here'" in order to ask him questions. *Id*. at 3 (emphasis omitted). However, "mere police questioning does not constitute a seizure." *United States v. Barry*, 394 F.3d 1070, 1074 (8th Cir. 2005) (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). The relevant inquiry is whether "the questioning is 'so intimidating, threatening, or coercive that a reasonable person would not have believed himself free to leave.'" *United States v. Flores-Sandoval*, 474 F.3d 1142, 1145 (8th Cir. 2007) (quoting *United States v. Hathcock*, 103 F.3d 715, 718 (8th Cir. 1997)).

"For an officer's behavior to rise to the level of a Fourth Amendment seizure, the officer must use 'physical force or [a] show of authority' to restrain a citizen's liberty." *United States v. Cook*, 842 F.3d 597, 600 (8th Cir. 2016) (alteration in original) (quoting

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[2] In the Report and Recommendation, Judge Williams reversed the order of these two events in his findings of fact. *See* Report and Recommendation at 4. Defendant alleges that this was done intentionally and for some improper purpose. *See* Motion at 9-10. The court finds this allegation to be wholly without basis. The chronology of these two events was not germane to the issues presented in the Motion to Suppress, and the court finds that their transposition in the Report and Recommendation was a simple and genuine error.

Terry, 392 U.S. at 19 n.16). To determine whether a seizure has occurred, the court "examine[s] the totality of the circumstances, considering seven non-exclusive factors." *United States v. Garcia*, 888 F.3d 1004, 1009 (8th Cir. 2018). The seven factors the court considers are:

> [O]fficers positioning themselves in a way to limit the person's freedom of movement, the presence of several officers, the display of weapons by officers, physical touching, the use of language or intonation indicating compliance is necessary, the officer's retention of the person's property, or an officer's indication the person is the focus of a particular investigation.

Id. (alteration in original) (quoting *United States v. Aquino*, 674 F.3d 918, 923 (8th Cir. 2012)).

In this case, five of the seven factors were wholly absent. Officer Walker did not position himself in a way that restricted Defendant's movement. Even after instructing Defendant to "just kind of stay here," Officer Walker remained with his back to the wall, allowing Defendant to move freely. The video from Officer Walker's body camera shows that he never displayed a weapon or physically touched Defendant. Officer Walker was not in possession of any of Defendant's personal property. Finally, Officer Walker never indicated to Defendant that he was the focus of an investigation. Indeed, Officer Walker's questions clearly demonstrated that he was investigating the circumstances that led to E.M. becoming unresponsive and was seeking information that would aid the paramedics. The absence of these five factors weighs toward a finding that Defendant was not seized. Additionally, although there were multiple officers in the residence, only Officer Walker was focused on Defendant. The other officers were speaking to the other residents or carrying out other tasks on the scene. This sixth factor, therefore, also weighs toward a finding that Defendant was not seized.

Defendant's argument rests entirely on the seventh factor, the use of language or intonation indicating compliance is necessary. Defendant argues that when Officer Walker

said, "I just gotta talk to you, so just kind of stay here," it constituted a "'show of authority' . . . [and] a reasonable person would not [have] felt free to decline the officer's request." Motion at 7. The court finds, however, that Officer Walker's intonation and word choice were such that a reasonable person would have felt free not to comply. Officer Walker spoke casually and colloquially with Defendant, indicating that he was requesting Defendant's assistance in gathering information. Officer Walker's tone was calm and friendly, conveying that his words were a request and not a command. *See United States v. Vera*, 457 F.3d 831, 835 (8th Cir. 2006) (finding that the same words from an officer may be a request or command based on the officer's demeanor). Indeed, Defendant did not comply with Officer Walker's request, but instead continued to move throughout the residence. The court finds that, in the totality of the circumstances, a reasonable person in Defendant's position would have felt free to leave, and that, therefore, Defendant was not seized.

Even if Officer Walker's words constituted a show of authority, however, Defendant was still not seized because he failed to submit to that show of authority. A seizure "requires either physical force . . . or, where that is absent, submission to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (emphasis omitted). Evidence obtained while a defendant is fleeing, resisting or otherwise failing to comply with a show of authority, even if that show of authority was unlawful, is not subject to suppression. *See id.* at 629. In this case, Defendant did not submit when Officer Walker told him to "just kind of stay here." Instead, Defendant continued to walk away from Officer Walker and move throughout the residence. Therefore, Defendant was not seized when he told Officer Walker about E.M.'s drug use. Accordingly, the statement was not the product of an unlawful seizure and is not subject to suppression.

