

A-18-000902

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

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THE STATE OF NEBRASKA,

Appellee,

vs.

DAEJERRON VALENTINE

Appellant,

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APPEAL FROM THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Honorable Duane C. Dougherty, District Court Judge

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BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION OF APPELLATE COURT

Mr. Daejerron Valentine is appealing his conviction and sentence for the offense of possession of a deadly weapon (firearm) by a prohibited person, second offense, a Class IB felony at Case Number CR17-3891. On July 25, 2018, he was found guilty following a jury trial before the Honorable Duane C. Dougherty in the District Court of Douglas County Nebraska of count 1: the lesser-included offense of possession of marijuana less than one ounce and count 2: possession of a firearm by a prohibited person. (T: Verdict for Plaintiff dated July 25, 2018). The court accepted the jurors' verdict. (T: Order of Judgement dated July 16, 2018). On September 12, 2018, the prosecution offered Exhibit 45, a certified copy of a prior conviction for possession of a firearm by a prohibited person which the court accepted without objection, enhancing count 2 to a second offense. (586: 23- 588: 4). On September 12, 2018, Mr. Valentine was sentenced to pay a \$300 fine for possession of marijuana less than one ounce first offense and to serve a term of 20 years to 20 years and 1 day for possession of a deadly weapon (firearm) by a prohibited person, second offense at Case Number CR17-3891. Mr. Valentine was given credit for 335 days served. (T: Sentencing Order dated September 13, 2018).

This appeal is authorized by the Nebraska Constitution, Article I, Section 23 and Neb. Rev. Stat. Section 29-2301 (Reissue 2008). The Notice of Appeal was filed on September 19, 2018. An Order Allowing Mr. Valentine to Proceed *in forma pauperis* was signed by the Honorable Judge W. Duane C. Dougherty on September 13, 2018.

STATEMENT OF THE CASE

(A) Nature of the Case

This is a criminal prosecution wherein Mr. Valentine was charged with the offenses of possession with intent to deliver marijuana with a firearm and possession of a deadly weapon

(firearm) by a prohibited person, second offense at Case Number CR17-3891. (T: Information). Possession with intent to deliver marijuana with a firearm is a Class II felony, punishable by a minimum of one year in prison and a maximum of fifty years in prison. The lesser included offense of possession of marijuana less than one ounce, first offense is an infraction and punishable by a \$300.00 fine. Possession of a firearm by a prohibited person, second offense is a Class IB felony, punishable by a minimum of 20 years in prison and a maximum of life in prison.

(B) Issue Presented to the Court Below

The issue presented in the court below was whether Mr. Valentine was guilty beyond a reasonable doubt of the crimes charged.

(C) How the Issue Was Decided and Judgment Entered

Mr. Valentine entered a not guilty plea in district court on December 1, 2017. (T: Written Arraignment/Waiver of Appearance). On January 8, 2018, Mr. Valentine filed a Motion to Suppress the search and seizure of his vehicle and person. (T: Motion to Suppress filed January 8, 2018). On February 14, 2018, a hearing was held and the Court overruled the motion on April 20, 2018. (T: Order Denying Motion).

On June 8, 2018, after private counsel withdrew from the case and a public defender was appointed, a Motion to Withdraw Plea, a Plea in Abatement, and a Motion to Quash the Information. (T: Motion to Withdraw as Counsel; Order Withdraw as Counsel and Appoint public Defender; Motion to Withdraw Plea; Motion to Quash; Plea in Abatement). The district court allowed Mr. Valentine to withdraw his previously entered plea and proceed with the Plea in Abatement and Motion to Quash. (33: 19-34: 5). On June 15, 2018, and June 25, 2018, bi-furcated hearings were held. (34: 9-39:20). After the hearing, the Court overruled the Plea in Abatement and Motion to Quash. (T: Motion Overruled filed June 29, 2018).

On June 29, 2018, defense counsel filed a Motion to Reconsider the Motion to Suppress Search and Seizure and a Motion to Suppress Statements. Both motions were heard and new evidence adduced on July 16, 2018. After the hearing, the Court overruled the Motion to Suppress Search and Seizure again but granted the Motion to Suppress Statements on July 18, 2018.

A jury trial in the District Court of Douglas County, Nebraska, was held July 23, 2018, through July 25, 2018. (103:1-581:25). Jury instructions proposed by defense counsel were refused by the Court on July 25, 2018. (511:12- 513:8; 513:18-514:21; 515:4-516:18). On July 25, 2018, the jury returned a verdict of guilty on count 1 of the lesser-included offense of possession of marijuana less than one ounce and a verdict of guilty on count 2 of possession of a firearm by a prohibited person. (578:9-579:7). On September 12, 2018, the prosecution offered Exhibit 45, a certified copy of a prior conviction for possession of a firearm by a prohibited person which the court accepted without objection, enhancing count 2 to a second offense. (587:13-25).

On September 12, 2018, Mr. Valentine was sentenced to pay a \$300 fine for possession of marijuana less than one ounce, first offense and to serve a term of 20 years to 20 years and 1 day for possession of a deadly weapon (firearm) by a prohibited person, second offense at Case Number CR17-3891. (590:12-591:6; T: Sentencing Order). Mr. Valentine was given credit for 335 days served. (T: Sentencing Order).

