

No. 20-7329

ORIGINAL

FILED

JAN 09 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

JUSTIN L. KNIGHT,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEBRASKA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Justin L. Knight #89125
Nebraska State Penitentiary
P.O. Box 22500
Lincoln, Nebraska 68542-2500
(402) 471-3161

PRO SE PETITIONER

QUESTIONS PRESENTED

1. Whether, under the totality-of-the circumstances test, the police officers in this case had reasonable suspicion that justified an investigative stop of a vehicle because one of its occupants was counting his cash in a convenience store?
2. Whether an occupant of a vehicle should be convicted for drugs found in another passenger's pocket and, also be convicted for a firearm that was in the other passenger's possession as well?

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and decision of the Nebraska Court of Appeals.

OPINIONS BELOW

The memorandum opinion and judgment on appeal from the Nebraska Court of Appeals appears at Appendix A to the petition and is unpublished. The Order from the Nebraska Court of Appeals denying rehearing appears at Appendix B to the petition and is unpublished.

JURISDICTION

The order of the Nebraska Supreme Court denying discretionary further review was issued on August 12, 2020. Due to the Covid-19 pandemic, this Court on March 19, 2020, extended the deadline to file any petition for writ of certiorari to 150 days from the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The present petition for writ of certiorari is timely filed by not later than January 09, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that: "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 person or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "No state shall make or enforce any law which will abridge the privileges or immunities of the 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."

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On December 20, 2018, a Scotts Bluff County, Nebraska jury convicted Petitioner Justin L. Knight of one count of possession of a controlled substance with the intent to distribute, to wit: methamphetamine, more than 140 grams, possession of a defaced firearm, and fugitive/prohibited person in possession of a firearm (T109). The trial court on February 13, 2019, sentenced Petitioner to imprisonment for a total term of not less than 20 years to no more than 20 years, with all three counts running concurrent to each other. On direct appeal, the Nebraska Court of Appeals affirmed the Petitioner's convictions and sentences on March 24, 2020 in *State v. Knight*, No. A-19-0274 (Neb.App. 2020), unpublished, further review denied August 12, 2020. Knight is now petitioning this Court for a writ of certiorari of his direct appeal.

Knight was represented by three different attorneys throughout the state proceedings at the trial court level (T26, T59). Attorney Katy A. Reichert was appointed to represent Knight in his direct appeal on February 13, 2019 (T126).

Knight's first two attorneys filed separate Motions to Suppress (T24, T50). A suppression hearing was held in which Knight sought to suppress the evidence found by law enforcement as a result of an illegal search. His third attorney represented him at this hearing. The trial court entered an Order denying the Motion to Suppress on September 18, 2018 (T68).

After sentencing, Knight timely filed his Notice of Appeal in the trial court on March 15, 2019 (T128, T146). Knight also filed in the trial court with his Notice of Appeal—an Application for Permission to Proceed in Forma Pauperis and supporting Affidavit in Support to Proceed in Forma Pauperis, and Affidavit of Poverty (T149-156). On March 15, 2019, the trial court granted Knight leave to proceed with his direct appeal in Forma Pauperis (T157-159).

B. STATEMENT OF FACTS

I. MOTION TO SUPPRESS

On the late evening of January 11 and early morning of January 12, 2018, Scotts Bluff County Deputy Matt Dodge, Deputy Adkins, Deputy Velke, and Trooper Buxbaum were taking a coffee break at Western Travel Terminal (WTT) in Scottsbluff, Nebraska. Their break was filmed and introduced into evidence as Exhibit 2. At approximately 11:52 p.m., the four law enforcement officers were sitting at a table in WTT Deputy Dodge is shown wearing a black stocking cap. Deputy Velke has his back to the camera and is not wearing any kind of hat. Deputy Adkins is facing the camera to Deputy Dodge's right and has a silver coffee mug in front of him. Trooper Buxbaum is in a flat brimmed hat and is sitting across from Deputy Dodge. All four men are preoccupied with their respective cell phones (E2:25).

At 11:53.14 p.m., a younger man in a black Adidas sweatshirt with dark hair walked from the restroom. His hands were at his side. None of the officers

looked up at the man as they were all staring down at their cell phones (E2:25). Shortly after this man walked by, Trooper Buxbaum got up and left.