B. Reasonable Suspicion

Even if Defendant were seized when he told Officer Walker about E.M.'s drug use,

the court finds that the seizure would have been a lawful *Terry* stop supported by reasonable suspicion. "For an investigative *Terry*-type seizure to be constitutional under the Fourth Amendment, an officer must be aware of 'particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed.'" *United States v. Donnelly*, 475 F.3d 946, 952 (8th Cir. 2007) (quoting *United States v. Martin*, 706 F.2d 263, 265 (8th Cir. 1983)). "A reviewing court must look at the totality of the circumstances, allowing 'officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.'" *United States v. Davison*, 808 F.3d 325, 329 (8th Cir. 2015) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)).

In this case, officers knew that E.M. was unresponsive and not breathing based on Defendant's 911 call. They knew that E.M. had no apparent injuries or other visible indicators that would explain her condition. They also knew that Ostrander and Richards were frequent narcotics users, and that Richards was a known narcotics seller. In the totality of the circumstances, therefore, officers were reasonable in their suspicion that E.M. might have been using illegal narcotics. Officer Walker, therefore, was justified in conducting a brief investigatory stop of Defendant to determine whether illegal drug activity was taking place at the residence. *See United States v. Sokolow*, 490 U.S. 1, 9 (1989) (noting that evidence need not be "conclusive," but merely "sufficient to warrant consideration"). Accordingly, even if Defendant were seized when Officer Walker told him to "just kind of stay here," that seizure was lawful and does not warrant suppression.

V. CONCLUSION

In light of the foregoing, Motion (docket no. 163) is **DENIED**.

IT IS SO ORDERED.

DATED this 29th day of August, 2018.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

UNITED STATES DISTRICT COURT

Northern District of Iowa

UNITED STATES OF AMERICA) **JUDGMENT IN A CRIMINAL CASE**
)
v.) Case Number: **0862 2:17CR01034-001**
)
RICHARD LEROY PARKER) USM Number: **07178-029**
)

■ **ORIGINAL JUDGMENT**
☐ **AMENDED JUDGMENT**
Date of Most Recent Judgment:
Reason for Amendment:

Melanie S. Keiper
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)
which was accepted by the court.

■ was found guilty on count(s) **1 and 2 of the Indictment filed on August 24, 2017**
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(C), 851, and 860(a)	**Distribution of Heroin Near a Protected Location Resulting in Death After Two or More Prior Felony Drug Convictions**	**04/17/2017**	**1**
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(C), 851, and 860(a)	**Possession With Intent to Distribute Heroin Near a Protected Location After Two or More Prior Felony Drug Convictions**	**04/17/2017**	**2**

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

■ Count(s) **3 was dismissed on January 12, 2018**

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Linda R. Reade
United States District Court Judge
Name and Title of Judge

Signature of Judge

October 17, 2018
Date of Imposition of Judgment

October 18, 2018
Date

DEFENDANT: **RICHARD LEROY PARKER**
CASE NUMBER: **0862 2:17CR01034-001**

PROBATION

☐ The defendant is hereby sentenced to probation for a term of:

IMPRISONMENT

■ The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
Life. This term of imprisonment consists of a life term imposed on Count 1 and a life term imposed on Count 2 of the Indictment, to be served concurrently. It is ordered that this term of imprisonment be served consecutively to the undischarged term of imprisonment imposed in the Iowa District Court for Dubuque County, Case No. FECR061725, pursuant to USSG §5G1.3(d).

■ The court makes the following recommendations to the Federal Bureau of Prisons:
It is recommended that the defendant be designated to a Bureau of Prisons facility as close to the defendant's family as possible, commensurate with the defendant's security and custody classification needs.

It is recommended that the defendant participate in the Bureau of Prisons' 500-Hour Comprehensive Residential Drug Abuse Treatment Program or an alternate substance abuse treatment program.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant must surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant must surrender for service of sentence at the institution designated by the Federal Bureau of Prisons:

☐ before 2 p m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the United States Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **RICHARD LEROY PARKER**
CASE NUMBER: **0862 2:17CR01034-001**

SUPERVISED RELEASE

■ Upon release from imprisonment, the defendant will be on supervised release for a term of:
10 years. This term of supervised release consists of a 10-year term imposed on Count 1 and a 10-year term imposed on Count 2 of the Indictment, to be served concurrently.

MANDATORY CONDITIONS OF SUPERVISION

1) The defendant must not commit another federal, state, or local crime.

