

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE MENA-VALDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 21-1120

United States of America

Plaintiff - Appellee

v.

Jose Mena-Valdez

Defendant - Appellant

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: November 19, 2021

Filed: December 17, 2021
[Unpublished]

Before BENTON, KELLY, and ERICKSON, Circuit Judges.

PER CURIAM.

A jury convicted Jose A. Mena-Valdez of possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1), and possessing a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c)(1)(A).

APPENDIX A

The district court¹ sentenced him to 60 months on both counts, to be served consecutively. He appeals the denial of his motion to suppress. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

On October 30, 2018, Omaha police officers stopped Mena-Valdez for lack of license plates and failing to properly signal a turn. Officer James Holtmeyer approached the car. He “smelled a very strong odor of alcohol coming from the vehicle” and saw a red Solo cup in the center console. He asked Mena-Valdez to exit the car and seized the cup, which contained what he believed was rum and Coke. When asked, Mena-Valdez said he had been drinking “a little bit.” Officer Holtmeyer searched the car, finding a bag with 7.6 ounces of meth in the front passenger area. The officers arrested Mena-Valdez, finding a small amount of meth on him. After the car was impounded, officers found a handgun in it.

Mena-Valdez moved to suppress the drugs and gun, arguing officers stopped his vehicle without probable cause or reasonable suspicion. At the hearing, he also argued that there was no probable cause to search the car. After the hearing, he conceded there was probable cause to stop the car to issue traffic citations. The magistrate judge found probable cause both to initiate the stop and to search the car. He appeals.

This court reviews de novo the denial of a motion to suppress. *United States v. Czichray*, 378 F.3d 822, 825 (8th Cir. 2004). “Under the automobile exception to the warrant requirement, officers may conduct a warrantless search of a vehicle if they have probable cause to believe that the car contains contraband or other evidence.” *United States v. Edwards*, 891 F.3d 708, 712 (8th Cir. 2018). “Probable cause exists where there is a ‘fair probability that contraband or evidence of a crime

¹The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska, adopting the report and recommendation of the Honorable Michael D. Nelson, United States Magistrate Judge for the District of Nebraska.

will be found in a particular place.”” *United States v. Donnelly*, 475 F.3d 946, 954 (8th Cir. 2007), quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

During the traffic stop, Officer Holtmeyer smelled alcohol and found a red Solo cup filled with it, in violation of Nebraska Revised Statute § 60-6211.08. *See* Neb. Rev. Stat. § 60-6, 211.08(2) (making it “unlawful for any person in the passenger area of a motor vehicle to possess an open alcoholic beverage container while the motor vehicle is located in a public parking area or on any highway in this state”). Mena-Valdez also admitted drinking. He believes these circumstances justified an arrest, not a search. This belief has no merit. Officer Holtmeyer had probable cause to search the car for evidence related to the open container violation. *See United States v. McCoy*, 200 F.3d 582, 584 (8th Cir. 2000) (holding an officer had probable cause to search a car for marijuana after smelling it in the car); *United States v. Neumann*, 183 F.3d 753, 756 (8th Cir. 1999) (holding probable cause existed to search car for an open container where officer smelled alcohol on defendant’s breath). *See also United States v. Ross*, 456 U.S. 798, 825 (1982) (“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.”). The district court did not err in denying the motion to suppress.

* * * * *

The judgment is affirmed.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1120

United States of America

Plaintiff - Appellee

v.

Jose Mena-Valdez

Defendant - Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:19-cr-00065-JFB-1)

JUDGMENT

Before BENTON, KELLY, and ERICKSON, Circuit Judges.

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

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

December 17, 2021

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

/s/ Michael E. Gans

APPENDIX B

Adopted April 15, 2015
Effective August 1, 2015

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

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

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

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

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

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

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

UNITED STATES DISTRICT COURT

for the
District of Nebraska

UNITED STATES OF AMERICA

v.