At the suppression hearing, Deputy Dodge testified that this is the individuals he observed walking into the bathroom and counting cash (25:22-25). The Exhibit 2 does not show the man walking into the bathroom.

At 11:54.30 p.m., a man in a straw cowboy hat walked toward the bathroom. This man was later identified as Ryan Kubik (26:7-10). Deputy Dodge testified that he first observed Kubik walking to the bathroom counting a large amount of cash (26:9-11). However, the surveillance video in Exhibit 2 showed that the man's arms and hands were not moving. Deputy Dodge looked up at the man briefly, and then went back to looking at his phone. Deputy Adkins looked up momentarily and also returned his attention to his phone (E2:25).

At 11:56.12 p.m., the man in the straw cowboy hat walked from the restroom. Deputy Adkins looked momentarily and then back down. Deputy Dodge looked at the man as he walked by. The man pulled something out of his left pant pocket (E2:25). Deputy Dodge testified that he saw the man pull out a "large amount of cash and start counting it." (26:16-20). However, according to the video, Deputy Dodge would have been looking at or over the man's back right shoulder at the time he pulled the item from his left pocket (E2:25).

Deputy Dodge then got a confused look on his face and spoke to the other deputies (E2:25). He asked them if they had seen what he just saw (27:3). Dodge testified that his suspicion was aroused because he had gone on break many times at WTT, a convenience mart and gas station, and had "never seen anybody walk by with a large amount of cash, the two people that went to the bathroom in that close proximity of time and then exit the bathroom. And, both of them were counting cash and one of them was counting a large amount of cash both

times." (27:5-11).

At 11:57 p.m., Deputy Dodge got up and walked toward the restroom. Deputies Adkins and Velke remained seated. Dodge went to the restroom and looked through the trash cans and the back of the toilet bowl to see if there were any narcotics or drugs. He found none (27:16-25). Dodge returned from the restroom at 11:57 p.m. (E2:25). None of the three officers left the building. When the video cuts off at approximately 12:00 a.m., the three deputies were still at the tables inside WTT (E2:25).

The officers left WTT shortly after midnight and went back on routine patrol (28:8-13). When Dodge was a couple of blocks away from WTT, he received a text message from Velke stating that he had observed the people from WTT pull into the Lucky Keno parking lot. Dodge turned around and went to Lucky Keno to stop and talk to those individuals (28:14-25; 29:1-3). Dodge's suspicion was aroused again because Lucky Keno is known to law enforcement as a high drug trafficking area (29:4-10).

When Dodge pulled into the Lucky Keno parking lot, he did not know which vehicle the individuals were in. He was the first vehicle to arrive. He parked behind a red Dodge pickup such that the vehicle was "boxed in" and unable to back out (42:4-25; 43:1-25; 44:1-5). Dodge had to ask Deputy Velke which truck belonged to the suspects. Velke pointed to the red Dodge pickup (29:13-17).

The State introduce Exhibit 3, which is Dodge's body camera footage of his contact with the occupants of the red Dodge pickup (E3:30).. Dodge approached the vehicle and made contact with the person in the front passenger seat, who was identified as Ryan Kubik. There was a passenger in the backseat, who was identified as Isaiah Ortgiesen, the owner of the vehicle. There were no other occupants (30:14-25; 31:1-24).

When Dodge approached the vehicle, he asked the occupants what they were doing. They responded that they were waiting for their driver to come out of the building. Dodge asked who the driver was and was told it was Justin (E3: 35:30). Justin was identified as an uncle and a friend (E3:30).

Dodge asked to see identification and to speak to Ortgiesen outside the vehicle (E3,:54:30; 32:7-12). While speaking to Ortgiesen, Dodge showed his flashlight into the vehicle and saw a digital scale underneath the stereo in center console (32:13-20). Kubik held up a large, opened bottle of vodka and said, "this is mine." (33:1-9). Dodge then asked Kubik to step outside the vehicle.

Once Kubik was outside the vehicle, Dodge asked him for consent to pat him down for his safety.(E3:30). Dodge patted down Kubik and told him not to move and to put his hands behind his back. As Dodge patted down Kubik, he felt a crunch and felt narcotics inside of Kubik's top right pocket (34:1-6). Dodge then asked Deputy Velke to cuff Kubik (E2,2:44:30). After Kubik is cuffed, Dodge asked where "the uncle" was and Kubik tells Dodge he is inside (E3,4:22: 30; 35:3-6).