2) The defendant must not unlawfully possess a controlled substance.

3) The defendant must refrain from any unlawful use of a controlled substance.
The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future controlled substance abuse. *(Check, if applicable.)*

4) ■ The defendant must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

5) ☐ The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, and/or is a student, and/or was convicted of a qualifying offense. *(Check, if applicable.)*

6) ☐ The defendant must participate in an approved program for domestic violence. *(Check, if applicable.)*

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervision, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in the defendant's conduct and condition.

1) The defendant must report to the probation office in the federal judicial district where the defendant is authorized to reside within 72 hours of the time the defendant was sentenced and/or released from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed. The defendant must also appear in court as required.

3) The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.

4) The defendant must answer truthfully the questions asked by the defendant's probation officer.

5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where the defendant lives or anything about the defendant's living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6) The defendant must allow the probation officer to visit the defendant at any time at the defendant's home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about the defendant's work (such as the defendant's position or the defendant's job responsibilities), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9) If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.

10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12) As directed by the probation officer, the defendant must notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and must permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **RICHARD LEROY PARKER**
CASE NUMBER: **0862 2:17CR01034-001**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the United States Probation Office:

1. **The defendant must submit the defendant's person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. The United States Probation Office may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.**

2. **The defendant must participate in a mental health evaluation. The defendant must complete any recommended treatment program, and follow the rules and regulations of the treatment program. The defendant must take all medications prescribed to the defendant by a licensed medical provider.**

3. **The defendant must participate in an evaluation for anger management and/or domestic violence. The defendant must complete any recommended treatment program, and follow the rules and regulations of the treatment program.**

4. **The defendant must participate in a substance abuse evaluation. The defendant must complete any recommended treatment program, which may include a cognitive behavioral group, and follow the rules and regulations of the treatment program. The defendant must participate in a program of testing for substance abuse. The defendant must not attempt to obstruct or tamper with the testing methods.**

5. **The defendant must not use or possess alcohol. The defendant is prohibited from entering any establishment that holds itself out to the public to be a bar or tavern without the prior permission of the United States Probation Office**

6. **If not employed at a lawful type of employment as deemed appropriate by the United States Probation Office, the defendant must participate in employment workshops and report, as directed, to the United States Probation Office to provide verification of daily job search results or other employment related activities. In the event the defendant fails to secure employment, participate in the employment workshops, or provide verification of daily job search results, the defendant may be required to perform up to 20 hours of community service per week until employed.**

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them. Upon a finding of a violation of supervision, I understand the Court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the condition of supervision.

Defendant Date

United States Probation Officer/Designated Witness Date

DEFENDANT: **RICHARD LEROY PARKER**
CASE NUMBER: **0862 2:17CR01034-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment[1]	Fine	Restitution
TOTALS	**$ 200**	**$ 0**	**$ 0**	**$ 0**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss[2]	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

[1]Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014.
[2]Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **RICHARD LEROY PARKER**
CASE NUMBER: **0862 2:17CR01034-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ■ Lump sum payment of $ **200** due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant must pay the cost of prosecution.

☐ The defendant must pay the following court cost(s):

☐ The defendant must forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

United States Court of Appeals
For the Eighth Circuit

No. 18-3277

United States of America

Plaintiff - Appellee

v.

Richard Leroy Parker

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Dubuque

Submitted: September 26, 2019
Filed: April 5, 2021

Before LOKEN, COLLOTON, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

Richard Leroy Parker was found guilty of distributing a controlled substance near a protected location resulting in death and of possession with intent to distribute a controlled substance near a protected location. He was sentenced to life in prison

on both counts. Parker argues that the district court[1] erred by: (1) denying his motion to suppress statements made to law enforcement; (2) not instructing the jury on a lesser-included offense; (3) denying his motion for a new trial; and (4) sentencing him to two concurrent life sentences. We find no error and affirm.

I.

Shortly after midnight on April 17, 2017, Parker called 911 from a friend's apartment on Rhomberg Avenue to report that his girlfriend, E.M., was not breathing. Officers from the Dubuque Police Department arrived at the apartment, which was shared by Donte Richards and Ashley Ostrander, both known narcotics users.

As Officer Richard Walker interviewed Parker, Parker walked around the apartment, where other officers, Ostrander, Richards, and paramedics were either speaking, moving about, or caring for E.M. Parker would pause briefly to answer questions. Eventually, Officer Walker told Parker to "just kinda stay here." Parker stopped for a moment and then continued to roam throughout the apartment. Officer Walker asked him whether E.M. had drunk alcohol or used drugs. Parker replied that E.M. had been drinking and used cocaine. At this point, another officer asked Officer Walker and Parker to continue their conversation outside.

