

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

STATE OF NEBRASKA,

NO. A-18-902

Appellee,

vs.

DAEJERRON L. VALENTINE,

Appellant.

**PETITION FOR FURTHER REVIEW
AND
MEMORANDUM BRIEF IN SUPPORT**

COMES NOW, Appellant Daejerron Valentine, and pursuant to Nebraska Supreme Court Rule 2(F) hereby petitions the Supreme Court for an Order granting further review of the above-captioned matter and opinion of the Court of Appeals entered on October 29, 2019. The Court of Appeals has erroneously affirmed Appellant's conviction. The Court of Appeals erred as follows:

1. The Court of Appeals erred in holding the removal of the passenger door window control panel of Appellant's vehicle was within the scope of a reasonable search and seizure supported by probable cause as required by 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.
2. The Court of Appeals erred in finding Nebraska Revised Statute § 28-1206 was ambiguous, erred in considering the legislative history to determine legislative intent, and erred in holding that the statute should be interpreted as if the disjunctive "or" existed between subsections (1)(a)(ii) and (1)(a)(iii) thereby defining "prohibited person" as someone who meets one of the listed elements, not all of them.
3. The Court of Appeals erred in holding jury instruction No. 3 as given to the jury was a correct recitation of the law as the law existed during the applicable time period.

4. The Court of Appeals erred in holding the jury was properly instructed on the term “possession” in jury instruction No. 6 and No. 9.
5. The Court of Appeals erred in finding there was sufficient evidence to support a conviction of the crime of possession of a firearm by a prohibited person under Nebraska Revised Statute § 28-1206 as the law existed during the applicable time period.

STATEMENT OF FACTS

Appellant, Daejerron Valentine, incorporates the Statement of Facts contained in Appellant’s brief to the Court of Appeals, herein by reference.

MEMORANDUM BREIF IN SUPPORT OF PETITION FOR FURTHER REVIEW

I.

THE COURT OF APPEALS ERRED IN HOLDING THE REMOVAL OF THE PASSENGER DOOR WINDOW CONTROL PANEL OF APPELLANT’S VEHICLE WAS WITHIN THE SCOPE OF A REASONABLE SEARCH AND SEIZURE SUPPORTED BY PROBABLE CAUSE AS REQUIRED BY 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.

The Court of Appeals erred in holding the removal of the passenger door window control panel of Appellant’s vehicle was within the scope of a reasonable search and seizure supported by probable cause as required by 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. The Court of Appeals erroneously held that (1) “the odor of marijuana emanating from Valentine’s vehicle [gave Dempsy] probable cause to search the entire vehicle...” and that (2) finding less than an ounce of marijuana in the center console “served to substantiate [his] suspicions and furnish additional

probable cause to make a complete search of the automobile.” *State v. Valentine*, No. A-18-902, pg. 9 (citing *State v. Watts*, 209 Neb. 371, 374, 307 N.W.2d 816, 819 (1981)). This is both a misapplication of the facts and of the law.

Officer Dempsey testified that the basis for the search of Valentine’s vehicle was the smell of burnt marijuana. (14: 7-10). After finding less than an ounce of marijuana in the center console, Officer Dempsey continued to detain Appellant in handcuffs and extended the search of the vehicle to the removal of the passenger side door window control panel and the trunk of the vehicle. Removal of the paneling revealed a firearm.

First, the Court of Appeals inaccurately summarized the testimony and evidence as it pertained to Dempsey’s decision to remove the paneling. Over simplifying the record, the Court of Appeals wrote “[the officer] commonly checks the control panel on a vehicle’s doors during his searches because, in his experience, it is common for people to hide drugs or guns in that location.” *See State v. Valentine*, No. A-18-902, pg. 6. The record is more complicated and undercuts the notion that removal of the door paneling was in any way connected to the original purpose of the search.

At the motion to suppress hearing, Dempsey testified he removed the door paneling to check for “whatever” was concealed there – drugs or guns. (81:15-24). On the body camera video that was received into evidence as Exhibit 1, Dempsey explains to other officers where guns can be concealed on the passenger side of vehicles and there is no mention of marijuana, other drugs, drug paraphernalia, or other drug contraband. *See Exhibit 1* at 18:18-19:11. As such, it is incredible to find that the removal of the door paneling was connected to any fair probability that evidence of the crime of possession of marijuana less than an ounce would be found. The Court of Appeals also noted that Dempsey had “received information from other officers that they had been looking

for Appellant because they believed him to be selling marijuana and to be armed with a gun.” *See State v. Valentine*, No. A-18-902, pg. 6. However, it is clear from both Exhibit 1 and Dempsy’s testimony during the motion to suppress, Dempsy did not receive this additional information until after he had removed the door paneling and located the firearm. *See Exhibit 1* at 5:52 and 15:18-15:44; *see also* (81:8-14). As such, this information could not inform probable cause to extend the scope of the search.