Deputy Adkins arrived on scene. Dodge told him what he had found and that the owner of the vehicle was the kid that he had seen walking back, counting hundreds (E3,7:24:30). Dodge asked Deputy Velke and Deputy Adkins to go into the business and find the driver named Justin and bring him outside. Up to this point, none of the officers had seen the person named Justin (E3,7:35:30; 35:13-18).

A few minutes later, Deputies Adkins and Velke brought Justin out to the parking lot and patted him down. They found nothing on him. Dodge asked Justin how he became the driver for "these guys" and Justin denied being the driver.

Deputy Dodge stated that he found over 300 grams of methamphetamine. Justin responded, "What?" A few minutes later, Justin asked what is goin on and Dodge again told Justin that he found a large amount of meth. He told Justin that he was not under arrest but that he was detained (E3,11:34:30). Justin, Kubik, and Ortgiesen are placed in police cruisers.

The officers proceed to search the vehicle. They found a 1.7 liter bottle of McCormick vodka, a .38 special gun with a defaced serial number on the floorboard under where Kubik was sitting, the cylinder of the .38 gun, a plastic sack with gun cleaning equipment, a box of .38 special ammunition, a large fixed blade, 94 plastic yellow bags, 14 black plastic bags, a plastic bag containing 12 Trazadone pills, a digital scale with white powder residue, a showbox with a butane torch and three glass pipes with white residue powder, antique collectible coins, sports cards, and cell phones. On Kubik's person, Dodge found a presumptive 192 grams of methamphetamine, a "large denomination" of cash, and a notebook with names and numbers (37:23-25; 37:1-25; 38:1-11).

Deputy Velke went to WTT after the search to retrieve the surveillance video entered into evidence as Exhibit 2. Dodge reviewed the video after the arrests and realized that the man wearing the Adidas sweatshirt, supposedly counting cash, was not Ortgiesen. That man was never identified and was not in the red Dodge truck (38:13-25; 39:1-20; 41:3-13).

II. TRIAL

1. ISAIAH ORTGIESEN'S CLAIMS

Isaiah Ortgiesen is Knight's nephew. He was 19-years-old at the time of trial and 18-years-old in January 2018 (215:21-25; 216:1-5). Ortgiesen travelled with Knight in Ortgiesen's red Dodge pickup from Brush, Colorado to Scottsbluff, Nebraska on an early Tuesday morning in January of 2018 (217:1-25;

218:1-6). They stayed at the Fairfield Inn in Scottsbluff. Once there, Knight left the room at some point and returned around 10:00 a.m. The two drove back to Ft. Morgan, Colorado that day because Ortgiesen had to work that evening. (217:1-25; 218:1-25; 219:1-17). According to Ortgiesen, Knight told him this was a "drug run" but Ortgiesen never saw any drugs (221:21-25; 222:1).

Later that night after Ortgiesen was off work, Knight picked him up from Pizza Hut in the red pickup. A man named Ryan Kubik was sitting in the front seat of Ortgiesen's pickup. Ortgiesen observed a "huge baggie" full of meth in Kubik's coat pocket. Justin drove the pickup to Scottsbluff, where they arrived at the Fairfield Inn around 2:00 a.m. (220:17-25; 221:1-24; 222:2-17).

When the trio arrived at the hotel, Knight told Kubik, "we really need to find somebody to sell this to." (223:6-9). Knight invited a person named "Christian" to the hotel, but Ortgiesen left the hotel and was not present when or if Christian arrived (224:16-21). After a while, Knight and Kubik picked up Ortgiesen at Pizza Hut and drove to a trailer occupied by a woman named Misty Yekel. Knight went inside for about twenty to thirty minutes while Ortgiesen and Kubik waited in the pickup (225:10-25; 226:1-9). Ortgiesen did not know what Knight was doing in Yekel's house (271:10-16). Knight then dropped off Kubik and Ortgiesen at the hotel and was gone for a few hours (226:17-25).