JOSE MENA-VALDEZ

JUDGMENT IN A CRIMINAL CASE

Case Number: 8:19CR65-001
USM Number: 31052-047Dana C. Bradford
Defendant's Attorney**THE DEFENDANT:**

pleaded guilty to count(s)

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

was found guilty on counts I and II of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section& Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21:841(a)(1) and 21:841(b)(1) POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE	October 30, 2018	I
18:924(c)(1)(A) USE/POSSESS FIREARM WITH DRUG TRAFFICKING	October 30, 2018	II

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Count(s) dismissed on the motion of the United States.

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

January 4, 2021

Date of Imposition of Sentence:

s/ Joseph F. Bataillon
Senior United States District JudgeJanuary 4, 2021

Date

DEFENDANT: JOSE MENA-VALDEZ

CASE NUMBER: 8:19CR65-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **sixty (60) months on Count I and sixty (60) months on Count II to run consecutive to Count I.**

The Court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be allowed to participate in the Residential Drug Treatment Program or any similar drug treatment program available.
2. That the defendant be incarcerated in a federal facility as close as possible to Omaha, NE.
3. Defendant should be given credit for time served.

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

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

at
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant was delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHALBY: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOSE MENA-VALDEZ

CASE NUMBER: 8:19CR65-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years on Count I and five (5) years on Count II to run concurrently.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

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

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated

DEFENDANT: JOSE MENA-VALDEZ**CASE NUMBER: 8:19CR65-001**

circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: JOSE MENA-VALDEZ

CASE NUMBER: 8:19CR65-001

SPECIAL CONDITIONS OF SUPERVISION

- a. You must not purchase or possess, use, distribute, or administer any alcohol, just the same as any other narcotic or controlled substance.
- b. You must submit your person, residence, office, or vehicle to a search conducted by a United States Probation Officer at any time; failure to submit to a search may be grounds for revocation; you must warn any other residents that the premises may be subject to searches pursuant to this condition.
- c. You must attend, pay for and successfully complete any diagnostic evaluations, treatment or counseling programs, or approved support groups (e.g., AA/NA) for alcohol and/or controlled substance abuse, as directed by the probation officer.
- g. You must comply with all rules and regulations of the Bureau of Immigration Customs Enforcement and, if deported, shall not reenter the United States or reside therein without the express, written permission of the Secretary of the United States Department of Homeland Security.
- n. You must provide the probation officer with access to any requested financial information.
- zz. You must report to the Supervision Unit of the U.S. Probation Office for the District of Nebraska between the hours of 8:00 a.m. and 4:30 p.m., 111 South 18th Plaza, Suite C79, Omaha, Nebraska, (402) 661-7555, within seventy-two (72) hours of being placed on probation or release from confinement and, thereafter, as directed by the probation officer.

DEFENDANT: JOSE MENA-VALDEZ

CASE NUMBER: 8:19CR65-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

TOTALS	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
	\$200.00				

- The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
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Totals

- Restitution amount ordered pursuant to plea agreement \$
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution
 - the interest requirement for the fine restitution is modified as follows:

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299

**Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JOSE MENA-VALDEZ

CASE NUMBER: 8:19CR65-001

SCHEDULE OF PAYMENTS

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

- A** Lump sum payment of \$200.00 due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B** Payment to begin immediately (may be combined with C, D, or F below); or
- C** Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or
- D** Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or
- E** Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** Special instructions regarding the payment of criminal monetary penalties:

Without limiting the foregoing, and following release from prison, the defendant shall make payments to satisfy the criminal monetary penalty in the following manner: (a) monthly installments of \$100 or 3% of the defendant's gross income, whichever is greater; (b) the first payment shall commence 30 days following the defendant's discharge from incarceration, and continue until the criminal monetary penalty is paid in full; and (c) the defendant shall be responsible for providing proof of payment to the probation officer as directed.

The criminal monetary penalty is due in full on the date of the judgment. The defendant is obligated to pay said sum immediately if he or she has the capacity to do so. The United States may institute civil collection proceedings at any time to satisfy all or any portion of the criminal monetary penalty.

All financial penalty payments are to be made to the Clerk of the U. S. District Court, 111 S. 18th Plaza, Suite 1152, Omaha, NE 68102-1322.

