

APPENDIX 1

TRIAL COURT PROCEEDINGS

IN THE DISTRICT COURT OF HALL COUNTY, NEBRASKA
STATE OF NEBRASKA,

Plaintiff,

CASE NO. CR 17-756

vs.

JOURNAL ENTRY

JESSICA JO LANG,

Defendant.

FILED

SEP 26 2018

VALORIE BENDIXEN
CLERK OF DISTRICT COURT

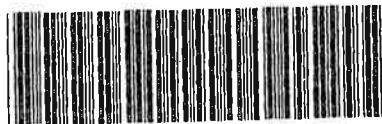
On September 24, 2018, this matter came on for jury selection.

Plaintiff was represented by its counsel Ms. VerMaas and Ms. Doering and the Defendant was present with her counsel Mr. Truell. The Court determined the Defendant competent to stand trial. 8:26:140

The prospective jury panel was indoctrinated and sworn. Voir dire commenced. The peremptory challenges were exercised and the jury panel instructed to return September 25, 2018, at 10:30 a.m.

Now on this 25th day of September 2018 this matter came on on a continuation of the jury trial.

Defendant was present with her counsel Mr. Truell and the State of Nebraska by Ms. VerMaas and Ms. Doering. The parties informed the Court they had received a copy of the proposed Preliminary Jury Instructions and had no objection to them being read as proposed prior to opening statements. The parties stipulated to the selection of the alternate juror. State moved to sequester the witnesses; Defendant objected; the motion was sustained. Counsel for Defendant moved for a competency evaluation which was overruled.



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Outside the presence of the jury the Defendant indicated she wished to proceed to rearraignment. Rights and penalties were explained; Defendant pled no contest to the Information. Defendant withdrew her no contest pleas and waived jury trial.

The jury was thanked and excused.

The matter proceeded to trial to the Court. The Court finds the Defendant guilty of Counts I and II and not guilty of Count III. The Court sets the matter for sentencing December 18, 2018, commencing at 10:00. A Presentence Investigation Report is ordered. Defendant to sign all releases associated with mental health care.

BY THE COURT:



MARK J. YOUNG
DISTRICT JUDGE

APPENDIX 2

NEBRASKA SUPREME COURT OPINION

MAY 13 2020

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

STATE OF NEBRASKA, APPELLEE,
V.
JESSICA JO LANG, APPELLANT.

Case Caption

STATE V. LANG

Filed May 8, 2020. No. S-19-275.

Appeal from the District Court for Hall County: MARK J. YOUNG, Judge.
Affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

STATE v. LANG

Filed May 8, 2020. No. S-19-275.

1. Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error. In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.

2. Mental Competency: Appeal and Error. A trial court's determination of competency will not be disturbed on appeal unless there is insufficient evidence to support the finding. But a trial court's decision not to order a competency evaluation or hold a competency hearing is reviewed for an abuse of discretion.

3. Effectiveness of Counsel: Appeal and Error. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.

4. Investigative Stops: Motor Vehicles: Time. A lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of the stop.

5. _____: _____: _____. When the mission of an investigative stop is addressing a suspected traffic violation, the stop may last no longer than is necessary to effectuate that purpose, and authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should have been, completed.

6. Controlled Substances: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs. Because of marijuana's legal status as contraband, a trained officer who detects the odor of marijuana emanating from a vehicle in Nebraska has firsthand information that provides an objectively reasonable basis to suspect contraband will be found in the vehicle.

7. Constitutional Law: Search and Seizure. Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.

8. Warrantless Searches: Motor Vehicles. Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions. Among the established exceptions to the warrant requirement is the automobile exception.

9. Search and Seizure: Warrantless Searches: Probable Cause: Motor Vehicles. The automobile exception to the warrant requirement applies when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle.

10. Search and Seizure: Probable Cause: Words and Phrases. Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.

11. **Controlled Substances: Search and Seizure: Warrantless Searches: Motor Vehicles: Probable Cause.** Assuming a vehicle is readily mobile, the odor of marijuana alone provides probable cause to search the vehicle under the automobile exception to the warrant requirement.
12. **Search and Seizure: Motor Vehicles: Probable Cause.** If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. This includes all containers within the vehicle.
13. **Courts: Trial: Mental Competency.** The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court may cause such medical, psychiatric, or psychological examination of the accused to be made as it deems necessary.
14. **Mental Competency.** An explicit competency determination is necessary only when the court has reason to doubt the defendant's competence, and if proceedings do not provide the court with reason to doubt a defendant's competence, it does not err by not conducting a competency hearing.
15. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.
16. **Mental Competency.** There are no fixed or immutable signs of incompetence, and a defendant can meet the modest aim of legal competency, despite paranoia, emotional disorders, unstable mental conditions, and suicidal tendencies.
17. **Effectiveness of Counsel: Proof: Words and Phrases.** Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
18. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding.
19. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.
20. **Mental Competency: Final Orders.** A trial court's decision to overrule a motion for a competency evaluation is not a final, appealable order.
21. **Trial: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics, and an appellate court will not second-guess trial counsel's reasonable strategic tactics when reviewing claims of ineffective assistance of counsel.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

STACY, J.

After a stipulated bench trial, Jessica Jo Lang was convicted of possessing methamphetamine and marijuana. In this direct appeal, she argues the district court erred in overruling her motion to suppress and her motions seeking a competency evaluation. Lang, who is represented by new appellate counsel, also claims her trial counsel provided ineffective assistance. Finding no error, we affirm.

I. BACKGROUND

1. TRAFFIC STOP

On August 16, 2017, Officer Bret Renz of the Grand Island Police Department was on patrol. At approximately 10:45 p.m., his radar detected a vehicle traveling more than 10 miles per hour over the posted speed limit and he activated his patrol car's overhead emergency lights and initiated a traffic stop. The driver of the vehicle was Omega Fristoe, and the sole passenger was Lang.

Renz gathered Fristoe's information and returned to his patrol car to run a record check and complete a traffic citation. As he did this, Officer Chris Marcello of the Grand Island Police Department arrived on the scene to assist.

After Renz completed the citation form, both officers approached Fristoe's vehicle. Renz approached on the driver's side, and Marcello approached on the passenger's side. The front passenger window was rolled down 4 to 6 inches, and as Marcello approached, he detected an odor of marijuana coming from the passenger window. He saw Lang look up at him and then reach into her purse. He watched Lang get a cigarette from her purse and light it, after which Lang blew smoke around the cabin of the vehicle and then continued to "go through her purse."

Marcello got Renz' attention, and the officers met at the back of the vehicle to speak privately. At that point, Renz had not issued the citation to Fristoe. Marcello told Renz he smelled marijuana coming from the passenger window, and the officers decided to expand their investigation. Renz placed his ticket book, with the citation still attached, on the trunk of Fristoe's vehicle, and then the officers reapproached the vehicle and asked the occupants to step out. Both Fristoe and Lang complied.

When Lang stepped out of the vehicle, she brought her purse with her. She was directed to place the purse on the hood of Fristoe's vehicle, which she did. The officers told Fristoe and Lang that the odor of marijuana had been detected coming from inside their vehicle. During the course of the investigation, Marcello searched Lang's purse and discovered a green leafy substance in a baggie that field-tested positive for marijuana, a white crystalline substance in a baggie that field-tested positive for methamphetamine, some nonnarcotic pills, and drug-related paraphernalia.