Ortgiesen saw Kubik's baggie of meth at the hotel room and again at Misty Yekel's trailer on Thursday (227:1-8; 229:16-23; 230:6-8). Ortgiesen saw the exchange of meth between Justin and Misty on one occasion. He saw Misty give Knight meth (258:1-4). He may have also seen an exchange of drugs between Justin and a person named Cat (231:8-25; 232:1-16). He saw no other exchange of drugs (244:12-25; 245:1-9).

Ortgiesen was present with Knight, Yekel, and Kubik when they went to a house south of Mitchel. Ortgiesen stayed in the pickup with Kubik while Knight and Yekel went inside. He saw no exchange of drugs (244:12-25; 245:1-9).

At some point in the trip, Knight acquired a late 80's Chevrolet half-ton pickup (233:19-22). After the purchase of the pickup, Ortgiesen split from Knight and Kubik and spent Thursday afternoon with a man named Dalton Slunecka (235:24-25; 236:1-3). Ortgiesen saw a gun in Slunecka's pocket on Thursday night (237:13-25). Ortgiesen, Slunecka, Knight, and Kubik went to Walmart where they purchased sandpaper (238:1-10). They dropped off Slunecka after the trip to Walmart and went to another house in Scottsbluff. There, Ortgiesen saw Knight and Kubik sanding the serial number of a gun (239:16-25; 239:1-25).

2. KNIGHT'S INTERVIEW WITH SERGEANT MATTHEW HOLCOMB

Matthew Holcomb was employed as a patrol sergeant with the Scotts Bluff County Sheriff's Office (287:6-8). On January 12, 2018, he interviewed Knight (288:13-25; 289:1). Knight's interview was admitted into evidence as Exhibit 22 (290:1-2). During the interview, Knight admitted to selling "Kathy" a quarter ounce of methamphetamine and Misty Yekel a quarter to half ounce (E22,13:18,16:30:290; 17:17). There are twenty-eight grams in one ounce (291:2). Knight did not know how much meth Kubik had on him (E22:289).

3. SEARCH OF KATHY SECKINGER'S HOME

Logan Ledroit was a deputy sheriff with the Scotts Bluff County Sheriff's Office (297:24-25). He participated in the execution of a search warrant at the home of Kathryn (or Kathy) Seckinger at 1345 17th Street in Gering, NE on January 14, 2018 (298:8-16). Through the search, law enforcement seized a clear cellophane bindle containing what Deputy Ledroit believed to be methamphetamine and a clear glass meth pipe (299:2-6).

4. MISTY YEKEL'S CLAIMS

Misty Yekel is a multi-convicted felon (314:17-21). Knight asked her to wire \$1300.00 to Ryan Kubik, but she was not able to. Instead, she elicited the help of a person named Beau Gealy to wire the money (317:6-15; 320:6-8). Yekel did not know why the money was being wired (328:3-5).

Around January 9, 2018, Knight went to Yekel's home to see if she knew anyone who needed meth. Yekel made a few phone calls and went with Knight to Brian Zitterkopf's home to "get rid" of meth. Zitterkopf bought an ounce from Yekel and Knight (323:2-20; 325:17-20).

5. DEPUTY MATT DODGE'S INVESTIGATION

Matt Dodge was working as a Scotts Bluff County Deputy Sheriff on the evening of January 11, 2018. While on a coffee break at Western Travel Terminal (WTT) in Scottsbluff, Nebraska, Dodge observed "some males" walking toward the bathroom counting large sums of cash. After that, Dodge left the area. He was approximately six or seven blocks from WTT when Deputy Velke texted him to inform Dodge that he observed the "suspicious people" at Lucky Keno, otherwise known as Frontside Bar. Dodge turned around and drove back to Lucky Keno to have contact with these individuals to see what was going on (328:24-25; 329:1-25; 330:1-7).

When Dodge pulled into Frontside, he did not know which vehicle belonged to these "suspicious" individuals. He called Deputy Velke, who pulled up beside Dodge's vehicle at that moment. Velke identified the red Dodge pickup as the individual's vehicle (330:18-25).

Dodge got out of his vehicle and approached the passenger side of the red Dodge. He looked into the vehicle but could not see much as the windows were tinted. The front passenger window then rolled down and Dodge had contact with

the occupants. The front passenger was identified as Ryan Kubik and the back passenger was Isaiah Ortgiesen (331:1-11).