(D) The Scope of Review

In reviewing a district court's conclusion whether the Information filed by the State failed to accurately reflect the law as it existed at the time Mr. Valentine was charged, the scope of review is de novo. In reviewing a district court's conclusion whether a search and seizure was consistent with due process, the scope of review is de novo. In reviewing whether a jury instruction should

have been given, the scope of review is plain error. In reviewing a sufficiency of the evidence claim, the scope of review is abuse of discretion.

ASSIGNMENTS OF ERROR

I.

The district court erroneously denied Mr. Valentine's Motion to Quash.

II.

The district court erroneously denied Mr. Valentine's Motion to Suppress the stop of his vehicle in violation of the Fourth, Fifth, and Sixth Amendments of the United States Constitution and Art. I, Sec. 7 and 12 of the Constitution of the State of Nebraska.

III.

The district court erroneously denied Mr. Valentine's Motion to Suppress the extenuated search of his vehicle in violation of the Fourth, Fifth, and Sixth Amendments of the United States Constitution and Art. I, Sec. 7 and 12 of the Constitution of the State of Nebraska.

IV.

It was plain error for the district court to refuse Jury Instruction #3 offered by Mr. Valentine which accurately reflected the law controlling possession of a firearm by a prohibited person, as that law existed on October 17, 2017, when Mr. Valentine was stopped and searched by law enforcement.

V.

It was plain error for the district court to overrule objection to Jury Instruction #6, denying Mr. Valentines request to clarify and integrate consistent language pertaining to the word "possess" in the instruction on possession of a firearm by a prohibited person.

VI.

It was plain error for the district court to refuse Jury Instruction #9 offered by Mr. Valentine, which accurately reflected the law on the definition of “possession.”

VII.

The district court abused its discretion by supporting a verdict based on evidence that is insufficient to support a conviction of Defendant guilty beyond a reasonable doubt for possession of a firearm by a prohibited person as the law existed at the time of Mr. Valentine’s arrest.

PROPOSITIONS OF LAW

I.

Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996).

II.

In reviewing a trial court’s ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, a two-part standard of review is applied. Regarding historical facts, the trial court’s findings are reviewed for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that is reviewed independently of the trial court’s determination. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

III.

In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence,

viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

IV.

To establish reversible error from a trial court's failure to give a requested jury instruction, an Mr. Valentine has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the Mr. Valentine was prejudiced by the court's failure to give the requested instruction. *State v. Castellanos*, 26 Neb.App. 310, 918 N.W.2d 345 (2018).

V.

An abuse of discretion takes place when the sentencing court's reasons or rulings are untenable and unfairly deprive the defendant of a substantial right and a just result. *State v. Segura*, 265 Neb. 903, 909, 660 N.W. 512, 517-518 (2003).

VI.

Police can constitutionally stop a vehicle and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists; however, reasonable suspicion entails some minimal level of objective justification, something more than an inchoate and unparticularized suspicion or hunch. *State v. Childs*, 242 Neb. 426, 433, 495 N.W.2d 475, 479 (1993).

VII.

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. *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct 2157, 2173, 72 L.Ed.2d 572.

VIII.

A probing search by law enforcement requires continued probable cause. *State v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

IX.

The scope of a warrantless search is not defined by the nature of the container in which the contraband is secreted but, rather, by the object of the search and the places in which there is probable cause to believe that it may be found. *State v. Vermuele*, 234 Neb. 973, 453 N.W.2d 441 (1990).

X.

It would be intolerable and unreasonable if law enforcement were authorized to stop every automobile on the chance of finding contraband, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

STATEMENT OF FACTS

Well into the nighttime hours of October 12, 2017, at 10:51 p.m., Officers Dempsey and Ramsey observed a 2013 white Dodge Avenger travelling eastbound on Sprague off 23rd Street in Omaha, Nebraska. (10:22-11: 3; 11:14; 11:25-12:3). Dempsey suspected the window tint of the vehicle was too dark and initiated a traffic stop. (11:25-12:3). No other traffic infraction was committed. Once he began travelling behind the vehicle, despite the time of night and previously suspected illegally tinted windows, Dempsey was able to observe through the rear windshield that the vehicle contained only one occupant and noted that the individual made no furtive gestures. (13:17-24; 70:15-17). Still, officers proceeded with stopping the vehicle by activating their cruiser emergency lights. (13:11-13). The vehicle came smoothly to a stop, and as officers approached on

both sides with flashlights to illuminate their walk, the driver rolled down the driver's side window and asked why he had been stopped. (13: 21-24; 14:1-4). Giving no answer, Dempsy demanded his license and registration. (54:17-18). The driver complied. (15:9-10). Dempsy then opened the driver side door and commanded the driver step out of the vehicle. (54: 22-55: 8). The driver complied. *Id.* While conducting a search of the driver's person, Dempsy asked if the driver had been smoking marijuana. *Id.* The driver denied. *Id.* Despite no contraband being found during the search of his person, Dempsy had his partner escort the driver to the front of the cruiser while the vehicle was searched. (17:12-23; 71:14-21). Dempsy conceded he did not ask permission, but instead asserted he smelled an odor of burnt marijuana and simply told the driver he would be searching the car. (16:22-25).