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

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

- Joint and Several

Case Number	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
Defendant and Co-Defendant Names <i>(including defendant number)</i>			

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s): _____
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

DEFENDANT: JOSE MENA-VALDEZ

CASE NUMBER: 8:19CR65-001

CLERK'S OFFICE USE ONLY:

ECF DOCUMENT

I hereby attest and certify this is a printed copy of a document which was electronically filed with the United States District Court for the District of Nebraska.

Date Filed: _____

DENISE M. LUCKS, CLERK

By _____ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSE MENA-VALDEZ,

Defendant.

8:19CR65

**FINDINGS AND
RECOMMENDATION**

This matter is before the Court on the Motion to Suppress ([Filing No. 28](#)) filed by Defendant, Jose Mena-Valdez. Defendant filed a brief in support of the motion ([Filing No. 29](#)) and the government filed a brief in opposition ([Filing No. 30](#)). The Court held an evidentiary hearing on the motion on October 22, 2019. The government was represented by Assistant United States Attorney, Martin J. Conboy, IV. Defendant was present with his attorney, Dana C. Bradford, III. City of Omaha Police Officer James Holtmeyer testified on behalf of the government. The Court received into evidence, without objection, Exhibits 1 and 2 offered by the government. The Court granted the parties leave to submit post-hearing briefs, which were filed by Defendant ([Filing No. 37](#)) and the government ([Filing No. 38](#)). A transcript (TR.) of the hearing was prepared and filed on November 19, 2019. ([Filing No. 39](#)). This matter is now fully submitted to the Court. For the following reasons, the undersigned magistrate judge recommends that Defendant's motion be denied.

BACKGROUND

Around 10:00 p.m. on October 30, 2018, Officer Holtmeyer was on patrol with two other gang unit officers in the area of 25th and I Streets, in Omaha, Nebraska, when he observed a white Chrysler 300 traveling westbound without license plates. (TR. 8-9). Officer Holtmeyer watched the Chrysler turn left at an intersection without signaling 100-feet prior to the turn. (TR. 10-12; Ex. 1 at 22:04:05). Officer Holtmeyer initiated a traffic stop, and as he approached the Chrysler, he could see paper in-transit tags in the windshield that were not clearly visible because of the tinted windows. (TR. 20). Officer Holtmeyer testified that as soon as he made contact with the driver, Defendant, Officer Holtmeyer "smelled a very strong odor of alcohol coming from the vehicle." Officer Holtmeyer also saw a red Solo cup in the center console. (TR. 15-16). Officer Holtmeyer

removed Defendant from the Chrysler and seized the red Solo cup, which contained about ten ounces of liquid that Officer Holtmeyer believed was rum and Coke, and could smell that the source of the alcoholic odor was coming from the cup. (TR. 16-17; Ex. 1 at 22:05:07-22:07:37). Defendant was asked if he had been drinking, and Defendant replied, “a little bit.” (TR. 17). Officer Holtmeyer and another officer then searched the Chrysler and found a bag containing 7.6 ounces of methamphetamine in the front passenger area. Defendant was arrested and a small amount of methamphetamine and cash were found on his person. (TR. 28-29). Officers impounded the Chrysler and recovered a handgun wedged between the center console and front passenger seat during a subsequent search. (TR. 18-19, 26-27). A registration check of the Chrysler’s VIN showed that it was unregistered. (TR. 33).

Defendant filed a motion to suppress solely raising the argument that the stop of his vehicle was made without probable cause or reasonable suspicion and that any evidence obtained as a result was a product of the unconstitutional stop. ([Filing No. 28](#); [Filing No. 29](#)). During the hearing on the suppression motion, counsel for Defendant raised the additional argument that probable cause did not exist to search the vehicle. (TR. 4). Following the evidentiary hearing, Defendant conceded that “[t]he evidence set forth in the reports and videos of the Omaha Police Officers may show probable cause for stopping the motor vehicle driven by the Defendant . . . but only to appropriately issue traffic citations.” ([Filing No. 37 at p. 1](#)). Defendant now argues that the search of his vehicle was unconstitutional because officers did not have probable cause for the search, nor was the search incident to his arrest. ([Filing No. 37 at p. 2](#)).