2. MOTION TO SUPPRESS

Lang was charged with (1) possession of a controlled substance, methamphetamine (a Class IV felony); (2) possession of marijuana, less than an ounce (an infraction); and (3) possession of drug paraphernalia (an infraction). She pled not guilty.

Lang filed a motion to suppress the evidence found in her purse, arguing it was obtained as the result of an unconstitutional search. At the suppression hearing, both Renz and Marcello testified to the events as summarized above. In addition, Renz testified that before Marcello alerted him to the odor of marijuana coming from the passenger window, he had not smelled marijuana either time he approached the driver's side of the vehicle.

At the conclusion of the evidence, the district court overruled Lang's motion to suppress. It found there was probable cause for the traffic stop because the vehicle was observed speeding. It reasoned the smell of marijuana coming from inside the vehicle gave the officers probable cause for a warrantless search of the vehicle and containers in the vehicle, including Lang's purse. The court found Marcello's testimony about smelling marijuana coming from the passenger window was credible, and it rejected Lang's argument to the contrary. Lang's case was set for trial.

3. TRIAL

(a) First Request for Competency Evaluation

On the morning of September 24, 2018, Lang appeared in court with her attorney for jury selection. Outside the presence of the prospective jurors, Lang's counsel told the court he was concerned that Lang's emotional state may interfere with jury selection and trial. The court construed this as an oral motion for a competency evaluation, and it took the matter up on the record.

No evidence was offered, but Lang's attorney informed the court that Lang suffered from post-traumatic stress disorder as a result of a prior work-related assault and that she had been unable to afford her anxiety medication for more than a year. Counsel explained that Lang had been frightened during all of her court appearances, but that her emotional state that day was "extreme." Counsel told the court that Lang "does understand what is going on and understands what we are saying," but that he was concerned about her sobbing in court, explaining:

I am having trouble getting communication back from her that I understand or that the jury will understand in part due to her inability to control her depression.

She also has informed me that for the past couple three weeks, she has seriously considered issues of suicide and self-harm because of this situation and her lack of medication. She has not known how to resolve it.

She states to me that she has in fact sought help from governmental entities in regards to her mental health, but because she is pending a worker's compensation claim against the State of Nebraska, those entities have said that the State should be responsible for paying that and they have not provided treatment. Her worker's comp trial is not scheduled for another couple of months.

....

... Your Honor, I think if we were to go to jury selection and trial today, I don't believe the jury would be able to get past the emotional condition that my client is in for purposes of actually addressing and listening to the facts that may be presented at the time of trial or that they would be able to even understand Ms. Lang should she elect to testify, if she was able to testify at all.

The State took no position on the issue other than advising it was ready for trial. The district court, with counsel's permission, spoke with Lang directly:

THE COURT: Ms. Lang, we're here today to select a jury that will ultimately decide whether or not you are guilty or not guilty of the charges that have been filed against you. Do you understand that Ms. Lang?

THE DEFENDANT: Yes.

THE COURT: Ms. Lang, it's important that the jury reach a decision based upon the facts of the case and not their impressions, positive or negative, about you or anyone else. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: Ms. Lang, will you control yourself during the courtroom proceedings?

THE DEFENDANT: I can try my best. I apologize.

THE COURT: Ms. Lang, are there any accommodations that the Court can provide that would allow you to calm yourself?

THE DEFENDANT: No.

....
THE COURT: At this point, it appears that Ms. Lang understands the nature of these proceedings and that Ms. Lang suffers, by her statements and by counsel's statements, from some traumatic issues that don't involve this case.

I find Ms. Lang is competent to proceed to trial. We will attempt at least to begin voir dire today as the second case to be chosen. We'll see how things go.

I'll be willing to listen to any comments by either counsel.

Our record does not include jury selection, but it does show that the next day, the district court commented favorably on Lang's composure during jury selection.

(b) Second Request for Competency Evaluation

On the first day of trial, outside the presence of the jury, the State requested a reciprocal order of witness sequestration, which the court granted. Fristoe, who was present in the courtroom and a possible witness for the defense, was told he would have to step out once the trial began. At that point, Lang covered her face and began sobbing. Lang's counsel told the court that Fristoe was a strong emotional support for Lang, who was still having anxiety issues.

The court spoke again with Lang about the importance of a fair trial and controlling her emotions and behavior during trial. Lang replied to the court, "I cannot control my mental illness. I am sorry." The court replied:

I don't mean to belittle your emotional situation, but I have not received any evidence that would support a claim that you cannot carry on appropriately or behave yourself.

I would note you did a great job at jury selection yesterday. I would note that no tears appear to be falling off when you are making the sobbing noises.

Lang's counsel then offered exhibit 8, a psychological evaluation from December 2014 conducted as part of Lang's workers' compensation case. The exhibit was received without objection. The State again advised the court it was ready to try the case and opposed additional delays.

The court asked Lang's counsel to clarify whether he was seeking a continuance or seeking a competency evaluation. Counsel replied:

[R]ight now, I do not know -- well, how can I put this -- if Ms. Lang can understand what's going on.

I believe that her emotional condition, her anxiety reaction, and her depression have made it such that she cannot control her physical condition. As she has presented in the courtroom, it's making it difficult to verbally communicate and appropriately provide an appearance to the jury which may jeopardize their ability to render an impartial decision. That's my concern.

The court asked again, "[A]re you asking for a competency evaluation, [counsel]?" to which counsel replied, "I will ask for a competency evaluation to see if she's capable of participating in her current psychological condition." The court took a recess to review exhibit 8 and then went back on the record and made the following ruling outside the presence of the jury:

Based upon review of Exhibit 8 and the Court's observations from yesterday and today, I am overruling the motion for a competency evaluation. There's nothing in the record indicating Ms. Lang is incapable of understanding the proceedings or communicating with counsel.

I will, however, in an attempt to accommodate Ms. Lang, continue this matter until one p.m. so that Ms. Lang may have a chance to get some fresh air and to come back and hopefully be ready to participate or be ready to be attentive during the trial of this case.

....
Ms. Lang, this is an unusual step, but I am giving you a chance to take a little more time to compose yourself. In reviewing Exhibit 8, the mental health reports from three and four years ago, it appears that you have had some coping skills you need to be utilizing.

(c) Change of Plea

When the parties returned at 1 p.m. to begin trial, Lang's counsel advised that his client wanted to enter a no contest plea to the charges in the information. Lang confirmed that was her desire.

The court went through the standard plea colloquy with Lang, and Lang consistently indicated that she understood her rights and the consequences of her pleas. After the State recited the factual basis, the court asked Lang whether she understood that if the court accepted her pleas, she would be giving up her right to appeal the overruling of her motion to suppress. Lang

indicated she was not aware of that fact and told the court it may affect her decision. A recess was taken so Lang could talk with her attorney.

After the recess, Lang's counsel advised the court that in order to preserve her right to appeal the suppression ruling, Lang now wanted to withdraw her no contest pleas, enter not guilty pleas, waive a jury, and have the matter tried to the bench on "the facts as submitted to the Court in the hearing on the motion to suppress." Lang confirmed that was how she wanted to proceed.

The court allowed Lang to withdraw her no contest pleas and enter not guilty plea and then discussed the waiver of a jury trial with Lang. Lang stated she had discussed the matter with her attorney and wanted to waive a jury trial. She told the court that no one had made any threats, used any force, or made any promises to get her to waive a jury. The court accepted Lang's jury waiver, expressly finding it was made freely, voluntarily, knowingly, and intelligently. The jury was dismissed, and the matter proceeded immediately to a bench trial.