Fresh marijuana totaling less than an ounce was located in the center console. (72:2-5). The search did not end there. Dempsy proceeded to the passenger side of the vehicle where he felt along the seat, floorboard, and passenger side door. (18:15-24). Dempsy noted that while the passenger side window controls worked correctly, the panel covering the controllers was loose and could be popped off. *Id.* He removed the hard plastic panel from around the controls and observed a firearm. (29: 25-30:3). He showed additional officers who arrived on scene the location of the gun and explained he regularly searches door and seat panels for firearms during traffic stops. (81:15-19; 82:3-13). After the search was conducted, the window tint on the front driver's side window was checked. (20:16-25). The tint meter indicated the tint was 19.1 percent when the city code required the tint to be a minimum of 35 percent. (21:2-5).

Because a concealed firearm was located, Dempsy arrested the driver and transported him to corrections to interrogate him further. (20:11-15). The driver, Dajerron Valentine, was subsequently charged with possession with intent to deliver marijuana with a firearm and

possession of a firearm by a prohibited person, second offense. He was never cited or charged with window tint violation. (72: 12-14).

In a different city, on a different day, events took place that dramatically impacted the trajectory of Mr. Valentine's criminal case: the Nebraska Legislature passed a law changing the legality of firearm possession.

Until May 9, 2017, Nebraska Revised Statute § 28-1206 "Possession of a deadly weapon by a prohibited person; penalty" read:

"28-1206 (1)(a) Any person who possesses a firearm, a knife, or brass or iron knuckles and who has previously been convicted of a felony, or who is a fugitive from justice, or who is the subject of a current and validly issued domestic violence protection order and is knowingly violating such order . . ."

On May 9, 2017, the Nebraska State Legislature amended the statute to read:

"(1) A person commits the offense of possession of a deadly weapon by a prohibited person if he or she:

- (a) Possesses a firearm, a knife, or brass or iron knuckles and he or she:
- (i) Has previously been convicted of a felony;
- (ii) Is a fugitive from justice;
- (iii) Is the subject of a current and validly issued domestic violence protection order, harassment protection order, or sexual assault protection order and is knowingly violating such order . . ." (LB478)

Notably, the construction of the statute was changed to a list format and the word "or" after (1)(a)(ii) was omitted.

In the last legislative session, LB848 was passed which amended § 28-1206 and re-inserted the word “or” in the list of conditions. This form of the law went into effect on July 19, 2018.

On June 8, 2018, Mr. Valentine filed a motion to withdraw his plea, a motion to quash the information, and a plea in abatement. (T: 12-14). The district court allowed Mr. Valentine to withdraw his previous plea of not guilty and considered his plea in abatement and motion to quash. Mr. Valentine asked the district court to consider whether it was appropriate to proceed in prosecution against him regarding the charge of possession of a firearm by a prohibited person. Specifically, Mr. Valentine alleged that the statute at the time of his stop and arrest required the state to prove all three elements, rather than just one – that he was a convicted felon, *and* a fugitive, *and* in violation of a domestic violence protection order. The prosecution could present no evidence as to two of the three prongs required by Neb.Rev.Stat. § 28-1206 (as amended May 9, 2017). The district court overruled these motions and the case proceeded to pre-trial matters. (T: 18).

Prior to private counsel withdrawing from representation and the Public Defender’s Office being appointed, a hearing was conducted on Mr. Valentine’s motion to suppress the search of his vehicle on February 14, 2018. The district court overruled that motion on April 20, 2018. In May, private counsel withdrew representation and the district court appointed the Douglas County Public Defender’s Office. When the change of counsel occurred on May 24, 2018, Mr. Valentine’s new counsel filed a motion to reconsider the motion to suppress the stop and search of the vehicle and reopen the record and also filed a motion to suppress statements. Mr. Valentine asserted the search of his vehicle was the product of an unconstitutional pre-textual stop and the removal of the door panel was unconstitutionally beyond the scope of a reasonableness. (T: 17).

On July 16, 2018, the district court granted the motion to reopen the record on the previously filed motion to suppress. A hearing was held on both that matter and the admissibility of the defendant's statements at trial. (49: 1-100: 25). In an order dated July 20, 2018, the district court overruled the motion to suppress the stop and search and held that evidence obtained during the search of the car was admissible. (T: 20). However, the district court did rule that any statements made by the defendant would be inadmissible at trial due to the violation of Mr. Valentine's constitutional rights by law enforcement and Dempsy's failure to advise Mr. Valentine of his rights to remain silent and to counsel. (T: 20). The case then proceeded to trial.

At trial, evidence was adduced consistent with the testimony from the previously heard motions to suppress. (296:1-503: 25). A stipulation was entered by the parties that Mr. Valentine was a convicted felon. (501: 1-25). However, no evidence was produced by the State of Nebraska that Mr. Valentine was or had ever been a fugitive from justice or the subject of a validly issued protection order or that he was in violation of such order. Mr. Valentine renewed his motion to suppress at the appropriate times at trial and moved for a directed verdict at the close of the prosecution's case in chief consistent with his valid assertion that he was not being prosecuted under the correct statement of law. (309: 1-25; 503:1-25). Mr. Valentine requested a jury instruction consistent with state law on the count of possession of a firearm by a prohibited person. (T: Jury Instructions proposed/refused). That request was denied. *Id.* Mr. Valentine also requested jury instructions clarifying the term "possession"; both proposed changes were refused. (513: 18-514: 21; 515: 4-516: 18; T: Jury Instructions proposed/refused).