Outside, Officer Walker continued asking Parker about the events that led up to E.M.'s medical emergency and the 911 call. Officer Walker also asked whether Parker had used drugs that day, which Parker denied. As they spoke, Parker tried to reenter the apartment a few times, but each time Officer Walker asked him to remain outside, including when paramedics brought a stretcher through the apartment's back

[1]The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa, adopting in part and modifying in part the report and recommendations of the Honorable C.J. Williams, then-Chief United States Magistrate Judge for the Northern District of Iowa.

door. Eventually, Officer Walker was able to get Parker to stand inside a vestibule just outside the apartment door. Here, Officer Walker asked Parker about his own drug use and this time, Parker admitted to using drugs earlier that evening. He also told Officer Walker that he last saw E.M. alert roughly 30 minutes before he called 911. Following this conversation, Parker reentered the apartment and sat in the dining room. While Parker sat, officers learned that E.M. had died at the hospital.

Investigator David Randall arrived at the apartment around 2:45 a.m. and asked whether Parker, Ostrander, and Richards would voluntarily accompany him to the police station. He told them that they were not under arrest. Parker was the only one who agreed. Before asking any questions at the station, Investigator Randall again informed Parker that he was not under arrest and also advised him of his *Miranda* rights. Parker waived those rights and admitted that he and E.M. snorted something he believed was heroin. Later that morning, Parker was arrested for a parole violation and police executed a search warrant at the Rhomberg apartment. Officers recovered baggies containing four grams of heroin from a living room chair.

Parker was charged with one count of distributing a controlled substance near a protected location resulting in death (Count I) and with two counts of possession with intent to distribute a controlled substance near a school (Counts II and III). *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(C), 851, & 860(a).[2] At trial, testimony showed that Parker and E.M. went into a bedroom around 9 or 10 p.m. and snorted an unknown substance prior to falling asleep. Parker woke up to Richards knocking on the door around midnight. Parker then tried to wake E.M., but she was unresponsive. A state medical examiner testified that E.M's death was caused by a mixed drug toxicity involving cocaine, ethanol, and heroin. He explained that

[2]Before trial, the Government dismissed Count III of the indictment after the district court suppressed evidence found at Parker's residence because the search warrant application lacked probable cause.

cocaine and heroin were each present at potentially fatal levels and that E.M. had ingested the heroin shortly before her death because 6-monoacetylmorphine, a byproduct of heroin which breaks down rapidly, was found during her autopsy.

Parker was convicted on two counts. The Government sought to enhance Parker's sentence based on four prior felony drug offenses. At sentencing, the district court found that those convictions supported a mandatory life sentence on both counts. It also found that Parker's total base level offense was 47 but reduced it to 43 because that was the maximum offense level permitted by the Guidelines, and that his criminal history was category III. The court accepted the Guidelines recommendation and sentenced Parker to life imprisonment for Counts I and II. Parker timely appealed.

II.

Parker claims the district court erred in denying his motion to suppress statements he made at the Rhomberg apartment and later at the police station. He makes two arguments about statements he made to Officer Walker at the apartment: First, he says that he was unlawfully seized during his conversation with Officer Walker. Alternatively, Parker contends that even if he was seized lawfully, he was functionally in custody during that conversation, and so Officer Walker had to provide him *Miranda* warnings. Because Officer Walker never provided the warnings, Parker says he was unlawfully interrogated. As to the statements Parker made at the police station, he argues that his waiver of his *Miranda* rights was involuntary.

A.

Parker argues that the statements he made to Officer Walker must be suppressed because he was in custody and not provided a valid *Miranda* warning.

We review the district court's custody determination *de novo* and its fact findings for clear error. *United States v. Vinton*, 631 F.3d 476, 481 (8th Cir. 2011).

"The Fifth Amendment requires that *Miranda* warnings be given when a person is interrogated by law enforcement after being taken into custody." *United States v. Giboney*, 863 F.3d 1022, 1027 (8th Cir. 2017). The Government concedes Parker was interrogated, so we need only determine whether he was in custody. "The ultimate question in determining whether a person is in 'custody' for purposes of *Miranda* is whether there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *United States v. Williams*, 760 F.3d 811, 814 (8th Cir. 2014) (citation omitted). "To determine whether a suspect was in custody, we ask whether, given the totality of the circumstances, a reasonable person would have felt at liberty to terminate the interrogation and leave or cause the agents to leave." *United States v. Laurita*, 821 F.3d 1020, 1024 (8th Cir. 2016) (citation omitted).