(d) Stipulated Bench Trial

The parties stipulated that the court should take judicial notice of the evidence presented at the motion to suppress hearing and that the court should consider it as evidence in the bench trial. Lang's counsel renewed his objection to the evidence seized from Lang's purse on the ground it was obtained through an unconstitutional search, and the objection was overruled. The State then offered, without objection, a copy of the laboratory report containing test results for the substances found in Lang's purse, and the parties stipulated that one of the items described in the laboratory report was the white crystalline substance found in Lang's purse, which tested positive for methamphetamine, weighing 3.5 grams.

After the presentation of evidence, the district court found the State had met its burden of proof as to counts I and II of the information and found Lang guilty. The court found the State had failed to prove count III, possession of drug paraphernalia, and dismissed that count. The court ordered a presentence investigation and asked the parties whether they wanted to request "any other . . . evaluations." The State and Lang both declined. Lang was ordered to appear at sentencing on February 5, 2019.

(e) Sentencing and Third Request for Competency Evaluation

Lang did not appear for sentencing on February 5, 2019, but new defense counsel appeared on her behalf and requested a continuance. Sentencing was continued to February 14.

At the sentencing hearing, Lang's new counsel moved for a competency evaluation, arguing he did not think Lang had been able to effectively assist her prior counsel. The State argued that a competency evaluation was unnecessary and opposed a continuance for that purpose.

In support of the request for a competency evaluation, defense counsel asked the court to take judicial notice of the presentence investigation report and offered exhibits 10 and 11, both of which had been prepared in connection with Lang's workers' compensation case. Exhibit 10 was a medical report dated October 20, 2018, which summarized Lang's diagnoses of generalized anxiety disorder, post-traumatic stress disorder, and major depressive disorder. Exhibit 11 was a

report of psychological testing performed on September 18, 2018, which generally agreed with the diagnoses set forth in exhibit 10 and added diagnoses of panic disorder without agoraphobia and of avoidant personality disorder. Exhibits 10 and 11 were received without objection.

After reviewing the exhibits, the district court denied Lang's third motion for a competency evaluation. The court acknowledged evidence of Lang's traumatic work-related injury and her mental health diagnoses. But it also observed that throughout the criminal proceedings, Lang had been able to confer with counsel and make decisions regarding her defense, including the decision to withdraw her pleas of no contest and proceed with a stipulated bench trial to preserve her right to appeal the suppression ruling and her decision to hire new counsel for the sentencing phase. The court concluded that Lang understood the nature of the proceedings and her rights within those proceedings and that a formal competency evaluation was not necessary.

After an opportunity for allocution, Lang was sentenced to 12 months' probation on count I and was fined \$300 on count II. She timely appealed, and we moved the appeal to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

Lang assigns that the district court erred in (1) overruling her motion to suppress and (2) overruling her motions to determine competency. Lang also assigns that her trial counsel provided ineffective assistance in several respects.

III. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.¹ When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.²

[2] A trial court's determination of competency will not be disturbed on appeal unless there is insufficient evidence to support the finding.³ A trial court's decision not to order a competency evaluation or hold a competency hearing is reviewed for an abuse of discretion.⁴

[3] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to

¹ *State v. Hartzell*, 304 Neb. 82, 933 N.W.2d 441 (2019).

² *Id.*

³ *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019).

⁴ See *State v. Cortez*, 191 Neb. 800, 218 N.W.2d 217 (1974) (failure to hold hearing on defendant's mental capacity to stand trial not abuse of discretion). See, also, *U.S. v. Turner*, 644 F.3d 713 (8th Cir. 2011) (district court's decision not to order competency evaluation or hold competency hearing reviewed for abuse of discretion).

conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.⁵

IV. ANALYSIS

1. MOTION TO SUPPRESS

In seeking to suppress evidence obtained from the search of her purse, Lang argues (1) the search was unlawful because it occurred after the purpose of the traffic stop had been completed and (2) the search of her purse was not justified by the automobile exception to the warrant requirement. We address each argument in turn and reject both.

(a) Traffic Stop Not Impermissibly Extended

[4,5] A lawful traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of the stop.⁶ When the mission of an investigative stop is addressing a suspected traffic violation, the U.S. Supreme Court has instructed that the stop may last no longer than is necessary to effectuate that purpose, and authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should have been, completed.⁷

Here, Fristoe was stopped for exceeding the speed limit. Lang does not challenge the stop itself, but she argues that by the time the odor of marijuana was detected, the traffic stop was already complete.⁸ We disagree.

The record shows that near the end of the traffic stop, while one officer was in the process of explaining the speeding citation to the driver but before the citation had been issued, the other officer smelled marijuana coming from the passenger window. The district court made an express factual finding that the odor of marijuana was detected before the traffic citation had been issued to the driver. This factual finding is supported by the record and is not clearly erroneous.

There is no evidence that officers took any longer than necessary to investigate the speeding violation or to prepare the resulting citation. And because the citation had not yet been issued to Fristoe, the purpose of the traffic stop had not yet been effectuated when the smell of marijuana was detected coming from the vehicle.

[6] Because of marijuana's legal status as contraband, a trained officer who detects the odor of marijuana emanating from a vehicle in Nebraska has firsthand information that provides an objectively reasonable basis to suspect contraband will be found in the vehicle.⁹ The smell of marijuana provided officers with reasonable suspicion to expand the traffic stop to include investigation of possible criminal activity involving controlled substances.¹⁰ Moreover, because

⁵ *State v. Lee*, 304 Neb. 252, 934 N.W.2d 145 (2019).

⁶ *State v. Barbeau*, 301 Neb. 293, 917 N.W.2d 913 (2018).

⁷ *Rodriguez v. U.S.*, 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015).

⁸ See *id.*

⁹ *State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018).

¹⁰ See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

the vehicle was readily mobile, the odor of marijuana alone provided officers with probable cause to search the vehicle under the automobile exception to the warrant requirement.¹¹ We discuss that exception next.

(b) Automobile Exception

[7,8] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.¹² Searches without a valid warrant are *per se* unreasonable, subject only to a few specifically established and well-delineated exceptions.¹³ Among the established exceptions to the warrant requirement is the automobile exception.¹⁴

[9-11] This exception applies when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle.¹⁵ Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.¹⁶ Assuming the vehicle is readily mobile, the odor of marijuana alone provides probable cause to search the vehicle under the automobile exception to the warrant requirement.¹⁷

Lang does not contest that Fristoe's vehicle was readily mobile, and she generally concedes the officers had probable cause to search the vehicle after smelling marijuana. But Lang argues the automobile exception did not justify the warrantless search of her purse, because when the purse was searched, it was no longer inside the vehicle. On this record, we are not persuaded that makes a difference.

[12] The U.S. Supreme Court has held that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.¹⁸ This includes all containers within the vehicle.¹⁹

The district court made a factual finding that Lang was seated inside the vehicle with the purse on her lap when the officer detected the smell of marijuana. Lang was seated in the passenger seat, and the smell of marijuana was coming from the passenger window. After noticing the smell, the officer observed Lang repeatedly "go through her purse," and when Lang was asked to step out of the vehicle, she brought the purse with her.

Officers instructed her to set the purse on the hood of the vehicle, and she complied. On this record, the location of the purse at the time it was searched does not change its character as a

¹¹ *Seckinger*, *supra* note 9.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Wyoming v. Houghton*, 526 U.S. 295, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).