On July 25, 2018, the jury unanimously acquitted Mr. Valentine of the charge of distributing marijuana with a firearm and instead found him guilty of merely possessing less than an ounce of marijuana, a lesser included offense. Also unanimously, without correct instruction on

the law, the jury found Mr. Valentine guilty of possession of a firearm by a prohibited person. (578:1-581: 25). During his sentencing hearing on September 13, 2018, the State of Nebraska enhanced Mr. Valentine's charge of possession of a firearm by a prohibited person a second offense. (582:1- 593:21). The district court Judge explained that although he did not want to sentence Mr. Valentine to 20 years, he had no choice. (592:14-19; 593:13-15). The district court subsequently imposed a 20 years to 20 years and 1 day sentence, with credit for 335 days served (590:12-16; 591:3-6; T: Sentencing Order).

SUMMARY OF ARGUMENTS

The stop of Mr. Valentine's vehicle was made in violation of his Fourth Amendment right against unlawful seizure. To stop a vehicle for window tint violation, a police officer must have probable cause based on objective, measurable rationale. Here, officers could not provide such objective, measurable rationale, and, thus, the stop was unreasonable and barred by the United States Constitution and Nebraska State Constitution. The district court committed reversible error in denying Mr. Valentine's motion to suppress the stop of his vehicle.

The search of Mr. Valentine's vehicle went beyond the scope of the original purpose for the traffic stop and the removal of a door panel after finding evidence of a mere infraction was a violation of his Fourth Amendment right against unlawful searches. To search an entire car, a police officer must have probable cause that the vehicle contained additional contraband. Here, officers based their initial search of the vehicle on the smell of burnt marijuana. They located a user amount of marijuana in the center console of the vehicle. There was insufficient probable cause to continue their search to other areas of the car, and, thus, the continued search was unreasonable and barred by the United States and Nebraska Constitutions. The district court

committed reversible error in denying Mr. Valentine's motion to suppress the extenuated search of his vehicle.

Even if this Court finds evidence of the firearm was admissible at trial, insufficient evidence was presented to convict Mr. Valentine of being a prohibited person as defined by state law at the time of his arrest. Mr. Valentine was erroneously arrested, charged, prosecuted, and convicted under an outdated and inapplicable version of the law governing possession of a firearm by a prohibited person. This Court should reverse the finding of conviction on count 2.

It was plain, reversible error for the district court to refuse Jury Instruction #3 and proposed changes to Jury Instructions #6 and #9. In each instance, the proposed instruction properly stated the law, was warranted by the evidence, and the denial of those proposed instructions prejudiced Mr. Valentine. This Court should reverse the decisions of the district court and remand the case for a new trial.

ARGUMENT

I.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN DENYING MR. VALENTINE'S MOTION TO SUPPRESS THE STOP AND SEARCH OF HIS VEHICLE.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" U.S. Const. amend. IV. Temporary detention of individuals during a traffic stop, even if only for a brief period and for a limited purpose, constitutes a seizure. *See State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct 2157, 2173 (1982); *State v. Acevedo*, 500 U.S. 565, 570 111

S.Ct. 1982, 114 L.Ed.2d 619 (1991). Importantly, “[a]n individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.” *Draganescu*, 276 Neb. at 459 (citing *State v. Childs*, 242 Neb. 426, 432, 495 N.W.2d 475, 479 (1993)).

In reviewing a district court’s ruling on a motion to suppress based on the Fourth Amendment, this Court will uphold its findings of fact unless they are clearly erroneous. However, this Court must review de novo the trial court’s ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search. *See State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

In the present case, the district court committed reversible error by denying Mr. Valentine’s motion to suppress the stop and extenuated search of his vehicle. First, the stop was unconstitutional because the prosecution failed to show the officers had an objective basis for concluding a traffic violation had occurred. Without an objective basis for the stop, such government intrusion on the fourth amendment rights of motorists cannot be tolerated by the court. Second, the extenuated search of the vehicle where the officers removed portions of the passenger side door paneling was unconstitutional because the officer did not have probable cause to believe contraband related to the objective of the search would be found there. Without continued probable cause, the Fourth Amendment does not tolerate a continued probing search. As such, this Court should find the stop and extenuated search of Mr. Valentine’s vehicle unconstitutional and that any evidence obtained should have been excluded from trial. Therefore, this Court should reverse the lower court’s decision and remand the case with instruction.

**A. THE STOP OF MR. VALENTINE’S VEHICLE WAS UNCONSTITUTIONAL
BECAUSE THE STATE FAILED TO SHOW THE OFFICERS HAD AN OBJECTIVE**

BASIS FOR CONCLUDING MR. VALENTINE'S VEHICLE HAD UNLAWFUL WINDOW TINT.

“[P]olice can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment.” *State v. Childs*, 242 Neb. 426, 433, 495 N.W.2d 475, 479 (1993). Reasonable suspicion entails some minimal level of objective justification, something more than an inchoate and unparticularized suspicion or hunch. *Id.* In other words, officers must provide an objective basis for their conclusions. *Id.* In the present case, the stop of Mr. Valentine’s vehicle was unconstitutional because the officers could not provide an objective basis for why they concluded Mr. Valentine’s vehicle had unlawful window tint.

