

NO. _____

SUPREME COURT OF THE UNITED STATES

Jessica Lang

Petitioner,

vs.

State of Nebraska,

Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Nebraska

PETITION FOR A WRIT OF CERTIORARI

Gerard A. Piccolo, 16023
Hall County Public Defender
117 East First Street
Grand Island, NE 68801-6022
Tel: (308) 385-5016
Fax: (308) 385-5029
gerardp@hallcountyne.gov

Attorney for Petitioner

I. Question Presented

Whether police officers violate the Fourth Amendment when they search a passenger's purse, while on her lap, inside an automobile where probable cause exists to search the automobile compartment.

II. TABLE OF CONTENTS

	PAGES
I. Question Presented.....	i
II. Table of Contents.....	ii
III. Table of Authorities.....	iii
IV. Parties to the Action; History of Case; Jurisdiction.....	1
V. Constitutional Provision Involved.....	2
VI. Statement of the Case.....	2
VII. ARGUMENT.....	7
VIII. APPENDIX.....	10

III. TABLE OF AUTHORITIES

Cases Cited:

<i>Birchfield v. North Dakota</i> , 579 U.S. ___, 136 S. Ct. 2160, 195 L.Ed.2nd 560 (2016).....	7, 8
<i>Carroll v. U.S.</i> , 267 U.S. 132 (1925).....	7
<i>Riley v. California</i> , 573 U.S. ____ (2014).....	8
<i>United States v. Di Re</i> , 332 U.S. 581, 68 S. Ct. 222, 92 L.Ed. 210 (1948).....	8
<i>U.S. v. Robinson</i> , 414 U.S. 218 (1973).....	8
<i>U.S. v. Ross</i> , 456 U.S. 798 (1982).....	7
<i>U.S. v. White</i> , 804 F.3rd 132 (1st Cir. 2015).....	7
<i>U.S. v. Wilson</i> , 699 F.3rd 235 (2nd Cir. 2012).....	7
<i>Wyoming v. Houghton</i> , 526 U.S. 295, 119 S. Ct. 1297, 143 L.Ed.2nd 408 (1999).....	7, 8

IV. Parties to the Action; History of Case; Jurisdiction

- A. The Petitioner is a citizen of the United States and Nebraska. The Respondent is the State of Nebraska.
- B. The original case is filed in Hall County District Court (Grand Island) as *State of Nebraska v. Jessica Lang*, CR17-756. A Motion To Suppress Evidence was filed and denied. Miss Lang was convicted after trial. The District Court's decision was appealed to the Nebraska Supreme Court. The Nebraska Supreme Court case number is S-19-275. The opinion of the Nebraska Supreme Court is found at 305 Neb. 726, 942 N.W.2d 388 (2020). The Supreme Court case is captioned *State of Nebraska v. Jessica J. Lang*. The opinion is dated May 8, 2020.
- C. No other related cases exist.
- D. The Nebraska Supreme Court decided the case by opinion dated May 8, 2020. See Appendix 2
- E. The United States Supreme Court has jurisdiction under 28 U.S.C. 1257.
- F. Notifications were made to the State of Nebraska Attorney General Douglas Peterson, 2115 State Capitol, Lincoln, NE 68509-8920.

V. Constitutional Provision Involved

Fourth Amendment – U.S. Constitution:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VI. Statement of the Case

A. Statement of Facts

(References are to the trial court bill of exceptions/record. See Appendix 3) On November 27, 2017 the State filed an Information in Hall County District Court. The State charged Miss Lang with Possession of a Controlled Substance, a Class IV felony; Possession of Marijuana less than an ounce; and Possession of Drug Paraphernalia.

On March 7, 2018 a Motion to Suppress is filed by Miss Lang, through her attorney, Mr. Truell. On May 4, 2018, the actual hearing on the Motion to Suppress is held. (5:1-16).

Officer Renz of the Grand Island Police Department travelled south on South Locust Street in Grand Island. It is around ten forty four p.m. (7:9-23:6-6-8) Going in the opposite direction is a car which Officer Renz believes is speeding. (7:24-8:3) To support his belief, Officer Renz uses his radar, which confirmed the car's speed at forty nine miles per hour in a thirty five miles per hour zone. (8:4-13) Officer Renz stops the car for speeding. (8:14-16) The place where the car is stopped is near a Wendys. (8:20-21).