¹⁹ *Id.*

container that was inside the vehicle when officers developed probable cause to search the vehicle.²⁰ The district court properly overruled Lang's motion to suppress.

2. COMPETENCY RULINGS

Lang's trial counsel moved for a competency evaluation three times during the course of this case--before jury selection, before the presentation of evidence, and before sentencing. She argues the court erred in overruling those motions.

[13,14] The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court.²¹ The trial court may cause such medical, psychiatric, or psychological examination of the accused to be made as it deems necessary.²² But an explicit competency determination is necessary only when the court has reason to doubt the defendant's competence, and if proceedings do not provide the court with reason to doubt a defendant's competence, it does not err by not conducting a competency hearing.²³

[15,16] A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.²⁴ We have recognized there are no fixed or immutable signs of incompetence, and a defendant can meet the modest aim of legal competency, despite paranoia, emotional disorders, unstable mental conditions, and suicidal tendencies.²⁵

We find no abuse of discretion in the trial court's decision to overrule Lang's motions for a competency evaluation. On appeal, Lang does not contend she was unable to understand or comprehend the proceedings against her. She argues only that "[h]er mental illness before jury selection and presentation of evidence prevented [her] from presenting a rational defense."²⁶ She does not explain why this is so, and we see nothing in the record to support this argument.

Despite Lang's mental health diagnoses and her occasional emotional responses in the courtroom, the record contains nothing that would provide the court with a reason to doubt her competence.

The trial court had the opportunity to observe and interact with Lang during jury selection, during the plea hearing, during the bench trial, and during sentencing. During those

²⁰ See, e.g., *State v. Furrillo*, 274 Or. App. 612, 362 P.3d 273 (2015) (passenger's backpack properly searched after he removed it from vehicle upon exiting after drug dog alerted to vehicle); *State v. Smith*, 152 Idaho 115, 266 P.3d 1220 (Idaho App. 2011) (backpack in vehicle at time officer observed marijuana pipe in vehicle properly searched even though driver removed it from vehicle upon exiting).

²¹ *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

²² See, *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016); *Cortez*, *supra* note 4. See, also, Neb. Rev. Stat. § 29-1823 (Cum. Supp. 2018).

²³ See *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

²⁴ *Grant*, *supra* note 22.

²⁵ *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

²⁶ Brief for appellant at 15.

interactions, Lang consistently demonstrated an understanding of the criminal proceedings and her rights in relation to those proceedings, as well as the ability to assist in her own defense. On this record, there was no abuse of discretion in overruling Lang's motions for a competency evaluation.

3. INEFFECTIVE ASSISTANCE OF COUNSEL

[17] Lang assigns that her trial counsel, who was different from her appellate counsel, provided ineffective assistance. Generally, to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,²⁷ the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.²⁸

[18] When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding.²⁹

[19] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal.³⁰ The determining factor is whether the record is sufficient to adequately review the question.³¹ We have said the record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.³²

Lang's brief argues that her trial counsel was deficient in three respects: (a) failing to preserve appellate review of the court's rulings on the competency motions, (b) failing to move for a continuance, and (c) stipulating that evidence received at the suppression hearing could be considered by the court during the bench trial. We conclude the record is sufficient to resolve all of Lang's claims, and we find them all to be meritless.

(a) Preserving Appellate Review

Lang argues that to preserve appellate review of the court's rulings on her motions for a competency evaluation, trial counsel should have taken an immediate interlocutory appeal from the court's rulings. Lang is mistaken, as is perhaps best illustrated by the fact that we reviewed those rulings in this direct appeal.

[20] It is true that a proceeding to determine competency to stand trial is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2016) and that an order

²⁷ *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

²⁸ *State v. Stelly*, 304 Neb. 33, 932 N.W.2d 857 (2019).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

finding an accused incompetent to stand trial and ordering the accused confined until such time as he or she is competent is a final order from which an appeal may be taken.³³ But no such order was entered here, because competency proceedings were deemed unnecessary by the court. The trial court's decisions overruling Lang's motions for a competency evaluation were not final, appealable orders,³⁴ and Lang's trial counsel was not deficient in waiting until direct appeal of the judgment to assign error to those interlocutory rulings.

(b) Failing to Move for Continuance

Lang argues her trial counsel performed deficiently when he moved for competency evaluations prior to jury selection and prior to trial, rather than moving to continue trial. She argues that as between the two motions, "the correct motion was to continue the trial, as it would be easier to prove."³⁵ To prevail on such a claim, Lang would need to show both that counsel's decision to move for a competency evaluation rather than a continuance fell below an objective standard of reasonableness and that if a motion to continue had been made, a reasonable probability exists that the result of the trial would have been different.³⁶ She can show neither.

[21] Trial counsel is afforded due deference to formulate trial strategy and tactics, and an appellate court will not second-guess trial counsel's reasonable strategic tactics when reviewing claims of ineffective assistance of counsel.³⁷ As such, counsel does not render deficient performance merely by failing to present the motion that is "easier to prove." Moreover, Lang does not argue, and we see nothing in the record, suggesting that if a motion to continue had been made and sustained, the result of trial in this case would have been any different. This claim has no merit.

(c) Stipulating to Evidence

Lang argues her trial counsel was ineffective for stipulating, during the bench trial, that the court could consider evidence received at the suppression hearing. The record affirmatively refutes her claim that trial counsel performed deficiently in this regard.

At the plea hearing, Lang told the court that in order to preserve her right to appeal the suppression ruling, she wanted to waive a jury and have a stipulated bench trial. At the time, Lang's counsel explained that Lang was asking to "try this matter based upon the facts as submitted to the Court in the hearing on the motion to suppress." The court accepted Lang's jury waiver and proceeded directly to the stipulated bench trial. As is typical in such a proceeding, trial counsel stipulated to the admission of certain evidence while preserving the arguments raised in the motion to suppress, then the district court determined whether that evidence was sufficient to convict Lang of the crime charged.³⁸

³³ See *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000).

³⁴ See *id.*

³⁵ Brief for appellant at 16.

³⁶ See *State v. Nolt*, 298 Neb. 910, 906 N.W.2d 309 (2018).

³⁷ *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019).

³⁸ See, e.g., *State v. Saylor*, 294 Neb. 492, 883 N.W.2d 334 (2016); *Howard*, *supra* note 10.

The record shows that Lang agreed to a stipulated bench trial to preserve her right to appeal the suppression ruling and that she did so after discussing this strategy with trial counsel and with the understanding that counsel would stipulate to the admission of the evidence received during the suppression hearing. On these facts, Lang cannot show trial counsel performed deficiently in stipulating to that evidence during the bench trial.

V. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX 3

TRANSCRIPT OF LOWER COURT PROCEEDINGS

IN THE DISTRICT COURT OF HALL COUNTY, NEBRASKA

IN AND FOR THE NINTH JUDICIAL DISTRICT

STATE OF NEBRASKA,)	Case No. CR17-756
)	
Plaintiff,)	
)	<u>BILL OF EXCEPTIONS</u>
vs.)	
)	PARTIAL TRANSCRIPT
JESSICA J. LANG,)	(Pages 5 - 27
)	and 63 - 67)
Defendant.)	
)	

Proceedings had before the HONORABLE MARK J. YOUNG, DISTRICT JUDGE, at the Hall County Courthouse, Grand Island, Nebraska, on May 4, 2018; September 24, 2018; September 25, 2018; and February 14, 2019.