This Court’s reasoning in *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993) and *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008) is instructive for the present case. In *Childs*, officers stopped a vehicle to check the validity of the displayed in-transit tags. This Court found there was no law violation, and, thus, the stop was unconstitutional. *Childs* at 432, 495 N.W.2d 475, 479. In *Draganescu*, officers stopped a vehicle for following too closely. Rejecting Draganescu’s argument that the officer could not provide an objectively reasonable basis for the stop, this Court distinguished the facts from *Childs*. “In *Childs*, the officer lacked outward observable signs that would support probable cause to believe that the driver was violating any traffic regulation.” *Draganescu*, 276 Neb. at 460, 755 N.W.2d 57, 73. Noting the specific contrast to *Childs*, this Court explained the officer in *Draganescu*’s case did provide an “objective standard” to support his conclusion that a traffic violation occurred, which thereby provided the requisite reasonableness for the stop. *Id.* “[Officer] Bigsby testified that he used an objective standard for determining whether the van was following the truck too closely: one car length for

every 10 m.p.h. of speed. Bigsby further stated that he observed the van following one car length behind the semi-truck while both vehicles were traveling over 70 m.p.h. in the rain.” *Id.*

Similar to *Childs* and in direct contrast to *Draganescu*, officers in Mr. Valentine’s case did not provide an objective basis for the stop of his vehicle. The prosecution, whose burden it was to prove an objective standard was utilized, elicited the testimony of only one officer during the motion to suppress hearings.

Dempsey testified he observed a white 2013 Dodge Avenger with “apparent window tint violation.” (8: 24-25). The prosecutor attempted to obtain an objective basis for the stop by asking Dempsey, “Is it fair to say that if a vehicle has a correct tint in the front, you ought to be able to see in (sic) person in the vehicle?” (9: 25-10: 2). Dempsey responded that, generally, if a vehicle has correct tinting “you can almost see somebody in the vehicle[.]” (10: 3-4). Dempsey went on to testify that he and his partner could not see anyone inside the vehicle; however, immediately contradicted himself by stating that despite the tint of the windows he was able to see that there was only one occupant inside. (9: 21-24; 10: 16-19; 68: 4-12). He further noted he did not observe the occupant of the vehicle make any furtive gestures or lean or reach for anything inside the vehicle. (70: 15-22). Importantly, it was undisputed that the officers’ observations of the suspect vehicle occurred at night, in the dark, at nearly 11:00 p.m. in a residential neighborhood with only streetlights to provide ambient lighting. (7: 23; 9:10-12, 21-24). In these conditions, Dempsey still testified as to several observations he made of the suspect and the suspects conduct occurring *inside* the vehicle.

Dempsey’s testimony did not support a finding that the officers were unable to see inside the vehicle prior to making the stop. Furthermore, Dempsey’s testimony was inconsistent with the vague basis provided for a window tint violation. On cross-examination, Dempsey admitted that

whether or not a vehicle's window tint is too dark is based on his "discretion." (27: 5-7). No other standard of measurement was given. Because no objective basis was given for suspecting a window tint violation, the stop of Mr. Valentine's vehicle was not objectively reasonable as required by the Fourth Amendment. Therefore, any evidence obtained as a result of the unconstitutional stop should have been excluded at trial. This court should reverse the decision of the trial court and remand the case with instruction.

B. THE EXTENUATED SEARCH OF MR. VALENTINE'S CAR WAS UNCONSTITUTIONAL BECAUSE REMOVAL OF THE PASSENGER SIDE DOOR PANEL WAS NOT SUPPORTED BY PROBABLE CAUSE.

The "automobile exception" to the fourth amendment's warrant requirement, established in *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), applies to searches of vehicles that are supported by probable cause to believe that the vehicle contains contraband. Courts have consistently held that "[i]f 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." *United States v. Ross* 456 U.S. 798, 825, 102 S.Ct 2157, 2173. Importantly, however, to be within the scope of the *Carroll* doctrine, the probing search requires continued probable cause. *State v. Acevedo*, 500 U.S. 565, 570, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). The scope of a warrantless search is not defined by the nature of the container in which the contraband is secreted but, rather, by the object of the search and the places in which there is probable cause to believe that it may be found. *State v. Vermuele*, 234 Neb. 973, 979-980, 453 N.W.2d 441, 445 (1990) (citing *United States v. Ross*, supra.). "It would be intolerable and unreasonable if a [law enforcement] agent were authorized to stop every automobile on the chance of finding [contraband], and thus subject all persons lawfully using the highways to the inconvenience and

indignity of such a search.” *Carroll* at 153. In the present case, the extenuated search of Mr. Valentine’s vehicle was unconstitutional because removal of the passenger side door panel was not supported by probable cause.

The present case can be compared and contrasted to *California v. Acevedo*, 111 S.Ct. 1982, 500 U.S. 565, L.Ed.2d 619 (1991), wherein the United States Supreme Court concluded the *Carroll* doctrine afforded more, not less, protection for motorists against unlawful search and seizure by limiting the officers’ search to where they had probable cause to believe the suspected contraband to be found. In *Acevedo*, officers had intercepted a package containing marijuana at a Federal Express Office. *Acevedo*, 500 U.S. at 567-568, 570 111 S.Ct. 1982, 1984-1985. Officers set forth a plan to conduct surveillance and apprehend the individuals involved in trafficking the marijuana. *Id.* Eventually, two different suspects were identified—Daza and Acevedo. Daza was observed carrying the original package into an apartment, then exiting and throwing the packaging away. *Id.* Officers then left to obtain a search warrant. *Id.* When they returned, Daza exited the apartment with a blue knapsack and started to drive away. *Id.* Fearing the marijuana was in the knapsack and would be destroyed, officers conducted a traffic stop, located and searched the blue knapsack, and discovered 1½ pounds of marijuana. *Id.* Acevedo later arrived at the apartment empty handed, but left the apartment with a brown bag. *Id.* He placed the bag in the trunk of his car and started to drive away. *Id.* Again, fearing the loss of evidence, officers stopped Acevedo. *Id.* They opened the trunk and the bag, and found marijuana. *Id.* The Supreme Court noted that in these cases police had probable cause to search the bag, but that “[t]he facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause

and unreasonable under the Fourth Amendment.” Acevedo, 500 U.S. at 580, 570 111 S.Ct. 1982, 1991.