"[S]eizure is a necessary prerequisite to *Miranda*." *United States v. Newton*, 369 F.3d 659, 672 (2d Cir. 2004). Parker says that he was unlawfully seized after Officer Walker told him to "just kinda stay here" because compliance was mandatory. We disagree. "It is well settled that not all interactions between law enforcement and citizens amount to seizures under the Fourth Amendment." *United States v. Cook*, 842 F.3d 597, 600 (8th Cir. 2016). Consensual encounters between officers and citizens, for example, are not Fourth Amendment seizures. *United States v. Perez-Sosa*, 164 F.3d 1082, 1084 (8th Cir. 1998). But, "[a] consensual encounter becomes a seizure when a reasonable person in the same circumstances would not feel free to leave." *Id.*

Parker's initial interaction with officers was consensual. After waking up, he called 911 to report that E.M. needed medical assistance. Once paramedics and officers arrived, it is reasonable to expect that officers would talk to individuals at the

apartment. Parker resists this conclusion, arguing that Officer Walker seized him by telling him to "just kinda stay here." In making this argument, Parker implicitly concedes that his encounter was consensual before that request.

Because the encounter was initially consensual, our task is to examine the totality of the circumstances to determine whether and when Parker was seized or had his freedom of movement restrained to a degree associated with formal arrest. *See United States v. Garcia*, 888 F.3d 1004, 1009 (8th Cir. 2018); *Giboney*, 863 F.3d at 1027. We examine several-nonexhaustive factors to guide our inquiry, none of which is dispositive. *Id.* We consider whether the officers restricted Parker's freedom of movement, informed him that questioning was voluntary, or that he was free to leave. *See id.* We also consider whether officers engaged in strong arm tactics or deceptive strategies while questioning Parker, whether the apartment was police dominated, and whether Parker was placed under arrest after the questioning ended. *See id.*

Officer Walker and Parker's conversation occurred as Parker paced throughout the apartment while paramedics attended to E.M. and other officers spoke with Ostrander and Richards. We agree with the district court that Officer Walker spoke "casually and colloquially" with Parker and that his "tone was calm and friendly, conveying that his words were a request and not a command." D. Ct. Dkt. 170 at 6. Officer Walker's request that Parker "just kinda stay here" did not by itself constitute a seizure or a significant restraint on his movement because it was "spoken as a colloquialism to be understood by the reasonable person to mean something more on the order of 'be patient while we finish up here,' not 'you are being detained.'" *See United States v. Valle Cruz*, 452 F.3d 698, 706 (8th Cir. 2006).

Parker next claims that even if he was not seized inside the apartment, a seizure occurred outside when Officer Walker told him to "just wait here." Officer Walker and Parker continued their conversation outside at another officer's request. While outside, paramedics continued to assist E.M. and also brought a stretcher inside

through the back door. During this conversation, Parker moved toward the back door and each time, Officer Walker told him to remain outside. Viewed in context, Officer Walker telling Parker to wait outside was not a command indicating compliance was necessary; instead he was ensuring that neither he nor Parker got in the way of paramedics or other conversations inside. Parker ignores this larger context and focuses on Officer Walker's "order[] to just 'wait here' when he showed even the slightest sign of moving." Parker Br. 29. "The totality-of-the-circumstances test precludes this sort of divide-and-conquer analysis." *See United States v. Quinn*, 812 F.3d 694, 698 (8th Cir. 2016) (citation omitted). Officer Walker's statement to Parker outside would be understood by the reasonable person to mean "let's just stay here and out of the way" rather than an order indicating something akin to "you are being detained." *See Valle Cruz*, 452 F.3d at 706. And although Parker was never explicitly told the questioning was voluntary, his continued walking around the apartment shows he possessed virtually unrestrained freedom of movement during the questioning. By merely following Parker inside and saying they should wait outside, Officer Walker did not restrain Parker's "freedom of movement to the degree associated with formal arrest." *See Giboney*, 863 F.3d at 1028 (citation omitted).