ANALYSIS

Defendant now concedes, and the Court finds, that probable cause existed to initiate the traffic stop based on Officer Holtmeyer’s observation of Defendant committing a traffic infraction. See *United States v. Fuehrer*, 844 F.3d 767, 772 (8th Cir. 2016) (“It is well established that “if police observe a traffic violation, no matter how minor, there is probable cause to stop the vehicle.”). Nebraska law requires a driver to use a turn signal 100-feet before any turn. See *Neb. Rev. Stat. § 60-6,161(2)*; *United States v. Adler*, 590 F.3d 581, 584 (8th Cir. 2009). Officer Holtmeyer’s testimony, corroborated by his cruiser’s video, establishes that Defendant did not signal his turn at least 100-feet before turning, and therefore probable cause supported the traffic stop. (TR. 11-12; Ex. 1 at 22:04:05).

Defendant argues that officers unlawfully searched his vehicle because probable cause did not exist to believe that any evidence of a crime beyond that of a traffic violation was located within the Chrysler. Defendant also contends that officers did not conduct a field sobriety test and did not place Defendant under arrest, and therefore officers could not conduct a search incident to arrest. ([Filing No. 37 at p. 2](#)). The government asserts that the search of Defendant's vehicle was "done to find additional contraband and evidence of the open container violation." ([Filing No. 38 at p. 2](#)).

The undersigned magistrate judge concludes that the search of Defendant's vehicle was constitutionally permissible. "[O]fficers may conduct a warrantless search of a vehicle if they have probable cause to believe that the car contains contraband or other evidence." *United States v. Edwards*, 891 F.3d 708, 712 (8th Cir. 2018)(citing *California v. Acevedo*, 500 U.S. 565, 580 (1991)). Probable cause exists "when, considering all the circumstances, there is a fair probability that evidence of a crime will be found in a particular place." *United States v. Lopez-Zuniga*, 909 F.3d 906, 909 (8th Cir. 2018)(citing *United States v. Faulkner*, 826 F.3d 1139, 1144 (8th Cir. 2016)). Probable cause to search under the automobile exception has been found where circumstances indicate the driver is likely under the influence of alcohol or a controlled substance, or an open container or controlled substance is likely in the car as evidenced by its odor. See *United States v. McCoy*, 200 F.3d 582, 584 (8th Cir. 2000); *United States v. Caves*, 890 F.2d 87, 90-91 (8th Cir. 1989); see also *United States v. Neumann*, 183 F.3d 753, 756 (8th Cir. 1999)(finding probable cause supported warrantless search of vehicle for an open container after officer detected alcohol on driver's breath, the driver had a positive PBT, and the driver admitted he drank a beer "in a town about 60 miles back").

In this case, Officer Holtmeyer testified that he immediately smelled "a very strong odor of alcohol" emanating from the vehicle when he first made contact with Defendant, observed what looked like an alcoholic beverage in a red Solo cup in the center console, and confirmed it was an alcoholic beverage by smelling it. Defendant also admitted having drank "a little bit." Nebraska law makes it "unlawful for any person in the passenger area of a motor vehicle to possess an open alcoholic beverage container while the motor vehicle is located in a public parking area or on any highway in this state." *Neb. Rev. Stat. § 60-6,211.08(2)*. Under the circumstances, Officer Holtmeyer had probable cause to search Defendant's vehicle for evidence regarding an open

container violation.¹ During the search, officers recovered a bag of methamphetamine in the passenger floorboard area of the vehicle, which is an area that could have contained the object of such search. See *United States v. Ross*, 456 U.S. 798, 825 (1982) (“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.”). The recovery of the methamphetamine provided officers with probable cause to arrest Defendant, and therefore the second search of the vehicle after it was impounded, which resulted in recovery of the firearm, was permissible as either a search incident to arrest or as an inventory search. See *United States v. Stegall*, 850 F.3d 981, 984 (8th Cir. 2017) (“[O]fficers may conduct a warrantless search of a vehicle incident to arrest . . . when officers have a reasonable basis to believe the vehicle contains evidence related to the crime of arrest.”); *United States v. Frasher*, 632 F.3d 450, 454 (8th Cir. 2011) (Inventory searches conducted according to standardized police procedures “are one of the well-defined exceptions to the warrant requirement of the Fourth Amendment.”). Accordingly, the undersigned finds that the warrantless search of Defendant’s vehicle was permissible under the Fourth Amendment and that his motion to suppress should be denied. Upon consideration,

IT IS HEREBY RECOMMENDED to Chief United States District Court Chief Judge John M. Gerrard that Defendant’s Motion to Suppress ([Filing No. 28](#)) be denied.