The car is driven by Omega Fristoe. Miss Lang is the passenger. (8:22-9:6:17:14-22)) Officer Renz, while processing the speeding ticket, is joined by Officer Marcello of the Grand Island Police Department. (9:17:1-23:16:10-12:16:23-17:4) Both officers meet at Officer Renz' patrol car. (17:5-9) Officer Renz completes the ticket. (12:1-3).

At one point, both officers approached the car; Officer Renz on the driver's side and Officer Marcello on the passenger side. (9:24-10:3;17:5-13:12:1-6) At the passenger side window, Officer Marcello smells marijuana. (9:24-10:3;18:1-20) The passenger window is down (from a closed position) about four to six inches. (18:1-20).

Officer Renz comes in contact with Mr. Fristoe mostly. (10:13-20) Once Mr. Fristoe got out of the car, Officer Renz smelled marijuana as well. (10:13-20) Prior to this time, Officer Renz did not smell marijuana. (10:4-6) Officer Renz claims he was positioned wrong, being at the driver's window, with the

wind breeze behind him. Also, Miss Lang is smoking a cigarette. (10:4-12:18:1-20).

Once Officer Marcello smells the marijuana he informs Officer Renz by flashing a flashlight of something wrong. (18:21-19:4) According to Officer Marcello, the two officers met at the rear of the car. (19:5-11).

After reapproaching the car, both Mr. Fristoe and Miss Lang are asked out of the car. (19:12-17;10:13-25) Both Mr. Fristoe and Miss Lang are told of the marijuana smell. (19:23-25) Both denied marijuana was smoked in the car. (19:21-22) When Miss Lang left the car, she took her purse with her. (20:1-3) Officer Marcelo told Miss Lang to put her purse on hood of car. (20:4-8).

Officer Marcello "searched" Miss Lang by having her pull her clothes tight. Apparently a pocket search is done by "Jessica". Officer Marcello then searches Miss Lang's purse. (20:11-24) Inside the purse, Officer Marcello finds drugs and paraphernalia. (20:25-21:2) Specifically, Officer Marcello finds marijuana, methamphetamine, pills, and a drug kit. (21:3-5) The drug kit consists of a pipe and pipe cleaning materials. (21:6-8) Marijuana is in a small container, methamphetamine is in a baggie and pills in a baggie. (21:10-14). No mention is made of marijuana found in the car.

Photos of these items were received into evidence. (21:8-9;21:15-17;21:18-23:18; E1, found after page 93 in Bill of Exceptions, 23:9-18) These

items were field tested by Officer Marcello where marijuana and methamphetamine were confirmed. (23:19-25).

During the Motion to Suppress hearing, other items were brought into evidence. As mentioned above, Officer Renz testified to the wind and his position relative to the wind. Officer Marcello says the wind was calm that night. Further, Officer Marcello did not notice the wind's direction. (25:6-15) Miss Lang lit her cigarette while Officer Marcello was standing by the passenger window. (24:9-16;25:13-18) Once lit, the cigarette smoke was overpowering the marijuana smell. (25:19-21) Only a small baggie of marijuana was found in the purse. (24:22-25) Once Miss Lang left the car, Officer Marcello testified she was fidgety, nervous, avoided eye contact with Officer Marcello, and asked the driver what to do next. (26:15-21) However Miss Lang stated to Officer Marcello she was never involved in a traffic stop before and did not know what to expect. (27:3-7).

Regarding the Motion to Suppress, the lower court made factual findings. First, there is probable cause to stop the car because of speeding. When Officer Renz approached the car, he did not smell marijuana because of the wind conditions, specifically blowing the smell away from Officer Renz. Officer Marcello smelled marijuana and told Officer Renz of this before any traffic ticket was given. Officer Marcello's smelling of marijuana gave the officers reason to search for evidence of a crime. (30:23-31:22).

At the end of a recess, the parties reached an agreement on how to proceed. Essentially, Miss Lang waives jury trial. She will proceed by allowing the lower court to use the Motion to Suppress evidence. (60:17-25) Miss Lang waives jury trial and submits to trial by the Court. (62:7-10) The lower court finds the waiver of jury trial is voluntary, knowingly, and intelligently made. (61:19-62:6).