Dodge began asking Kubik and Ortgiesen what they were doing. He requested their IDs. He noticed a digital scale and a set of wood pistol grips in the center console by the stereo. He asked Ortgiesen to step outside of the vehicle. When he did so, Kubik held up an opened bottle of vodka and said it was his. Dodge asked Kubik to step out of the vehicle and for permission to search him. Kubik obliged (332:7-25). Dodge patted down the exterior of Kubik's clothing and felt a large bag in his right front jacket pocket crumple. Dodge believed this to be illegal narcotics. Kubik was then handcuffed (333:1-16).

Knight was brought out of the Frontside by Deputies Velke and Adkins. He was searched for drugs and money, neither of which were found (356:2-13). After detaining Kubik, Ortgiesen, and eventually Knight, the officers searched the red Dodge pickup. They found the following items:

- Cell phone with charger on top of center console;
- Digital scale in center console;
- Wood pistol grips in ashtray;
- Debit card in center console;
- 1.75-liter bottle of McCormick vodka;
- .38 special with a defaced serial number;
- Sack with purple sandpaper;
- Methamphetamine in yellow baggie by 4-wheel drive shifter;
- Yellow plastic sack with a white powdery substance;
- Black bag in backseat containing 94 small plastic bags and 14 black empty plastic bags;
- 12 Trazadone pills;
- Gun cleaning kit;
- Gun oil;
- .38 special ammunition;
- Gun clothes with gun oil on them;
- Brass cleaning rods;
- Can of oil;
- Screwdriver; and
- Shoebox with butane torch and glass bong with white residue.

The suspected methamphetamine found in Kubik's pocket tested positive for 187.22 grams of methamphetamine (E42,1:371; E44,1:371). The suspected methamphetamine found inside the vehicle tested positive for 3.6284 grams of methamphetamine (E43,1:371; E44,1:371).

6. JURY'S VERDICT

The jury returned a verdict finding Knight guilty of possessing methamphetamine with intent to manufacture, dispense, distribute or deliver (T109). It found that the weight of the methamphetamine was 190.84 grams, which is the total weight of meth found in Kubik's pocket and in the red Dodge pickup that was analyzed by the Nebraska State Patrol lab (E42,1:371; E43,1:371; E44,1:371). The jury also found Knight guilty of possession of a defaced firearm and possession of a firearm by a felon (T109).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE NEBRASKA STATE COURTS VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS BY FAILING TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE ON THE BASIS OF LACK OF REASONABLE SUSPICION.

This Court has held that the Fourth Amendment tolerates only reasonable mistakes with respect to reasonable suspicion for a traffic stop or an investigatory stop, and those mistakes, whether of fact or of law, must be objectively reasonable; thus, the court does not examine the subjective understanding of the particular officer involved. *Heien v. North Carolina*, 574 U.S. 54, 66 n.6 (2014). In this case, the main issue is whether Deputy Dodge had a "reasonable suspicion" that a crime was being committed. Petitioner asserts that the lawful activity of counting money by itself cannot be deemed to create reasonable suspicion that a crime is occurring, especially considering that the stop and search took place in the private parking lot of a gambling facility. The

reasonable suspicion standard for conducting a traffic stop takes into account the totality of the circumstances—the whole picture; as a result, the presence of additional facts might dispel reasonable suspicion. *Kansas v. Glover*, 140 S.Ct. 1183, 1191 n.17 (2020). The "whole picture" in this case consists of the observation of someone counting money and law enforcement's designation of the Lucky Keno as a location where drug dealing is known to occur. An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. *Illinois v. Wardlow*, 525 U.S. 119, 125 (2002); *Brown v. Texas*, 443 U.S. 47, 52 (1979).

Apparently, in this case, law enforcement chooses not to recognize that gambling, such as occurs at a Keno facility, is a cash endeavor where a player may be counting out his bet or his winnings. Also, anyone at a convenience store taking cash out of one's pocket or wallet to count in order to make a purchase is not suspicious. Petitioner Knight was an occupant in the red Dodge truck who had stepped out to go into the Keno parlor. His friends waited for him outside in the truck. Kubik and Knight had told the deputies that Knight was the driver of the vehicle.