A P P E A R A N C E S:

For the Plaintiff:	GAIL VerMAAS KATHERINE DOERING Deputy Hall County Attorneys 231 South Locust Street Grand Island, Nebraska 68801
For the Defendant:	JAMES TRUELL Attorney at Law 220 Oxnard Avenue Grand Island, Nebraska 68801
(05/04/18, 09/24/18, and 09/25/18)	
(02/14/19)	CARLOS MONZON Attorney at Law 1133 "H" Street Lincoln, Nebraska 68508

Lori K. Moss
Official Court Reporter
Hall County Courthouse
111 West First Street
Grand Island, Nebraska 68801

C E R T I F I C A T E

I, Lori K. Moss, Official Court Reporter, do hereby certify that the within and following Bill of Exceptions (Partial Transcript) is correct and complete.

Dated this 29th day of June 2020.



Lori K. Moss
Official Court Reporter

Motion to Suppress (05/04/18)

1 (At 11:00 a.m. on May 4, 2018, in the
2 District Court of Hall County in Grand Island,
3 Nebraska, before the HONORABLE MARK J. YOUNG,
4 DISTRICT JUDGE, with Gail VerMaas, Deputy Hall
5 County Attorney, appearing as counsel for the State,
6 and James Truell, Attorney at Law, appearing as
7 counsel for the Defendant, the Defendant being
8 personally present, the following proceedings were
9 had:)

17 Are the parties ready to proceed?

18 MS. VerMAAS: I am, Your Honor, yes.

19 MR. TRUELL: Yes, Your Honor.

20 MS. VerMAAS: The State would call Officer
21 Renz to the stand.

22 BRET RENZ,

25 | THE COURT: Go ahead, Ms. VerMaas.

Direct Examination - B. Renz

DIRECT EXAMINATION

2 BY MS. VerMAAS:

3 Q Would you state your name for the record
4 and spell your last name.

5 A Bret Renz, R-E-N-Z.

6 Q How long have you been employed by the
7 Grand Island Police Department?

8 A Since October 1, 2013.

9 Q Are you a certified law enforcement
10 officer?

11 A Yes.

12 Q Where did you receive that certification?

13 A Nebraska Law Enforcement Training Center.

14 Q Through your training at the Law
15 Enforcement Center, did you learn how to use a radar
16 detector?

17 A Yes.

18 Q So as part of your daily procedure when
19 you are at work, do you -- I'm sorry.

20 Do you calibrate the radar every --
21 check the radar and make sure it's in proper working
22 condition?

23 A We test it at the beginning of the shift.

24 Q How do you do that?

25 A With two tuning forks.

Direct Examination - B. Renz

1 Q And then how does that work?

2 A It works off of sound waves, the tuning
3 forks. Then the radar unit, you put into test mode.
4 When you do so, the tuning forks have a set speed
5 that will show calibration or show testing for the
6 radar. Test all four different categories
7 correctly, and the radar is in functional order.

8 Q Do you do that every time before the start
9 of your shift?

10 A I do.

11 Q Did you do that on August 16th, August 16,
12 2017?

13 A Yes.

14 Q Was that in proper working condition?

15 A Yes.

16 Q What is your -- on August 16th, what was
17 the shift that you working that day?

18 A Six p.m. to six a.m.

19 Q And at approximately 22:44, what time is
20 that?

21 A 10:44 p.m.

22 Q Where were you at that time?

23 A On South Locust traveling southbound.

24 Q Did you observe anything that drew your
25 attention to it?

Direct Examination - B. Renz

1 A I observed a car traveling northbound that
2 appeared to be going faster than the posted speed
3 limit.

4 Q What did you do once you observed that
5 vehicle?

6 A I activated my radar and confirmed my
7 observation, and with audio tone and digital display
8 from the radar station, I was able to confirm the
9 vehicle was speeding.

10 Q Do you know how fast the vehicle was
11 traveling?

12 A Forty-nine miles per hour in a
13 thirty-five miles per hour zone.

14 Q At that time, what did you do next?

15 A Activated my overhead emergency lights and
16 conducted a traffic stop.

17 Q And did the vehicle pull over in a timely
18 manner?

19 A Yes.

20 Q Where did the vehicle pull over to?

21 A Wendy's on South Locust.

22 Q Did you initiate -- did you make contact
23 with the driver of the vehicle?

24 A I did.

25 Q Who was that driver?

Direct Examination - B. Renz

1 A Omega Fristoe.

2 Q Did Mr. Fristoe have a passenger in the
3 car?

4 A He did.

5 Q Who was that?

6 A Jessica Lang.

7 Q Do you see Ms. Lang in the courtroom
8 today?

9 A I do.

10 Q Could you please point her out and tell me
11 something she is wearing.

12 A Pink sweatshirt.

13 MS. VerMAAS: Your Honor, at this time,
14 the State would request that the record reflect
15 that the witness has identified the Defendant.

16 THE COURT: The record will so reflect.

17 Q (By Ms. VerMaas) So once you made contact
18 with the driver and you observed Ms. Lang in the
19 passenger seat, what was the next step you took?

20 A I gathered Omega's things, went to my car
21 and ran the records check, filled out a citation.
22 Officer Marcello arrived at that time, and he
23 approached the vehicle with me.

24 Q Okay. Then what happened?

25 A I began presenting the citation to Omega,

Direct Examination - B. Renz

1 and during the process of that, Officer Marcello
2 advised he could smell the odor of marijuana coming
3 from the vehicle.

4 Q Once you -- did you observe the smell of
5 marijuana in the car?

6 A I did not.

7 Q Why was that do you believe?

8 A The wind was from west to east, so the
9 wind was blowing through the driver's window out the
10 passenger's window. Also, the passenger was smoking
11 a cigarette. That was all I could smell at that
12 time.

13 Q So once you were informed by Officer
14 Marcello that he smelled marijuana, what was the
15 next step you took?

16 A I advised Omega that I would have him step
17 out of the vehicle, the odor of marijuana was
18 observed. Omega stepped out of the vehicle. I
19 searched his person, and I advised him to stand in
20 front of the vehicle.

21 Q And what did you observe happen next?

22 A Officer Marcello had Jessica Lang step out
23 of the vehicle -- same process. I searched the
24 vehicle. Officer Marcello searched Ms. Lang's
25 belongings.

Direct Examination - B. Renz

1 Q Did you find anything in the vehicle when
2 you searched?

3 A I did. I found a knife measuring
4 over three and a half inches. Inside the
5 butt of the knife was a combat tactical knife.
6 I screwed the knife cap off, and I located a
7 bag of methamphetamine inside the handle of the
8 knife.

9 Q All right. Did all of the above occur in
10 Hall County?

11 A Yes.

12 MS. VerMAAS: I will pass this witness at
13 this time.

14 THE COURT: Cross, Mr. Truell?

15 MR. TRUELL: Thank you.

16 CROSS-EXAMINATION

17 BY MR. TRUELL:

18 Q Officer Renz, you did the usual, took the
19 driver's license and registration and went back to
20 your vehicle and called in to verify the status; is
21 that right?