Within a few minutes, the court reconvenes. (63:18-64:3) By agreement of the parties, the lower court uses the evidence presented at the Motion to Suppress. (64:4-20) Exhibit 9 is received (lab report). (E9:64:21-65:8) Miss Lang's identity is stipulated. (65:25-66:10) Miss Lang renews an objection based on the Motion to Suppress. (66:11-17) The lower court accepts the objection, notes the objection as a continuing objection and overrules the objection. (66:12-21).

The Court convicts Miss Lang of two of the three charges in the Information; namely the Possessions of Methamphetamine and Marijuana. (66:22-67:3)

B. Miss Lang, at trial, raised constitutional objections to the search and seizure in this case. (66:11-21) The Nebraska Supreme Court handles with the suppression issues in its opinion on pages 9-12; affirming the trial court's decision denying the Motions to Suppress.

VII. ARGUMENT

The Nebraska Supreme Court decided an important question of Fourth Amendment case law that was not settled by this Court in *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L.Ed.2nd 408 (1999); in short the breath/extent of the automobile exception to Fourth Amendment requirements.

Since the rise of automobiles over the last one hundred and twenty years, the intersection of automobiles and the Fourth Amendment generated many cases. Modern jurisprudence recognizes this intersection as the “automobile exception”, an exception to the Fourth Amendment warrant requirement. See *Carroll v. U.S.*, 267 U.S. 132 (1925) and *U.S. v. Ross*, 456 U.S. 798 (1982).

When a “container” is found in a car, only probable cause is needed to search, as opposed to obtaining a warrant. See *Ross, id.* and *U.S. v. White*, 804 F.3rd 132 (1st Cir. 2015) and *U.S. v. Wilson*, 699 F.3rd 235 (2nd Cir. 2012).

However in a recent case the United States Supreme Court held a warrant was needed to piece/poke the body of a suspected drunken driver. See *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160, 195 L.Ed.2nd 560 (2016). This was based on another exception to the warrant requirement; namely a search incident to arrest. In short, the recognized “search incident to arrest” exception to the warrant requirement did not extend into searching the body. See *Birchfield, id.* This despite the “mere fact of lawful arrest”

justifies “a full search of the person”. See *U.S. v. Robinson*, 414 U.S. 218 (1973) at page 236, cited in *Birchfield*, *id.* at page 19 of the *Birchfield* slip opinion. Also, see *Riley v. California*, 573 U.S. ____ (2014) recognizing the “*Robinson* categorical rule.” However *Riley* cautioned as follows concerning “categorical rules”.

... we generally determine whether to exempt a given type of search from the warrant requirement by assessing on the one hand the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for promotion of legitimate governmental interests... (*Riley*, *id.* at page 9 of the slip opinion; also cited in *Birchfield* at page 19 of the slip opinion).

Does this recognized restriction of *Riley* and *Birchfield* on the search incident to arrest exception, apply in automobile container exception to the warrant requirement?

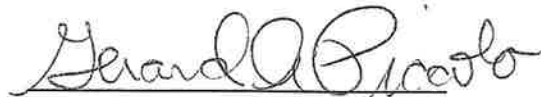
In *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L.Ed.2nd 408 (1999) this Court recognizes the automobile container search exception to the warrant requirement. Yet that opinion hints at a restriction to this “categorical rule” on automobile containers, when body searches are involved. See *Houghton*, *id.* 526 U.S. pages 303 and 304, and *United States v. Di Re*, 332 U.S. 581, 68 S. Ct. 222, 92 L.Ed. 210 (1948).

The Nebraska Supreme Court in affirming applied the “categorical rule” that any containers inside the vehicle are subject to a warrantless search. (*State v. Lang*, opinion at page 11).

The question then presented for review of the United States Supreme Court is the extent of the automobile container exception to the warrant requirement of the Fourth Amendment.

DATED this 20 day of July, 2020.

Respectfully submitted,

A handwritten signature in cursive script, reading "Gerard A. Piccolo".

Gerard A. Piccolo, 16023
Hall County Public Defender
117 East First Street
Grand Island, NE 68801-6022
Tel: (308) 385-5016
Fax: (308) 385-5029
E-Mail: gerardp@hallcountyne.gov