Deputy Dodge asked Deputy Velke and Deputy Adkins to go into the Keno and find the driver named Justin and bring him outside (seizure) (E3,7:35:30; 35:13-18). Deputy Dodge told Justin (Petitioner Knight) that he was not under arrest but that he was detained (E3,11:34:30). Knight, Kubik, and Ortgiesen are placed in police cruisers. Deputy Dodge had parked behind the red Dodge pickup such that it was "boxed in" and unable to back out, and both Deputy Dodge and Deputy Velke approached the vehicle, one on each side (43:13-24, 52:13-15). These were all tier-two encounters that effectively restrained

Knight's, Ortgiesen's, and Kubik's movements. No reasonable person would have felt free to leave when the vehicle is surrounded by law enforcement officers.

To ensure that the resulting seizure is constitutionally reasonable, a Terry stop must be limited. The officer's action must be "justified at its inception and...reasonably related in scope to the circumstance which justified the interference in the first place." (emphasis added). *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humbolt County*, 542 U.S. 177, 185 (2004); quoting Terry v. Ohio, 392 U.S. at 20. In this case, Deputy Dodge himself even doubted that he had reasonable suspicion. At the 14:21 mark in Exhibit 3, Dodge speaks to Trooper Buxbaum on the phone about the millennial kid and cowboy counting money at the convenience store. Dodge says, "I was just wondering because that was going to be my stop...I was wondering if you got that. If you didn't, that's cool but that would help my case with the reasonable suspicion." (E3,14:21:30).

Furthermore, Dodge reviewed the convenience store surveillance video, entered into evidence as Exhibit 2, and realized that the man wearing the Adidas sweatshirt (millennial kid), supposedly counting cash, was not Knight or Ortgiesen. That man was never identified and was not in the red Dodge truck (38:13-25; 39:1-20; 41:3-13). The surveillance video shows the millennial kid wearing the Adidas sweatshirt exiting the restroom not counting money. In fact, his hands are at his sides. And, the video shows none of the officers even look at this individual. All four of the officers are intently looking down at their cell phones. Thus, Dodge's claim that this man's behavior is part of what created his "reasonable suspicion" is false and simply not supported by the evidence.

The "facts" that Deputy Dodge had when he approached the red Dodge in the Lucky Keno parking lot were that he saw two men counting cash as they walked

in and out of the restroom at WTT, a convenience mart, and they were now in the private parking lot of Lucky Keno, a restaurant/bar and gambling establishment, which is supposedly known for drug trafficking. Looking at the actual footage from WTT shows that the "facts" Dodge claims gave him reasonable suspicion were actually lies or not correct. Even if these "facts" were true, taking cash out of one's pocket at a convenience mart is not suspicious. Anyone who enters the building would make some kind of similar action to make a purchase.

Deputy Dodge merely had a "hunch," if even that, and this Court has held that "[i]ntrusions upon constitutionally guaranteed rights must be based on more than inarticulate hunches, and simple good faith on part of officer is not enough." *Terry*, 392 U.S. at 22. Dodge's hunch combined with the fact that this vehicle was parked in Luck Keno's private parking lot are simply insufficient to give rise to reasonable suspicion that the occupants of the red Dodge pickup were involved in illegal activity. As such, the investigatory stop and seizure of the occupants of the red Dodge was not supported by reasonable suspicion and was therefore unlawful. The central concern underlying the Fourth Amendment was about giving police officers unbridled discretion to rummage at will among a person's private effects. *Arizona v. Grant*, 556 U.S. 332, 345 n.9 (2009). Consequently, the evidence obtained as a result of the illegal seizure and search of Knight, Kubik, and Ortgiesen should have been suppressed by the Nebraska state courts as fruit of the poisonous tree.

The state-law procedures in Nebraska with respect to Fourth Amendment violations are unquestionably contrary to the fundamental principles of fairness and justice and, violated Knight's federal constitutional rights against

unreasonable searches and seizures, and to due process of law, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. Certiorari should be granted to address whether the police officers had reasonable suspicion for an investigative stop of Knight, Kubik, and Ortgiesen. This Court's discretionary intervention is necessary to address this important issue that will undoubtedly recur in future cases.

II. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE NEBRASKA STATE COURTS VIOLATED THE FOURTEENTH AMENDMENT IN FINDING SUFFICIENT EVIDENCE TO CONVICT A PERSON OF ANOTHER PERSON'S CRIMES.