22 A Yes.

23 Q It was during -- it was during that time
24 that the other officer joined you at the scene?

25 A Yes.

Cross-Examination - B. Renz

1 Q You stated that you both then approached
2 the vehicle and that you had filled out a citation?

3 A Yes.

4 Q Did you in fact present the citation to
5 the operator of the vehicle?

6 A I did.

7 Q When the other officer mentioned to you
8 that he smelled marijuana, were you still at the
9 side of the vehicle or had you started retreating
10 from behind the vehicle so you could speak
11 privately?

12 A Ask me that one more time.

13 Q When the other officer told you that he
14 could smell marijuana, were you by the car doors or
15 did you retreat to the back of the vehicle so you
16 could speak privately?

17 A He got my attention and before I had
18 handed the citation over to Omega, we spoke at the
19 back of the vehicle.

20 Q So you never gave the citation to the
21 driver?

22 A No.

23 Q Did you place it in his car?

24 A No, it was still attached to my ticket
25 book. I set it on the trunk of the vehicle that he

Cross-Examination - B. Renz

1 was in.

2 Q In fact, you mentioned to the driver, I
3 believe, that he should hang around a while, to stay
4 put?

5 A Yes, yes, he wouldn't be free to go.

6 Q He was not yet free to go?

7 A Right. Correct.

8 Q So he came back to the rear of the
9 vehicle, and at that time, the other officer told
10 you that he was able to smell the marijuana. You
11 then approached the vehicle again, and you were on
12 opposite sides of the vehicle?

13 A Yes.

14 Q It is your testimony that the passenger
15 side window was also down?

16 A I was never on the passenger side.

17 Q You don't know if the window was down or
18 not?

19 A I do not. You will have to ask Officer
20 Marcello that.

21 Q In conducting the search that you have
22 testified to, where did you find the knife?

23 A In the glove box.

24 Q And whose vehicle was this?

25 A It was registered to Omega Fristoe.

Cross-Examination - B. Renz

1 Q Do you know the relationship between the
2 owner of the vehicle and the Defendant, Ms. Lang?

3 A Omega advised that they were dating. I
4 believe, at the time, they had been for eight
5 months, if I remember correctly.

6 Q So you don't know if she had any
7 authority over the vehicle or not?

8 A No.

9 Q Did you -- were you able to discover
10 anything else in your search of the vehicle?

11 A No.

12 Q You mentioned that the wind was blowing.
13 Do you have any records of how fast it was, how
14 strong the wind was?

15 A I don't, no.

16 Q More of a breeze?

17 A It was a gentle breeze.

18 Q Gentle breeze?

19 A Yes.

20 Q A quiet night for a change?

21 A Yeah, yes.

22 Q And you stated you were unable to smell
23 any odor of marijuana --

24 A Yes.

25 Q -- from your position by that vehicle?

Cross-Examination - B. Renz

1 A Correct.

2 MR. TRUELL: No other questions, Your
3 Honor.

4 THE COURT: Redirect?

5 REDIRECT EXAMINATION

6 BY MS. VerMAAS:

7 Q Did you run a Triple "I" on Mr. Fristoe?

8 A Yes.

9 Q What was the result of that Triple "I"?

10 A Came back positive as a felon.

11 MS. VerMAAS: No further questions.

12 THE COURT: You can step down, Officer.

13 Is this officer excused or do you wish him
14 to remain?

15 MS. VerMAAS: I would like him to remain,
16 please.

17 THE COURT: Officer, you are excused, but
18 remain in the courthouse.

19 THE WITNESS: Yes, sir.

20 THE COURT: Next witness, Ms. VerMaas?

21 MS. VerMAAS: The State would call Officer
22 Marcello to the stand.

23 THE COURT: You have leave to get him.

24

25

Motion to Suppress (05/04/18)

CHRIS MARCELLO,

Called as a witness,
first having been duly sworn,
testified as follows:

THE COURT: Go ahead, Ms. VerMaas.

DIRECT EXAMINATION

BY MS. VerMAAS:

Q Could you please state your name for the record, and please spell your last name.

A Chris Marcello, M-A-R-C-E-L-L-O.

10 Q How long have you been employed by the
11 Grand Island Police Department?

12 A Since October 2013.

13 Q Are you a certified law enforcement
14 officer?

15 A Yes.

16 Q I'd like to draw your attention back to
17 August 17, 2017. Were you on duty that day?

18 A Yes.

19 Q Were you in uniform?

20 A Yes.

21 Q What shift were you working that day?

22 A I worked the night shift.

23 Q And did you receive a call to assist
24 Officer Benz?

25 A T did.

Direct Examination - C. Marcelllo

1 Q Where was that, at what location?

2 A Parking lot of Wendy's, South Locust.

3 Q Here in Grand Island?

4 A Yes.

5 Q So once you arrived on the scene, what was
6 the first thing you did?

7 A I went to the passenger side of Officer
8 Renz's vehicle as he was sitting in it filling out a
9 citation and asked him what was going on.

10 Q Okay. And then did you approach the
11 passenger side door while Officer Renz approached
12 the driver's door?

13 A Yes.

14 Q Who was sitting in the passenger side
15 seat?

16 A Jessica Lang.

17 Q Do you see her in the courtroom?

18 A I do.

19 Q Could you please point to her and tell me
20 something she is wearing.

21 A She is in a pink shirt with the word pink
22 on it.

23 MS. VerMAAS: May the record reflect that
24 the witness has identified the Defendant?

25 THE COURT: The record will so reflect.

Direct Examination - C. Marcelllo

1 Q (By Ms. VerMaas) Could you please
2 describe the car and what you observed about the car
3 on the passenger side.

4 A I believe it was a black car. I don't
5 know the make and model -- I can't remember.

6 On the passenger side, a female was seated
7 in the passenger seat. Officer Renz was talking to
8 the male in the driver's seat. The passenger window
9 was down -- I'd estimate about a quarter of the way
10 down, so maybe six to four inches.

11 Q And did you observe anything at that time?

12 A As soon as I walked up, I could smell an
13 odor of marijuana coming through the passenger
14 window. I'm observing the passenger who looks at me
15 and then goes into her purse, so I watched her, what
16 her hands were doing.

17 Q What did she do at that time?

18 A She got a cigarette out and lit it and
19 blew smoke all over the cabin of the vehicle and
20 just continued to smoke and go through her purse.

21 Q So once you smelled marijuana, did you
22 tell Officer Renz that you smelled the marijuana?

23 A It took a little bit. I was trying to get
24 his attention with subtle movements of my head or
25 trying to wave at him. He was pretty focused on

Direct Examination - C. Marcello

1 what he was doing, and in between trying to get his
2 attention, I was also trying to watch the hands of
3 the passenger, but I did get his attention by
4 flashing with my flashlight.

5 Q So once you got Officer Renz's attention,
6 what did you do next?

7 A I just kind of pointed at my nose,
8 indicating that I had an odor. Went to the back of
9 the vehicle. We backed up. As we back up, we don't
10 turn our backs on the vehicle. I then informed him
11 that I had an odor of marijuana.

12 Q So what did you and Officer Renz proceed
13 to do next?

14 A Then we had the occupants of the vehicle
15 step out of the vehicle and then asked if there
16 was -- I informed them of an odor of marijuana
17 coming from the vehicle. Then I always ask about
18 the odor of marijuana -- smoked in the past,
19 currently or how recent.