Plus, none of the other factors suggest Parker's encounter had ripened into a seizure or custodial arrest. The officers' weapons were all holstered, none of Parker's personal property was retained, nor did he have any indication that he was the focus of a particular investigation. *See Garcia*, 888 F.3d at 1009. Even though the residence was police dominated as officers and paramedics responded to E.M., "we have refused to find custody in circumstances where the atmosphere was much more police dominated." *Giboney*, 863 F.3d at 1028 (finding a home was not police dominated during execution of a search warrant). Once Officer Walker's conversation with Parker concluded, he was not placed under arrest. He remained in the dining room until he voluntarily agreed to accompany Investigator Randall to the police station. Viewing the totality of the circumstances, we conclude Parker was neither seized nor had a restraint on his freedom of movement of the degree associated with formal arrest and therefore he was not "in custody."

Finally, Parker relies on *United States v. Maltais*, 403 F.3d 550 (8th Cir. 2006) to contend that even if he "was initially seized lawfully (or not seized at all), the length and manner of the continued detention rendered it unlawful." Parker Br. 29. Parker's reliance is misplaced. In *Maltais*, we observed that "[a] detention may become a *de facto* arrest if it lasts for an unreasonably long time." *Id.* at 556. Crucially, the defendant in *Maltais* had been seized following a *Terry* stop. *Id.* at 554–55. Parker was never seized and therefore there was no detention that could have been rendered unlawful due to its length.[3]

B.

In another attempt to suppress his statements, Parker says that even if he was not seized at the apartment, and even if he was not subject to a custodial interrogation requiring a *Miranda* warning before arriving at the police station, he did not voluntarily waive his *Miranda* rights before being interrogated by Investigator Randall.

A *Miranda* waiver must be made voluntarily, knowingly, and intelligently. *United States v. Gaddy*, 532 F.3d 783, 788 (8th Cir. 2008). The waiver must be voluntary in the sense that "it was the product of a free and deliberate choice rather

[3]Parker also argues that he could not have validly consented to accompanying Investigator Randall to the police department later that night. Parker Br. 30–31. He claims his consent was invalid because "any consent is invalid when Parker was already told he did not have a choice" by Officer Walker. Parker Br. 31 (citation omitted). Investigator Randall asked Parker, Ostrander, and Richards to accompany him to the station and also informed them that they were not under arrest. Ostrander and Richards declined, but Parker agreed. Regardless of Officer Walker's previous statement, the voluntary nature of Investigator Randall's request was clear.

than intimidation, coercion, or deception." *Vinton*, 631 F.3d at 483.[4] We look to the totality of the circumstances and we accept the district court's factual findings unless they were clearly erroneous. *Id.* at 483. We review the ultimate determination of voluntariness *de novo*. *Id.*

Parker and Officer Walker's conversation ended around 12:48 a.m. Parker then sat in the dining room until 2:45 a.m and during this time period, fell asleep. There is no suggestion that officers intimidated, coerced, or deceived Parker following his conversation with Officer Walker. To the contrary, once Investigator Randall arrived, he informed Parker that he was not under arrest. Investigator Randall then asked Parker if he would accompany him to the station and reiterated that Parker was not under arrest. Even if Parker's contention that Officer Walker demanded he provide a statement to Investigator Randall were accurate, Investigator Randall made it clear that Parker was not under arrest and was not required to accompany him to the station. From this, it is apparent that Parker went to the police station voluntarily and was not in custody, so a *Miranda* warning was unnecessary. But even if we assume that Parker was seized and in custody at the police station, it is clear from the totality of the circumstances that Parker voluntarily waived his *Miranda* rights.

III.

Parker next contends that the district court abused its discretion by denying his request for a lesser-included-offense jury instruction of possession of heroin for Count II, in addition to distribution of heroin. We review the denial of a lesser-included offense instruction for abuse of discretion. *United States v. Santoyo-Torres*,

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[4]In addition to being the product of free will, a suspect must waive their rights "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Vinton*, 631 F.3d at 483. Parker does not argue he was unaware of the right and the consequences of abandoning it, so we only address whether it was voluntarily waived. *See* Parker. Br. 36.

518 F.3d 620, 624 (8th Cir. 2008). "The defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *United States v. Ziesman*, 409 F.3d 941, 949 (8th Cir. 2005) (citation omitted).