In the present case, Dempsey testified that his basis for believing there was marijuana in the car was the smell of *burnt* marijuana emanating from the vehicle when he first made contact with the driver. (14:7-10). If the scope of a warrantless search of an automobile is defined by the object of search and the places in which there is probable cause to believe that it may be found, then in this case, the object of the search was marijuana smoked by Mr. Valentine and the only place there would be probable cause to be found would be within Mr. Valentine’s immediate reach. Furthermore, the object of the search was successfully located in the center console before paneling had been removed or the trunk had been searched. (21:25-22:25; Exhibit 1; Exhibit 2). Moreover, Dempsey stated that he looked in the passenger side panel not for drugs but for firearms, which was not the object of the search and for which he had no probable cause. (21:25-22:25; 83:19-84: 3; Exhibit 1; Exhibit 2). Like the facts in *Acevedo*, the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and, thus, a search of the entire vehicle was without probable cause and was unreasonable under the fourth amendment.

The courts were established by the founders of our nation to protect the purpose of our constitution and thereby protect citizens from law enforcement personnel that overreach our Constitution’s bounds. Affirming the district court holding invites absurdity in the practical application of the law. For example, consider the college kid homebound for Christmas with a little bit of weed in the center console or the mother driving her epileptic son with his prescribed medicinal marijuana, If they should be stopped for a traffic infraction, should their entire car be disassembled on the highway? If there is no basis to believe more marijuana is stored throughout the vehicle, *Acevedo* demands the answer to this question be “No.” This Court should find the

extenuated search after the object of the search was located went beyond the scope of reasonableness required by the fourth amendment and reverse the lower court's decision and remand the case for further proceeding.

II.

MR. VALENTINE WAS ERRONEOUSLY ARRESTED, CHARGED, TRIED AND CONVICTED UNDER A STATE STATUTE THAT WAS NOT IN EFFECT AT THE TIME OF HIS ENCOUNTER WITH POLICE AND WAS THUS UNCONSTITUTIONALLY DENIED DUE PROCESS, AND THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO CONVICT HIM OF THE CRIME.

Even if evidence of the firearm was admissible at trial, Mr. Valentine was tried under an outdated law that was not in effect at the time of his arrest. The district court erred when it denied Mr. Valentine's Motion to Quash the Information. The district court erred when it overruled Mr. Valentine's Motion for Directed Verdict. The district court erred when it accepted the juror's finding of guilty as to count 2 of the Information. Insufficient evidence was presented to convict Mr. Valentine of being a prohibited person as defined by state law at the time of his arrest. While each of these claims are a monumental assault on due process and each deserves considered, separate attention, the basis for Mr. Valentine's argument in each instance is the same and so Mr. Valentine will address these claims in unison. Each error alone is a gross violation of Mr. Valentine's due process rights, and as such, this Court should vacate Mr. Valentine's conviction.

The Information filed on November 20, 2017, charged Defendant with possession of a firearm by a prohibited person, second offense in violation of Neb. Rev. Stat. § 28-1206(1)(a)&(3)(b), alleged to have occurred on October 12, 2017. Significant to this Court's

analysis of Mr. Valentine’s appeal is the legislative changes to the law governing illegal possession of firearms on May 9, 2017, prior to Mr. Valentine’s arrest.

Until May 9, 2017, Nebraska Revised Statute § 28-1206 “Possession of a deadly weapon by a prohibited person; penalty” read:

“28-1206 (1)(a) Any person who possesses a firearm, a knife, or brass or iron knuckles and who has previously been convicted of a felony, or who is a fugitive from justice, or who is the subject of a current and validly issued domestic violence protection order and is knowingly violating such order . . .”

On May 9, 2017, the legislature amended the statute to read:

“(1) A person commits the offense of possession of a deadly weapon by a prohibited person if he or she:

- (a) Possesses a firearm, a knife, or brass or iron knuckles and he or she:
- (i) Has previously been convicted of a felony;
- (ii) Is a fugitive from justice;
- (iii) Is the subject of a current and validly issued domestic violence protection order, harassment protection order, or sexual assault protection order and is knowingly violating such order . . .” (LB478)

Notably, the construction of the statute was changed to a list format and the word “or” after (1)(a)(ii) was omitted. In effect, for a citizen to violate this amended version of the law, a citizen would have to meet *all three* elements. For purposes of the present case, the law as it stood in effect on October 12, 2017, required the State of Nebraska to prove Mr. Valentine possessed a

firearm, AND had previously been convicted of a felony, AND was a fugitive from justice, AND was the subject of a current and validly issued domestic violence protection order and was knowingly violating such order. Why must this Court conclude that all three elements must be proven? This interpretation is supported by the plain language of the revised statute as well as legal precedent.

Legislatures are the law-making bodies of the government, thereby defining what constitutes criminal activity. Thus, the courts must interpret “what Congress has expressed” in the plain language of the statute. *Callahan v. United States*, 364 U.S. 587, 81 U.S. 587, 5 L.Ed.2d 312 (1961).