20 Q What was their response?

21 A They both denied any marijuana being
22 smoked in the vehicle.

23 Q So did you get Ms. Lang out of the
24 vehicle?

25 A Yes.

Direct Examination - C. Marcelllo

1 Q And when she stepped out of the vehicle,
2 did she also have a purse with her?

3 A Yes.

4 Q Did you place the purse on the hood of the
5 car?

6 A I had her place the purse on the hood of
7 the car.

8 Q Where did you place Ms. Lang?

9 A She was three feet in front of the
10 vehicle.

11 Q So then what did you do next?

12 A I continued to ask questions about
13 marijuana or any dangerous weapons or anything in
14 the vehicle or on their person. Jessica did -- I
15 had Jessica do an inside/outside pockets check.
16 Because she wasn't wearing any concealing clothes,
17 there's really no need for a pat-down for weapons.
18 I just had her pull her clothes tight. Officer Renz
19 searched the driver. I then searched the purse. I
20 searched the purse.

21 Q Okay. So at that time, after you made
22 sure she didn't have any weapons, you then searched
23 Ms. Lang's purse?

24 A Correct.

25 Q What did you find in the purse?

Direct Examination - C. Marcelllo

1 A The things of note were drugs and drug
2 paraphernalia.

3 Q Tell me what type of drugs did you find.

4 A Marijuana, methamphetamine. There was
5 some pills and then what we refer to as a drug kit.

6 Q What was the drug kit?

7 A pipe, some cleaning material to clean a
8 pipe. I would have to refer to the photos for the
9 rest of the miscellaneous stuff.

10 Q How were the drugs packaged?

11 A The marijuana was packaged in a little
12 container. The methamphetamine was packaged -- I
13 believe it was in a baggie and the pills were in a
14 baggie also.

15 Q Did you take pictures of the items that
16 were found?

17 A I did.

18 MS. VerMAAS: May I approach, Your Honor?

19 THE COURT: Yes.

20 (Exhibit No. 1 was marked for identification.)

22 Q (By Ms. VerMaas) Officer, I am handing
23 you what's previously been marked as Exhibit No. 1.
24 Do you recognize those pictures?

25 A I do.

Direct Examination - C. Marcelllo

1 Q What, first of all, is on that sheet?

2 A Three photographs.

3 Q Did you take those pictures?

4 A Yes.

5 Q All right. What's contained within those
6 photographs?

7 A So the pictures -- the way I take the
8 photos are from farthest out to closest in, just to
9 show all of the contents, and then a closer shot of
10 the actual illegal paraphernalia and contents.

11 Q What's in the top left photo?

12 A Top left photo is the purse and then all
13 of the contents that were pulled out of the purse.

14 Q And what does it show?

15 A There's a phone. There's gum. There's
16 a methamphetamine pipe, a smoother or cutter
17 which is a cut-off straw that is used for drug use.
18 All of these things were packaged inside a sock.
19 There was a marijuana pipe and pills and
20 methamphetamine.

21 Q When you say pills, do you know what kind
22 of pills were in that picture?

23 A I believe they were nonnarcotics. I
24 believe they were just ibuprofen, like Tylenol or
25 something.

Direct Examination - C. Marcelllo

1 MS. VerMAAS: May I approach again?

2 THE COURT: Yes.

3 Q (By Ms. VerMaas) So I guess in the bottom
4 right-hand corner, where is the methamphetamine?

5 Which one is the methamphetamine?

6 A The meth is the white substance in the
7 small baggie.

8 Q By the green --

9 A -- pen, yes.

10 MS. VerMAAS: Your Honor, at this time,
11 the State would request that Exhibit No. 1 be
12 placed into evidence.

13 THE COURT: As to Exhibit 1, Mr. Truell?

14 MR. TRUELL: No objection.

15 THE COURT: One is received.

16 (Exhibit No. 1 is hereby made a
17 part of the Bill of Exceptions
18 and may be found attached to
 Volume I of the Bill of
 Exceptions.)

19 Q (By Ms. VerMaas) Did you or Officer Renz
20 field test the objects found in Ms. Lang's purse?

21 A Yes.

22 Q What was the result of the field test?

23 A Positive for marijuana on the green leafy
24 substance and positive for methamphetamine for the
25 white powder crystalline substance.

Direct Examination - C. Marcelllo

1 Q Did all of the above occur in Hall County,
2 Nebraska?

3 A Yes.

4 MS. VerMAAS: I will pass the witness.

5 THE COURT: Cross?

6 MR. TRUELL: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. TRUELL:

9 Q Officer, when you approached the vehicle
10 in which Ms. Lang was sitting for the first time,
11 was there anyone in the vehicle smoking at that
12 time?

13 A No, not that I could tell.

14 Q You did not smell any odor of cigarette
15 smoke?

16 A No.

17 Q What you smelled was an odor of burned
18 marijuana?

19 A No, it was fresh marijuana.

20 Q Fresh marijuana?

21 A Mm-hmm.

22 Q And yet the search produced nothing
23 more than that little baggie as reflected in
24 Exhibit 1?

25 A Yes.

Cross-Examination - C. Marcelllo

1 Q At the time you approached the vehicle,
2 you have testified that the window on the passenger
3 side was about a quarter of the way down; is that
4 right?

5 A Yes.

6 Q What was the wind like that night?

7 A I cannot give you a number, but it was
8 pretty calm.

9 Q Fairly calm for around here?

10 A Yes.

11 Q From what direction was it blowing?

12 A I cannot tell you.

13 Q You don't know if it was blowing in from
14 the passenger's side or in from the driver's side?

15 A I don't recall.

16 Q While you were standing by the passenger
17 side, Ms. Lang lit a cigarette; is that right?

18 A Yes, sir.

19 Q Did the smell of the cigarette smoke
20 overpower the smell of the marijuana?

21 A For a little bit.

22 Q Who directed the people out of the car?

23 A Officer Renz asked the driver to get out,
24 and I went over to the passenger and asked her to
25 get out.

Cross-Examination - C. Marcelllo

1 Q You took your respective sides?

2 A Correct.

3 Q At the time you went back to the
4 car to ask the passenger to exit, was she still
5 smoking?

6 A I don't believe so.

7 Q Had you asked her to put out the
8 cigarette?

9 A I don't remember.

10 MR. TRUELL: No other questions, Your
11 Honor.

12 THE COURT: Redirect?

13 REDIRECT EXAMINATION

14 BY MS. VerMAAS:

15 Q Mr. Marcelllo, I forgot to ask you, but
16 once you requested Ms. Lang to step out of the car,
17 what was her demeanor?

18 A Very nervous, fidgety. Fingers were
19 fidgety. She was distant, wouldn't look me in the
20 eye, and continued to ask the driver what to do
21 next.

22 MS. VerMAAS: No further questions.

23 THE COURT: Mr. Truell, I will allow
24 recross.

25 MR. TRUELL: Thank you.

Recross-Examination - C. Marcello

1 RECROSS-EXAMINATION

2 BY MR. TRUELL:

3 Q During the course of your conversation
4 with Ms. Lang, was she consistently informing you
5 that she had never gone through this before, she
6 didn't know what to expect?

7 A Yes.

8 MR. TRUELL: No other questions, Your
9 Honor.

10 THE COURT: Officer Marcello, you can
11 step down. You may return to the rotunda,
12 please.

13 Ms. VerMaas, further evidence by the
14 State?

15 MS. VERMAAS: I think I will rest, Your
16 Honor.

17 THE COURT: Thank you.

18 Mr. Truett, evidence on behalf of
19 Ms. Lang?

20 MR. TRUELL: No, Your Honor.

21 THE COURT: Ms. VerMaas, do you wish to be
22 heard?

23 MS. VERMAAS: Yes, just briefly, Your
24 Honor.

25 THE COURT: Go ahead.

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1 reliability as to the basis for the search.