As this Court has noted, "a properly instructed jury may occasionally convict when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a judge sitting as jury." *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). When such a situation arises, the conviction cannot constitutionally stand. *Id.* The evidence in this case, even when taken most favorable to the State, fell woefully short of establishing the essential elements of the crimes for an objectionably reasonable trier of fact to convict Petitioner beyond a reasonable doubt.

(a) Count I

The evidence adduced at trial was insufficient to show that Knight possessed 190.04 grams of methamphetamine with the intent to distribute. The evidence showed that a large quantity of meth was found in Kubik's front shirt pocket in a vehicle owned by Ortgiesen (34:1-6; 30:14-25; 31:1-24). There was no evidence that Knight knew about or had any control of the meth Kubik possessed. (37:23-25; 37:1-25; 38:1-11). Knight sold his meth (a maximum of 49 grams) and stated adamantly that he was not aware of the meth Kubik possessed (E22,13:18, 16:30:290; 17:17) (E22:289). Knight was not even present at the time the meth

was found. Ortgiesen testified that he saw Kubik's baggie of meth at the hotel (227:1-8; 229:16-23; 230:6-8). But, Ortgiesen did not testify that he ever saw Knight have possession of the baggie. Knight could have been convicted of violating Neb.Rev.Stat. § 28-416(10)(6) (possession of meth more than 28 but less than 140 grams). Therefore, the evidence was insufficient to find him guilty of violating the charged in the Information, which was Neb.Rev.Stat. § 28-416(10)(a). The Nebraska state courts violated Knight's due process rights in accepting the jury's verdict and finding him guilty of Count I of the Information.

(b) Count II

The evidence adduced at trial was insufficient to prove beyond a reasonable doubt that Knight possessed a firearm. The gun in Ortgiesen's vehicle was found under Kubik's seat. Ortgiesen saw a gun in Slunecka's pocket (237:13-25). There is not any other independent factor linking Knight to the gun other than his association with Kubik, Ortgiesen, and Slunecka. Thus, the Nebraska state courts violated Knight's due process rights in accepting the jury's verdict and finding Knight guilty of Count II of the Information.

(c) Count III

The evidence adduced at trial was also insufficient to prove beyond a reasonable doubt that Knight was in possession of a defaced firearm. The gun found in Ortgiesen's vehicle was not defaced. Photos of the gun are contained in Exhibits 16, 34, and 35. The appearance has not been altered in any way. The serial number is noticeable and readable in Exhibits 16, 34, and 35. Knight did not possess any firearms for that matter. See, (b) Count II, *supra*. The Nebraska state courts violated Knight's due process rights in accepting the jury's verdict and finding him guilty of Count III of the Information.

The State argued that Knight should not be considered a passenger of the vehicle for purposes of standing to object to the search of the vehicle. On the other hand, the State also argued that Knight should be considered a passenger in the vehicle for purposes of constructive possession of the drugs found on Mr. Kubik. The Nebraska Court of Appeals agreed with the State's erroneous arguments in its analysis:

"Knight had continued to exercise control over the red truck and its contraband contents even after he acquired his own vehicle...there was sufficient evidence for a jury to conclude that Knight was in constructive possession of the 190.84 grams of meth" found in Kubik's pocket.

State v. Knight, No. A-19-0274 (Neb.App. 2020) (Appendix A at 10, ¶1).

The basic fundamental principles of fairness and justice would find to the contrary against the Nebraska state courts and the State being able to have it both ways. The *Winship* Court presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existance of every element of the offense. *Jackson*, 443 U.S. at 316.

The State of Nebraska failed to meet its burdon of proof beyond a reasonable doubt in offering sufficient evidence on every element of Knight's charges. After viewing the evidence in light most favorable to the prosecution, NO objectively reasonable trier of fact could have found the essential elements of the crimes to convict Knight beyond a reasonable doubt. The Nebraska state courts' unreasonable application of this Court's clearly established precedent undermines the integrity of the criminal justice system and, if left undisturbed, will result in a constitutionally intolerable conviction. A writ of certiorari should issue on this basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Justin L. Knight #89125
Nebraska State Penitentiary
P.O. Box 22500
Lincoln, Nebraska 68542-2500
(402) 471-3161

PRO SE PETITIONER

January 09, 2021