In reading Nebraska § 28-1206 (as revised on May 9, 2017), the legislature removed the operative word “or” from the statute, thereby creating necessary elements rather than a list of independent categories. See *State v. O’Laughlin*, 239 Ariz. 398, 372 P.3d 342, 347, 738 Ariz. Adv. Rep. 7 (2016); see also *Encyclopedia of Rhetoric and Composition*, 41, Ed. Theresa Enos, 1996; and Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16, 3, 51 n.179 (2010) (discussing that the omission or absence of a conjunction between parts of a sentence, or “asyndeton,” suggest unity of the listed items); and A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, 119 (2012) (wherein Supreme Court Justice Antonin Scalia asserts “the general rule interpreting asyndetic sentences is to imply ‘and’ as the final coordinating conjunction” in legal texts). Furthermore, it is presumed Legislative bodies know the language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended. *In re Estate of Psota*, 297 Neb. 570, 900 N.W.2d 790 (2017).

For example, this Court has considered this issue in other contexts. In *In re Estate of Psota*, 297 Neb. 570, 900 N.W.2d 790 (2017), this Court considered a case where the Legislature omitted the word “or” from a revised statute governing the probate of an estate. Specifically, the Court considered whether the absence of the term “or”, was significant. *Id.* Concluding the omission of the word “or” was significant, the *Psota* court explained the Legislature was presumed to know the language used in a statute and if the Legislature changes or uses different terms in the same connection, the court must presume that a change in the law was intended. Further, the court explained when the Legislature could have easily included the term “or” in an amended or revised statute but omitted any connector between the subsections, the change was intended. *Id.* at 576, 900 N.W.2d at 795. The court declined to read language into the amended statute that the Legislature plainly omitted. *Id.* Thus, the Court held that the omission of the word “or” from the amended statute required both subsections to be met. *Id.* at 576-577, 900 N.W.2d at 795.

Similarly, here, the Nebraska State Legislature specifically omitted the word “or”. In line with *Psota*, a correct interpretation of this change is to understand “and” after (1)(a)(ii) rather than “or.” Presumably, the Nebraska Legislature was familiar with the language of the statute before the amendment and thus, that the change in the statute and omission of the word “or” was intentional. Following the reasoning in *Psota*, this Court should find the revised version of the statute requires all three subsections of § 28-1206 be met by the State to meet its burden.

The State will attempt to persuade this Court to set aside clear legal precedent regarding separation of powers and ask the legislative intent be taken into consideration. At the district court, over Mr. Valentine’s relevancy objection, prosecutors offered several pages of legislative history. The prosecution conceded—as they must—that the statute had changed but argued the legislative discussion suggested the change in the law was unintentional. The prosecution pointed directly to

LB848, a bill that was passed to re-insert the word “or” in the list of conditions of § 28-1206. This newly amended form of the law went into effect on July 19, 2018. These assertions made by the State of Nebraska are problematic for two reasons.

First, it is a violation of the separation of powers and goes against legal precedent for this Court to start interpreting what the legislators’ intent was or was not when passing a bill. Second, LB848 only underscores the notion that the plain reading and resulting application of the statute changed as a result of the May 9, 2017, revision. LB848 was an acknowledgment that the May 9, 2017, revision did indeed change the law and its application.

The State may attempt to argue it was not the legislator’s intent to make this change – that the language was a mistake. This is conjecture beyond the Court’s purview. There was no ambiguity in the statute. Even if there was ambiguity, the rule of lenity demands interpretation in the criminal offender’s favor.

Despite this clear language in the law, the district court erroneously denied Mr. Valentine’s motion to quash and concluded the State of Nebraska could proceed in prosecution of Mr. Valentine under the old law. At trial, a stipulation was entered by the parties that Mr. Valentine was a convicted felon. (501: 1-25). However, no evidence was produced by the State of Nebraska that Mr. Valentine was or had ever been a fugitive from justice. No evidence was produced by the State of Nebraska that Mr. Valentine was the subject of a validly issued protection order or that he was in violation of such order. The district court erred by denying Mr. Valentine’s motion for a directed verdict and by failing to issue a directed verdict of not guilty on the charge of possession of a firearm by a prohibited person. The district court then further trampled on Mr. Valentine’s due process rights by refusing jury instructions which accurately stated the law at the time Mr. Valentine was charged (argued in section III). Finally, the district court erred in accepting the

jurors' finding of guilt as it pertains to count 2 of the Information when no evidence had been presented whatsoever in regard to two of the three prongs of the prohibited person statute. On each of these grounds, Mr. Valentine's conviction should be vacated.

III.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REFUSING PROPOSED JURY INSTRUCTION #3 AND DENYING PROPOSED CHANGES TO JURY INSTRUCTIONS #6 AND #9.

The district court committed reversible error by refusing Proposed Jury Instruction #3 (Exhibit 43) and denying proposed changes to Jury Instructions #6 and #9. To establish reversible error from a trial court's failure to give a requested jury instruction, an Mr. Valentine has the burden to show that (1) the tendered instruction was a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) that Mr. Valentine was prejudiced by the court's failure to give the requested instruction. *State v. Castellanos*, 26 Neb.App. 310, 918 N.W.2d 345 (2018). In each instance, Mr. Valentine's proposals were a correct statement of the law, was warranted by the evidence, and Mr. Valentine was prejudiced by the court's failure to give the requested instruction.