Second, the Court of Appeals misapplied *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981) in reaching their erroneous conclusion. Again, the interpretation was overly simplistic and failed to accurately identify the ways in which the present case is distinguishable.

In *State v. Watts*, *supra*, the officer smelled burnt marijuana and observed marijuana in plain view. When asked to step out of the vehicle, the defendant secreted a key into his sock. He lied about doing so. When the officer confronted the defendant about the secreted key, the defendant lied about what the key was for and denied that the key opened the trunk. This court held these deceptive gestures *developed* the probable cause for the officer to extend the search to include the trunk. *Id.* at 375, 307 N.W.2d at 819.

Importantly, the holding in *Watts* did not suggest probable cause had been developed for the search of the whole vehicle on the smell of marijuana alone. *Id.* Other decisions from the this court are consistent with the premise that the scope of search is limited. Even in automobile cases. Even when officers smell marijuana. *See State v. Daly*, 202 Neb. 217 (1979) (Nebraska State Trooper smelled the odor of marijuana coming from the bed of the pickup, which gave him probable cause to search the bed of the pickup but not the entire truck); *State v. Dalland*, 287 Neb. 231, 241 (2014) (the smell of marijuana coming from the Defendant’s person did not give rise to probable cause to search the vehicle until the Defendant told officers there was additional drug

paraphernalia in the car). The United States Supreme Court also has also ruled that the scope of the search in automobile cases must be limited. *See California v. Acevedo*, 111 S.Ct. 1982, 1991, 500 U.S. 565, 580, L.Ed.2d 619 (1991) (“The 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.”).

It is not accurate to say, as the Court of Appeals did, that the smell of burnt marijuana alone gives officers probable cause to search anywhere in a vehicle, including disassembly of paneling or other mechanical parts of a vehicle. Such an interpretation over simplifies the facts of *Watts* and undermines the well-established premise that for officers to have probable cause there must be a fair probability that evidence of the suspected crime will be found. *U.S. v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

The present case is also distinguishable from *Watts*, *Daly*, and *Dalland* in several important ways. Unlike the defendant in *Watts*, Appellant was “pretty cooperative.” (17: 1-4; *see also* 15:9-10). Unlike the defendant in *Watts*, Appellant did not continue to or repeatedly lie to officers. Appellant denied smoking marijuana himself, but told officers his friends smoked marijuana (16: 16-21). Unlike the defendant in *Watts*, Appellant did not try to hide contraband. Unlike the defendant in *Watts*, officers did not observe Appellant make any “furtive gestures” to suggest he was hiding anything, especially not a gun in the passenger side door window control panel. (70:15-19). Unlike the officers observations of the truck bed in *Daly*, there was no smell of marijuana emanating from the passenger side door window control panel. Unlike the defendant in *Dalland*, Appellant did not suggest to officers that a more thorough search of the vehicle would reveal additional contraband. Also notably, none of these cited cases remotely suggests the disassembly

of a vehicle on the side of the roadway would be permissible on the mere smell of burnt marijuana. As such, in no way was probable cause developed to justify the extended scope of the search of Appellant's vehicle.

Removal of the passenger door window control panel of Appellant's vehicle was not supported by a fair probability that evidence of the crime of possession of marijuana less than one ounce would be found and therefore was outside the scope of a reasonable search and seizure supported by probable cause. As such, this court should reverse the decisions of the lower courts and remand for further proceedings.

II.

THE COURT OF APPEALS ERRED IN FINDING NEBRASKA REVISED STATUTE § 28-1206 WAS AMBIGUOUS, ERRED IN CONSIDERING THE LEGISLATIVE HISTORY TO DETERMINE LEGISLATIVE INTENT, AND ERRED IN HOLDING THAT THE STATUTE SHOULD BE INTERPRETED AS IF THE DISJUNCTIVE "OR" EXISTED BETWEEN SUBSECTIONS (1)(A)(II) AND (1)(A)(III) THEREBY DEFINING "PROHIBITED PERSON" AS SOMEONE WHO MEETS ONE OF THE LISTED ELEMENTS, NOT ALL OF THEM.

Appellant incorporates the argument from section II contained in Appellant's brief to the Court of Appeals, herein by reference.