2 THE COURT: Ms. VerMaas, do you wish to
3 respond?

4 MS. VERMAAS: Just briefly. If you do
5 recall, Officer Renz stated that he was the
6 first officer that initiated the traffic stop.
7 That's when he went up to the driver's side of
8 the vehicle, and I think she was possibly
9 smoking a cigarette.

10 When Officer Marcello first arrived on the
11 scene, he went to the squad car before
12 approaching with Officer Renz to the car, and
13 at that time, it was when he observed he could
14 smell the odor of marijuana and that's when he
15 observed her to light up a cigarette. Also,
16 the purse was sitting on the Defendant's lap,
17 so I really don't think it's inconceivable that
18 Officer Marcello could smell marijuana. They
19 didn't need to search -- they had probable
20 cause to search, so consent was not needed at
21 that time.

22 I will rest on that, Your Honor.

23 THE COURT: The evidence presented --
24 from the evidence presented, the Court finds as
25 follows: There was probable cause for the stop

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1 of the vehicle based upon the alleged speeding.

2 Officer Renz was the first officer at the scene
3 and approached the vehicle and did not smell
4 marijuana; however, smelled cigarette smoke,
5 but said the wind was blowing from the driver's
6 side to the passenger side of the vehicle.

7 There is no evidence concerning who was smoking
8 at the time when Officer Renz first approached
9 the vehicle.

10 When Officer Marcello slowly approached
11 the passenger side, he smelled marijuana and,
12 after gaining Officer Renz's attention,
13 communicated that fact to Officer Renz, from
14 the evidence, before the citation had been
15 provided to the driver.

16 At that time, based upon the smell of
17 marijuana, the officer had the right to search
18 the vehicle and the passenger's containers,
19 such as the purse, because they had probable
20 cause to believe the vehicle did have evidence
21 of a crime within it. Therefore, I will
22 overrule the motion to suppress.

23 This matter is scheduled for jury trial on
24 Monday beginning at nine o'clock. Is that
25 correct, Mr. Truell?

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1 Sometimes you, as jurors or potential jurors,
2 serve just by coming in and helping people
3 resolve the differences they have.

4 I want to extend, on behalf of everyone,
5 our appreciation for your patience throughout
6 this. This was a unique set of facts that I
7 have not seen in 35 years. Your participation
8 is now complete.

9 Your next -- unless you are on the jury
10 for Thursday, your next reporting date is
11 November 5th. If you are on the jury for
12 Thursday, please be here at nine a.m. If not,
13 I will see you all on November 5th.

14 Thank you so much, ladies and gentlemen.
15 You are excused.

16 (Whereupon, the jury was
17 escorted out of the courtroom at
18 1:24 p.m.)

19 THE COURT: We're back on the record in
20 CR17-756, State v. Jessica J. Lang. The State
21 is represented by Ms. VerMaas and Ms. Doering.
22 Ms. Lang is present with counsel, Mr. Truell.
23 The jury has been excused based upon Ms. Lang's
24 waiver of her right to a jury trial.

25 This matter comes on now for a bench
 trial. Are the parties ready to proceed?

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1 MS. VerMAAS: Yes, Your Honor.

2 MR. TRUELL: Yes, Your Honor.

3 THE COURT: Ms. VerMaas, you may do so.

4 MS. VerMAAS: Procedurally, Your Honor, I
5 think for bench trial purposes, we are
6 requesting that Your Honor take note of the
7 motion to suppress and evidence that was
8 presented in that proceeding.

9 May I approach with another piece of
10 evidence?

11 THE COURT: Yes.

12 Ms. VerMaas, I take it that you are
13 requesting I consider the evidence presented on
14 May 4, 2018, at the motion to suppress held in
15 this case as evidence in the bench trial of
16 this matter; is that correct?

17 MS. VerMAAS: Yes, Your Honor, that's
18 correct.

19 MR. TRUELL: Yes, Your Honor, I do
20 stipulate to that.

21 THE COURT: Thank you, Mr. Truell.

22 Go ahead, Ms. VerMaas.

23 (Exhibit No. 9 was marked for
24 identification.)

25 MS. VerMAAS: Your Honor, in addition, the

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1 State would request that Exhibit No. 9 be
2 placed into evidence.

3 THE COURT: Mr. Truell?

4 MR. TRUELL: No objection to that either,
5 Your Honor.

6 (Exhibit No. 9 is hereby made a
7 part of the Bill of Exceptions
8 and may be found attached to
Volume I of the Bill of
Exceptions.)

9 THE COURT: Further evidence or
10 stipulation, Ms. VerMaas?

11 MS. VerMAAS: One more stipulation
12 regarding the lab report, Your Honor. In
13 regards for purposes of this trial, the State
14 is requesting that you consider Item 1A which
15 was the white crystalline substance, and then
16 that substance on the third page states that it
17 weighed 3.5. It did test positive, but there
18 were two different bags of methamphetamine, one
19 attributed to each of the Defendants and 1A is
20 the bag that was found in Ms. Lang's purse.

21 MR. TRUELL: I will stipulate to that.

22 THE COURT: Further stipulation,
23 Ms. VerMaas?

24 MS. VerMAAS: I don't believe so.

25 MR. TRUELL: Your Honor, as part of the

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1 stipulation, we acknowledge that Ms. Lang was
2 in fact the individual that was stopped on the
3 night of the arrest, August 17, 2017.

4 THE COURT: And that she is the person
5 here in court?

6 MR. TRUELL: She is the person here in the
7 courtroom.

8 THE COURT: Is that stipulation
9 acceptable, Ms. VerMaas?

10 MS. VERMAAS: Yes, Your Honor.

11 THE COURT: Mr. Truett, evidence on behalf
12 of Ms. Lang or are there any objections you
13 wish to make at this time?

14 MR. TRUELL: Your Honor, I wish to renew
15 my objection to the evidence based upon the
16 previous motion to suppress in that the search
17 was not authorized under law.

18 THE COURT: I will note your objection,
19 Mr. Truett. I will note it as a continuing
20 objection, and I will overrule it for purposes
21 of this trial.

22 Based upon the evidence presented at the
23 motion to suppress hearing, the Court finds
24 that the State has met its burden of proof as
25 to Counts I and II and has not met its burden

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1 of proof as to Count III and I will dismiss
2 Count III. I will find Ms. Lang guilty of
3 Counts I and II.

4 I have discussed my reasoning concerning
5 the stop and the search from the bench on
6 May 4th and will not belabor that point at this
7 time.

8 Ms. Lang, I am going to order that you
9 participate in the presentence investigation.
10 I am going to schedule this case for sentencing
11 on December 18th at 10:00 a.m.

12 Ms. Lang, I am going to continue your bond
13 with some additional terms: No. 1, that you
14 leave here and go immediately to the probation
15 office to begin the presentence investigation.
16 It is my understanding, Ms. Lang, you reside in
17 Lincoln. Is that correct?

18 THE DEFENDANT: Mm-hmm.

19 THE COURT: Let them know that. Hopefully
20 they can arrange to have you do the presentence
21 investigation in Lincoln. I will order, as
22 part of the presentence investigation, a drug
23 and alcohol evaluation as a condition of your
24 bond. Ms. Lang, you are ordered to appear for
25 all probation appointments and appointments