Most egregiously, the district court erred in refusing Mr. Valentine's proposed instruction regarding possession of a firearm by a prohibited person as the law existed on October 12, 2017, the date alleged in the criminal complaint. (511: 12- 513: 8). Mr. Valentine offered proposed Jury Instruction #3 during the jury instruction conference. (Exhibit 43). Specifically, Mr. Valentine requested that the language accurately reflect the law on possession of a firearm by a prohibited person as it existed on October 12, 2017, to include the word "and" between each element the

prosecution had the burden to prove. As argued in section II, the law as it existed at the time of Mr. Valentine's alleged law violation, required the prosecution to prove all three elements under the prohibited person statute, rather than just one of three. As given to the jury, Jury Instruction #3 did not accurately reflect the law or explain that all three elements must be met. Proposed Jury Instruction #3 accurately reflected the law at the time it existed when Mr. Valentine was charged. Certainly the instruction was warranted by the evidence. And certainly, Mr. Valentine was gravely prejudiced by the district court's failure to properly instruct the jury. The prosecution presented no evidence regarding two of the three elements. Thus, if proper instruction was given no reasonable jury could have convicted Mr. Valentine. Without a correct explanation of the law, the jury weighed the evidence against an outdated explanation of law and reached an untenable conclusion. Thus, this Court should reverse the district court's decision and remand the case for a new trial.

The district court also erred by refusing proposed changes to Jury Instruction #6 pertaining to the definition of possession. Specifically, Mr. Valentine requested that instead of reading "the defendant did possess a deadly weapon" the instruction should have read "the defendant did knowingly or intentionally possess a deadly weapon." (513:18-514:21). This proposed revision highlighted that intent was an element to criminal possession of the firearm, which was particularly important in the present case, and adopted the same knowing or intentional language from Jury Instruction #5 pertaining to the issue of criminal possession of marijuana with intent to distribute. This proposed revision not only was a correct statement of the law, it fully integrated the jury instructions so that there were no discrepancies between Jury Instruction #5 and Jury Instruction #6. Mr. Valentine was charged with two crimes for which the prosecution had the burden to prove knowing or intentional possession beyond a reasonable doubt. Robotically adopting the proposed instruction from Nebraska's Jury Instructions (hereinafter "NJI"), the district court ignored the

specific issues presented in the case and put forth two jury instructions that defined possession differently. The second prong noted in *Castellanos* requires this court to consider whether the evidence warranted the proposed instruction, and, thus, the second prong begs the court to consider how each instruction should be integrated into the entire picture of the case. Here, that means instructing the jury consistently on two law violations. The jury was asked to carefully consider the instructions, and it was presumed that they do. A careful consideration of these two instructions could not ignore the differences, and, it logically follows that the difference would impact juror deliberations.

Mr. Valentine contends he was prejudiced by this discrepancy in the two instructions for two reasons. First, because the jurors were not fully informed on their deliberation, he was denied adequate due process of the law. Second, because he was acquitted of the charge in which knowing and intentional possession was more fully defined, it can be presumed he may have been acquitted of the other charge had possession been more fully defined, or at least consistently defined. Thus, this Court should reverse the district court's decision and remand the case for a new trial.

Finally, Mr. Valentine proposed changes to Jury Instruction #9. Specifically, Mr. Valentine requested the definition of "possession" included instruction that "proximity standing alone is insufficient to prove possession." (515: 5-15). This is a correct statement of the law and is integrated into the NJI instructions as case notes. *See* NJI2d Crim. 4.2; *State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991). These case notes are not provided as a hollow exercise of the law, but rather exist to inform the Court and the parties to a dispute as to possible specifics that may arise in a given case. Many necessary instructions given to jurors are general in nature, and need not be specific to the case at hand. For those instructions, the general proposed instruction for the NJI are sufficient. However, when particularities arise in the evidence or are highlighted in

argument by the parties, the general proposed instruction from NJI may not be sufficient. This is why these case notes are provided – so that general instructions can be modified to meet the demands of individual cases and the evidence presented and argued therein. *See e.g., Harney* at 513-516, 466 N.W.2d 540, 543-544. Again, failure to adopt the proposed changes by Mr. Valentine resulted in the jury not being able to fully deliberate. This prejudiced Mr. Valentine by denying him due process of the law. Thus, this Court should reverse the district court's decision and remand the case for a new trial.

CONCLUSION

The stop and extenuated search of Mr. Valentine's vehicle was made in violation of his Fourth Amendment right against unlawful seizure. There was no objective, measurable basis for the stop, and the search of the vehicle extended well beyond any probable cause the officers had to continue searching. Any evidence obtained as a result of the stop should have been excluded at trial. This Court should reverse the lower court's decision and remand the case for further proceedings consistent with this finding.

Even if this Court finds evidence of the firearm was admissible at trial, insufficient evidence was presented to convict Mr. Valentine of being a prohibited person as defined by state law at the time of his arrest. Mr. Valentine was erroneously arrested, charged, prosecuted, and convicted under an outdated and inapplicable version of the law governing possession of a firearm by a prohibited person. This Court should reverse the finding of conviction on count 2.

It was plain, reversible error for the district court to refuse Jury Instruction #3 and proposed changes to Jury Instructions #6 and #9. In each instance, the proposed instruction properly stated

the law, was warranted by the evidence, and prejudiced Mr. Valentine. This Court should reverse the decisions of the district court and remand the case for a new trial in accordance with the same.

Respectfully Submitted,

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