The Court of Appeals failed to take into consideration or address the controlling decision of *In re Estate of Psota*, 297 Neb. 570, 900 N.W.2d 790 (2017) which applies well-established statutory interpretation methods. *See also State v. O'Laughlin*, 239 Ariz. 398, 403 (2016); *Encyclopedia of Rhetoric and Composition* 41 (Theresa Enos ed., 1996); and Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 Legal Writing: J. Legal

Writing Inst. 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); *Reading Law: The Interpretation of Legal Texts*, 119 (2012) (wherein United States Supreme Court Justice Antonin Scalia asserts “the general rule interpreting asyndetic sentences is to imply ‘and’ as the final coordinating conjunction” in legal texts).

Psota offers a clear guide for the statute at issues here. Directly on point, this court considered the significance of the omission of the disjunctive “or” between subsections within a statute. Holding the omission of the disjunctive “or” was within the plain meaning of the statute and required that both subsections be met, this court reasoned “it is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.” *Id.* at 576-577, 900 N.W.2d at 795. As such, this Court should reverse the decisions of the lower courts and remand for new trial.

III.

CONSISTENT WITH A PROPER CONCLUSION AS SET FORTH IN SECTION II, THE COURT OF APPEALS ERRED IN HOLDING JURY INSTRUCTION NO. 3 AS GIVEN TO THE JURY WAS A CORRECT RECITATION OF THE LAW AS THE LAW EXISTED DURING THE APPLICABLE TIME PERIOD.

Appellant incorporates the argument from section III contained in Appellant’s brief to the Court of Appeals, herein by reference.

The Court of Appeals erred in the interpretation of Nebraska Revised Statute § 28-1206 and as such, the Court of Appeals also erred in concluding that the district court properly instructed

the jury on the law as it pertained to Count 2: Possession of a Firearm by a Prohibited Person. As such, this court should reverse the decisions of the lower courts and remand for new trial.

IV.

THE COURT OF APPEALS ERRED IN HOLDING THE JURY WAS PROPERLY INSTRUCTED ON THE TERM “POSSESSION” IN JURY INSTRUCTION NO. 6 AND NO. 9.

Appellant incorporates the argument from section III contained in Appellant’s brief to the Court of Appeals, herein by reference.

The Court of Appeals held because Jury Instruction No. 9 was given, the jury was “adequately instructed regarding the elements of possession of a deadly weapon by a prohibited person.” However, the Court of Appeals erred in its interpretation of the recent decision in *State v. Castellanos*, 26 Neb. App. 310, 918 N.W.2d 345 (2018) and its application to Jury Instruction No. 9.

In *Castellanos, supra.*, this court held that the pattern jury instruction NJI2d Crim. 4.2 was appropriate for *that defendant*, with that defendant’s *particular facts* of his case. Appellant’s case is unique and distinguishable from *Castellanos* because it involves two charges, for which the pattern jury instruction defines possession differently. Thus, the pattern instructions create an inconsistency between the two charges as it pertained to the definition of “possession.” The pattern instruction of Count 1: Possession of Marijuana with the Intent to Distribute provided jurors with a more detailed definition of possession. *See* Jury Instruction No. 5 (instructing jurors that possession must be knowing and intentional). The pattern instruction for Count 2: Possession of a Firearm by a Prohibited Person provided jurors with a less detailed definition. *See* Jury Instruction No. 6 (providing no context for the word “possession”).

Appellant 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. Denial of due process under the law is a grave prejudice to Appellant, and all defendants. Second, the fact Appellant was acquitted of the charge in which knowing and intentional possession was more fully defined, is evidence that Appellant likely would have been acquitted of the other charge had possession been more fully, or at least consistently, defined.

This prejudice against Appellant is further exacerbated by the district court's failure to provide a full definition of the term "possession" in Jury Instruction No. 9. When particularities arise in the evidence or are highlighted in argument by the parties, the general proposed instruction from NJI may not be sufficient. Pattern instructions were not sufficient here. As such, this Court should reverse the decisions of the lower courts and remand for new trial.

IV.

THE COURT OF APPEALS ERRED IN FINDING THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF THE CRIME OF POSSESSION OF A FIREARM BY A PROHIBITED PERSON UNDER NEBRASKA REVISED STATUTE § 28-1206 AS THE LAW EXISTED DURING THE APPLICABLE TIME PERIOD.

Appellant incorporates the argument from section II contained in Appellant's brief to the Court of Appeals, herein by reference.

CONCLUSION

For the reasons and argument listed above, the Court of Appeals erred when it failed to rule in Appellant's favor. The Appellant respectfully requests that this court accept this case for further review.

Respectfully Submitted,

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