Parker was entitled to a lesser-included instruction if he could show, among other things,[5] that there was some evidence justifying conviction of the lesser offense and the proof on the elements differentiating possession and distribution were sufficiently in dispute that he could be found guilty of possession but not distribution. *See id.* Parker was charged with possessing heroin with the intent to distribute it. *See* 21 U.S.C. § 841(a)(1). Although Parker concedes he possessed heroin, he claims he did not intend to distribute it because "[o]nce he realized what the substance was, he intended to return it to the source." Parker Br. 38. Because he did not intend to resell the heroin, Parker says the court erred by denying the simple possession instruction. *Id.*

We disagree. "Distribute" means "to deliver . . . a controlled substance," 21 U.S.C § 802(11), and "deliver" means "the actual, constructive or attempted transfer of a controlled substance," *id.* § 802(8); *see also United States v. King*, 567 F.2d 785, 790–91 (8th Cir. 1977). We have repeatedly held that "federal drug distribution charges do not require an exchange for value." *United States v. Bynum*, 669 F.3d 880, 887 (8th Cir. 2012); *see also United States v. Fregoso*, 60 F.3d 1314,

[5]"[A] defendant is entitled to a lesser-included-offense instruction when: (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) there is some evidence which would justify conviction of a lesser offense; (4) the proof on the element or elements differentiating the two crimes is sufficiently in dispute that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense; and (5) there is mutuality, i.e., a charge may be demanded by either the prosecution or defense." *Ziesman*, 409 F.3d at 949 (citation omitted). The third and fourth requirements are the only ones in dispute.

1325 (8th Cir. 1995). Thus, a defendant distributes a controlled substance anytime he gives it to a third party. *See Fregoso*, 60 F.3d at 1325 ("[Defendant] distributed cocaine within the meaning of the statute when he freely gave cocaine to [his co-conspirators] on numerous occasions *as well as when he sold* . . . some of what he had purchased.") (emphasis added). As just discussed, Parker admits he intended to return the heroin to the individual from whom he purchased it. The district court rightly observed there was no testimony Parker "intended to keep and possess the heroin for his personal use without ever transferring it to another person." D. Ct. Dkt. 151 at 6. The court did not abuse its discretion in denying Parker's request for the lesser-included possession instruction.

IV.

Parker also asks that we reverse the jury's verdicts for Counts I and II because the verdicts lacked sufficient evidence.[6] "We review sufficiency of the evidence *de novo*, viewing evidence in the light most favorable to the jury's verdict, resolving conflicts in the government's favor, and accepting all reasonable inferences that support the verdict." *United States v. Seals*, 915 F.3d 1203, 1205 (8th Cir. 2019) (internal quotation marks and citations omitted).

As to Count I, Parker contends we should overturn the jury's verdict because the Government failed to show that he intentionally distributed heroin to E.M. and also failed to show the heroin caused her death. "To sustain a conviction under

[6]Parker's challenge to the validity of his conviction under Count II fails for the same reasons the district court did not abuse its discretion when it declined a lesser-included-offense instruction to the jury. Parker once more contends that because he intended to return the heroin to an individual in Chicago, he did not intend to deliver it. As discussed above, Parker's testimony shows he intended to transfer the heroin to another person, so we conclude that there was sufficient evidence to support his conviction. *See Bynum*, 669 F.3d at 887; *Fregoso*, 60 F.3d 1325.

21 U.S.C. § 841(a)(1) with a serious bodily injury or death enhancement under § 841(b)(1)(C), the government must prove: (i) knowing or intentional distribution of heroin, and (ii) serious bodily injury or death caused by ('resulting from') the use of that drug." *United States v. Harris*, 966 F.3d 755, 761 (8th Cir. 2020) (quoting *United States v. Lewis*, 895 F.3d 1004, 1009 (8th Cir. 2018)).

First, Parker claims that E.M. took the heroin on her own, even after he advised against it. He says this shows that he did not intentionally transfer the drugs to her. But, he also testified that he possessed the heroin before E.M. snorted it, she did not steal it from him, he did not attempt to stop her, and that he snorted one of the four lines E.M. prepared. In addition, his parole officer testified that Parker told her E.M. "took the pill–or crushed it up *after he gave it to her*." 1/17/18 Tr. 430:24–25 (emphasis added). Though Parker later testified that his parole officer lied, it is not for us to decide whether he or his parole officer was more credible. *United States v. Reddest*, 512 F.3d 1067, 1070–71 (8th Cir. 2008) ("[C]redibility determinations and the weighing of conflicting evidence are committed to the jury . . . . [T]he jury's credibility determinations are virtually unreviewable on appeal.") (internal quotation marks omitted). Viewing the trial evidence in the light most favorable to the verdict, we find there was sufficient evidence for the jury to find Parker intentionally distributed the heroin to E.M. because Parker knew the substance was heroin, brought it to the Rhomberg apartment, discussed it with E.M., told his parole officer that he gave it to E.M., and ultimately snorted it alongside E.M.