Dated this 19th day of December, 2019.

BY THE COURT:

s/ Michael D. Nelson
United States Magistrate Judge

ADMONITION

Pursuant to NECrimR [59.2](#), any objection to this Findings and Recommendation shall be filed with the Clerk of the Court within fourteen (14) days after being served with a copy of this Findings and Recommendation. Failure to timely object may constitute a waiver of any such objection. The brief in support of any objection shall be filed at the time of filing such objection. Failure to file a brief in support of any objection may be deemed an abandonment of the objection.

¹ Additionally, in *United States v. Burton*, 599 F.3d 823 (8th Cir. 2010), the Eighth Circuit found that, although a violation of Nebraska’s open container law constitutes a traffic infraction for which Nebraska state law does not permit an arrest, a defendant’s commission of such infraction “in the presence of officers supplied the officers with probable cause to arrest [the defendant] under the Fourth Amendment.” *Burton*, 599 F.3d at 829-30. Therefore, the Eighth Circuit concluded the Fourth Amendment permitted an officer to conduct a search incident to an arrest after observing the defendant violate Nebraska’s open container law. *Id.* at 830.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

8:19-CR-65

vs.

JOSE MENA-VALDEZ,

Defendant.

MEMORANDUM AND ORDER

The defendant objects ([filing 41](#)) to the Magistrate Judge's findings and recommendation ([filing 40](#)) recommending that his motion to suppress ([filing 28](#)) be denied. The Court conducted a de novo review of the motion to suppress, pursuant to [28 U.S.C. § 636\(b\)\(1\)](#). The Court concurs in the Magistrate Judge's factual findings and legal analysis.

Specifically, the Court agrees with the Magistrate Judge's conclusion that the initial search of the defendant's vehicle was justified by probable cause to believe further evidence of an open container violation would be discovered. *See United States v. Neumann*, 183 F.3d 753, 756 (8th Cir. 1999). Contrary to the defendant's suggestion, *see filing 42 at 2-3*, the fact that police had already seen evidence of an open container violation strengthens, rather than weakens, the legal basis for continuing to search. *See United States v. Burton*, 599 F.3d 823, 829 (8th Cir. 2010). The Court is aware of no authority for the counterintuitive proposition that a search supported by probable cause must be discontinued *because* some evidence of a crime was found.

The Court further agrees with the Magistrate Judge's conclusion that, with probable cause to arrest the defendant for possession of methamphetamine, the subsequent search of the impounded vehicle was

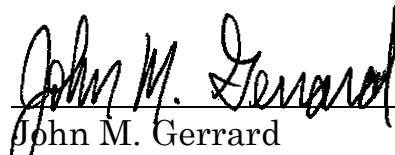
constitutionally permissible. *See United States v. Bettis*, No. 18-2407, 2020 WL 110759, at *4-5 (8th Cir. Jan. 10, 2020). The Court therefore finds the defendant's objection to be without merit, and will adopt the Magistrate Judge's findings and recommendation.

IT IS ORDERED:

1. The Magistrate Judge's findings and recommendation ([filing 40](#)) are adopted.
2. The defendant's objection ([filing 41](#)) is overruled.
3. The defendant's motion to suppress ([filing 28](#)) is denied.

Dated this 16th day of January, 2020.

BY THE COURT:



John M. Gerrard
Chief United States District Judge

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1120

United States of America

Appellee

v.

Jose Mena-Valdez

Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:19-cr-00065-JFB-1)

ORDER

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

February 02, 2022

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

/s/ Michael E. Gans

APPENDIX F