Second, Parker claims that E.M.'s death resulted from mixed drug toxicity, not his heroin alone. "[T]he statutory sentencing enhancement in § 841(b)(1)(C) may be proved in two ways: (1) 'but-for' cause, or (2) independently sufficient cause." *Lewis*, 895 F.3d at 1010. At trial, Parker testified that he and E.M. had snorted heroin shortly before her death, and the jury also heard a recorded jailhouse telephone call between Parker and an unidentified individual. During that call, Parker stated E.M. took "a little bump of that right there, boom, that was it, next thing you know she laid

down, she was outta there." The jury also heard the medical examiner's testimony that heroin was present at a potentially fatal level and that E.M.'s blood contained 6-monoacetylmorphine(6-MAM), which is a byproduct of heroin that converts into morphine in roughly 30 minutes. 1/17/18 Tr. 391:9–21. The medical examiner then explained that finding 6-MAM in the blood "suggests that that person has used quite recently prior to death." *Id.* at 391:17–19. Although the medical examiner testified that E.M.'s cause of death was a mixed toxicity involving cocaine, ethanol, and heroin,[7] there was sufficient evidence for the jury to conclude that the heroin Parker gave E.M. was an independently sufficient cause of her death because she immediately lost consciousness after taking it, still had 6-MAM in her blood, and heroin was present at a fatal level. *See Lewis*, 895 F.3d at 1010; *Seals*, 915 F.3d at 1206; *United States v. Allen*, 716 F. App'x 447, 450–51 (6th Cir. 2017). Because there was sufficient evidence, we affirm Parker's convictions.

V.

The district court sentenced Parker to life in prison on both Counts I and II.[8] Parker argues that his concurrent life sentence for Count II is incorrect because: (1) the court should have sentenced him under the First Step Act; and (2) he does not have two qualifying felony drug offenses to support a mandatory life sentence.

Because Parker's convictions and his life sentence under Count I are valid, we decline to review his concurrent life sentence under Count II pursuant to the

[7]The medical examiner also testified that cocaine, cocaethylene (the combination of cocaine and ethanol), and heroin were each present at possibly fatal levels.

[8]Parker argues that his life sentence for Count I must be reversed because the Government failed to prove that his distribution of heroin caused E.M.'s death. Because we conclude that there was sufficient evidence at trial to support his conviction, we reject this claim.

concurrent sentence doctrine. *See Eason v. United States*, 912 F.3d 1122, 1123 (8th Cir. 2019) ("The concurrent sentence doctrine allows courts to decline to review the validity of a concurrent conviction or sentence when a ruling in the defendant's favor would not reduce the time he is required to serve or otherwise prejudice him in any way.") (citation omitted); *see also Oslund v. United States*, 944 F.3d 743, 746 (8th Cir. 2019).

The elements necessary to apply the concurrent sentence doctrine are present here: (1) Parker received concurrent life sentences on Count I and Count II of the indictment; (2) we have decided that his conviction and sentence under Count I are valid; and (3) a ruling in Parker's favor on Count II would not reduce the time he would serve under the valid life sentence on Count I. *See United States v. Smith*, 601 F.2d 972, 973 (8th Cir. 1979) (setting forth elements).

We acknowledge that the Supreme Court has explained that even a separate $50 assessment can preclude us from applying the concurrent sentence doctrine. *Ray v. United States*, 481 U.S. 736, 737 (1987) (per curiam). But here, unlike in *Ray*, we have already decided that Parker's conviction under Count II was valid. And while the district court imposed the $100 assessment required by 18 U.S.C. § 3013(a)(2)(a) under Count II, that assessment would apply regardless of his sentence because it is imposed on "any person convicted of" a federal felony. Because Parker was properly convicted on Count II and subject to the assessment regardless of his sentence, he is not prejudiced by our application of the doctrine.

VI.

Parker's convictions and sentence are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3277

United States of America

Plaintiff - Appellee

v.

Richard Leroy Parker

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Dubuque
(2:17-cr-01034-LRR-1)

JUDGMENT

Before LOKEN, COLLOTON and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

April 07, 2021

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Adopted April 15, 2015
Effective August 1, 2015

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.

V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States,* 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file pro se a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California,* 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing pro se a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petion for writ of certiorari.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3277

United States of America

Appellee

v.

Richard Leroy Parker

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Dubuque
(2:17-cr-01034-LRR-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

June 10, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans