CASE NO. CR23-787

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

STATE OF NEBRASKA,

Appellee

vs.

TYLER FURMAN,

Appellant

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

The Honorable RYAN POST, District Judge

BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

1. Nature of the case.

   This is a criminal case prosecuted on a Complaint filed in the Lancaster County Court on a charge of Driving While Under the Influence 2nd offense.

2. Issues tried below.

   The guilt or innocence of Mr. Furman

3. How the issues were decided.

   After a trial, Mr. Furman was found guilty of Driving Under the Influence.

4. Scope of Review

   a. In proceedings where the Nebraska rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility

   Smith v. Colorado Organ Recovery Sys., 269 Neb. 578 (2005)

   b. In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, an appellate court reviews de novo the trial court's ultimate determinations of probable cause to perform a warrantless seizure. An appellate court will uphold its findings of fact unless they are clearly erroneous.

STATEMENT OF JURISDICTION

Tyler Furman was found guilty of Driving Under the Influence. (T17) Mr. Furman was sentenced to 60 days in jail, a $500 fine and a revocation of his license for eighteen months (T19) This is a final order for purposes of appeal.

ASSIGNMENT OF ERRORS

1. The District Court erred in affirming the County Court's decision to admit the Title 177 NAC 1.

   a) The District Court erred in affirming the County Court's decision to admit the breath test result.

2. The District Court erred in affirming the County Court's decision overruling the Motion to Suppress when an officer seized Mr. Furman outside of his primary jurisdiction.

3. The District Court erred in affirming the County Court's decision overruling the Motion to Suppress in determining there was sufficient evidence to seize Mr. Furman and place him the patrol car.
4. The District Court erred in affirming the County Court's decision overruling the Motion to Suppress by determining there was sufficient reasonable suspicion to request Standardized Field Sobriety Tests.
5. The District Court erred in affirming the County Court's decision overruling the objection equating Horizontal Gaze Nystagmus to driving while impaired.

PROPOSITIONS OF LAW

1. Before a chemical test can be admitted, the state must offer a copy of the administrative code currently approved by the Department of Health and Human Services.
   Neb. Rev. Stat. §60-6,201(3)
   State v. Gerber, 206 Neb. 75 (1980).
2. Hearsay is not admissible unless the rules provide for its admission.
   Neb. Rev. Stat. §27-802.
3. A written statement is hearsay.
   Neb. Rev. Stat. §27-801(1).
4. An administrative code can be self authenticating when it bears the state seal.
   Neb. Rev. Stat. §27-902(1).
5. An objection must be made at the time evidence is offered setting out the basis of the objection.
   Neb. Rev. Stat. §27-103(1)(a).
6. Where the purpose of the objection is apparent from the proceeding, no further clarification is necessary.
   State v. Huston, 285 Neb. 11 (2013).
7. The proponent of the evidence is the party responsible for establishing the necessary foundation for the public record.
   VKGS, LLC v. Planet Bingo, LLC, 309 Neb. 950 (2021)
8. An erroneous evidential ruling results in prejudice to a defendant unless

the State demonstrates that error was harmless beyond a reasonable doubt. *State v. Johnson*, 255 Neb. 865 (1998).

9. A law enforcement officer is only allowed to enforce the laws within their primary jurisdiction.
   Neb. Rev. Stat. §29-215(1)
10. The Fourth Amendment requires that an arrest be based upon probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity.
   State v. Royer, 276 Neb. 173 (2008)
11. Probable cause for a warrantless arrest exists if under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime.
   State v. Roach , 234 Neb. 620 (1990).
12. A person is arrested or seized for fourth amendment purposes when there is a restraint on his or her freedom of movement in any significant way.
   State v. Brooks, 5 Neb. App. 463 (1997)
13. An arrest occurs when a reasonable person would have believed that he was not free to leave.
   State v. Brooks, 5 Neb. App. 463 (1997)
14. Field sobriety tests may be justified by a police officer's reasonable suspicion based upon specific articulable facts that the driver is under the influence of alcohol or drugs.
   State v. Royer, 276 Neb. 173 (2008).
15. Horizontal Gaze Nystagmus Results are admissible for the limited purpose of establishing that a person has an impairment which may be caused by alcohol
   State v. Baue, 258 Neb 968 (2000)

STATEMENT OF FACTS

On July 21st, 2021, University of Nebraska Police Officer Backer noticed a vehicle in the ditch on Waverly Road as he went into town to drop off his son. (8:23-9:-16). On UNL Officer Backer's return, the car was still there and so he

stopped to check on the person. (9:19-20). When he noticed the person was asleep or unconscious, he called for emergency responders. (9:20-23).

Before having contact with Mr. Furman, UNL Officer Backer contacted 911. (E1 15:24) UNL Officer Backer told 911 that he was a UNL police officer. (E1 15:24). UNL Officer Backer than stated he was going to check on the person and not let him drive off. (E1 15:24). UNL Officer Backer checked on Mr. Furman so he could relay the information to dispatch pursuant to his training as a police officer. (10:8-13).

After making the call, Mr. Furman woke up and saw UNL Officer Backer and go out of his vehicle. (11:20-21). Mr. Furman said he must have fallen asleep. (12:1) UNL Officer Backer noticed the smell of alcohol and that Mr. Furman was groggy and disheveled. (12:7-8). UNL Officer Backer had some difficultly in remembering his conversation with dispatch that morning. (15:16-16:10). Mr. Furman remember's telling UNL Officer Backer that he was fine and he was going to take off. (109:4-5). Mr. Furman remembered UNL Officer Backer telling him that we wasn't going anywhere and that he was an officer. (109:7-9). UNL Officer Backer did not remember telling him he was not free to leave. (19:12-19).

UNL Officer Backer did not notice any slurred speech. (6:18-22:7) UNL Officer Backer did not notice Mr. Furman fall or stumble while he was with him, or while the deputy walked Mr. Furman to the deputies vehicle. (237:11-18).

UNL Officer Backer worked for the University of Nebraska-Lincoln Police Department. (21:22-22:3). The contact with Mr. Furman was made on Waverly road, which was not on university property. (22:4-7).

Deputy Sturdy responded to a dispatch on Waverly Road. (98:1-7). The deputy was the second law enforcement on the scene, as UNL Officer Backer was already there. (103:15-17). When the deputy arrived, he spoke with volunteer fire department members and an off duty law enforcement officer, UNL Officer Backer. (99:7-10). The deputy was able to speak with Mr. Furman, and he noted an odor of alcoholic beverage. (99:25-100:12). Mr. Furman told the deputy that he was a heavy sleeper and that he had parked his jeep. (100:23-101:1).

While talking to Mr. Furman, the deputy noticed that Mr. Furman was able

to grab his wallet, not fumble with it, open it and pull out his license. (260:8-25). Mr. Furman was able to walk up the incline without stumbling or falling to the deputies car. (262:4-12). The deputy did not notice any slurred speech. (93:22-105:13).

When the deputy made contact with Mr. Furman, he escorted him to the patrol vehicle. (104:3-5). After escorting him to the patrol vehicle, the deputy had him sit in the back. (104:6-8). The back of the patrol vehicle was the standard secured area in the back, with locked doors from the inside. (104:11-15). The deputy patted down Mr. Furman, and then shut the door after he was told to have a seat. (104:6-24). The only person searched for weapons was Mr Furman. (105:2-7). The only reason he made Mr. Furman sit in the caged area of the patrol vehicle so he could collect information from the other people at the scene. (101:11-14).

Deputy Hoggins and Schneider responded to the call as well. (27:20-21). When the deputies arrived, Mr. Furman was still locked in the cage areas in the back of Deputy Sturdy's car. (29:18-19). The back of the car is where suspects are secured. (40:7-9). The door was only able to be opened from the outside. (40:10-11). The deputy opened the door and talked to Mr. Furman. (40:19-22). Then the deputy shut the door to talk to the other deputy who was with him. (40:22-41:3). Deputy Hoggins then opened the door again, asked several additional questions of Mr. Furman, and then shut the door again, while trying to determine what he should do. (41:4-7).

After speaking with Mr. Furman, Deputy Hoggins noted a slight odor of alcohol, believed that Mr. Furman had red and watery eyes, slurred speech and he dropped his license on the ground. (31:9-15). Mr. Furman admitted to having four drinks at Blue Sushi. (31:20-21). Deputy Sturdy, Schneider or UNL Officer Backer did not notice slurred speech from Mr. Furman. (3:11-105:13)

The Deputy noted blood shot eyes, which can be caused by many things, such as allergies, fatigue and irritants. (43:7-18). Mr. Furman told the deputies that he had allergies and that he was tired. (80:23-81:1). The Deputy testified that the presence of blood shot eyes does not mean someone is impaired. (43:19-21). The deputy also noticed the odor of alcohol, but testified it does not mean

someone is impaired. (44:2-6).

Deputy Schneider was also present for the contact with Mr. Furman and Deputy Hoggins. (57:2-3). Deputy Schneider noted the red eyes and the odor of alcohol. (59:9-11) Deputy Schneider did not notice that Mr. Furman had any slurred speech. (50:3-92:20). Due to the odor of alcohol and blood-shot eyes, Deputy Schneider decided to have Mr. Furman submit to field sobriety tests. (80:2-10).

Deputy Schneider administered the field sobriety tests. (81:12-14). The deputy administered pursuant to his training using the National Highway Traffic Safety Administration (NHTSA), standards. (78:21-79:8). The deputy administered the horizontal gaze nystagmus (HGN), walk and turn and one-leg stand. (81:15-17). These test have standardized criteria of how they are to be administered or it can compromise its validity. (81:21-82:3).

After administering the HGN, deputy Schneider noticed 6 of 6 clues. (67:6-7). Deputy Hoggins was trained at the academy and knew what clues to look for on the HGN. (347:6-18). Deputy Hoggins who was standing behind Deputy Schneider as he performed the HGN in order to see the eyes. (347:19-24). Deputy Hoggins did not see any clues on the HGN. (349:7-8). Deputy Hoggins was in a place that if the clues were present, he would be able to see them. (416:15-18)

The deputy then moved onto the walk and turn. (67:15-16). The deputy determined that Mr. Furman missed heel-to-toe, stepped off line and used arms for balance. (70:6-8). The deputy's opinion was that Mr. Furman showed three of eight clues. (70:6-7). The deputy was still trying to formulate his arrest decision after completing the test. (86:10-13)

The deputy next had Mr. Furman submit to the one leg stand. The possible clues are: puts foot down, uses arms for balance, hops and sways. (71:10-11). The deputy noted that Mr. Furman swayed and used his left arm for balance. (71:14-15). However, using the NHTSA standardized criteria, there were zero clues. (419:7-9)

Deputy Hoggins had Mr. Furman submit to a PBT, which showed the presence of alcohol. (36:17-20). After the PBT, the deputies formally placed Mr.

Furman under arrest and took him for a DataMaster test. (88:13-14).

A complaint was filed charging Mr. Furman with Driving While Under the Influence of Alcohol, 2nd offense. (T2-4). Prior to trial, a Motion to suppress was filed. (T5). The Motion to Suppress was overruled. (T7-12). Prior to trial, an objection based on the Motion to Suppress was made, overruled, and allowed to be standing or continuing. (11:3-10).

At trial, in addition to the above, the state offered exhibit 14, an uncertified copy of tittle 177 and without any indication it was in full force and effect on July 21, 2021. (E14 164:17-22). The state offered exhibit 14, which was objected to on foundation and hearsay. (164:17-22). The objection was overruled. (164:21). The State offered the DataMaster test of Mr. Furman, which was objected to and overruled. (344:10-16).

At trial, Deputy Schneider was asked about his training in using the Horizontal Gaze Nystagmus. (286:23-25) The Deputy was asked, "if someone is not under the influence of alcohol, what should the eyes do." (287:10-11). An objection was made, and overruled. (287:12-14). The deputy then testified "Their eyes will be very smooth. They'll track equally and they'll be very smooth. They won't tick or bounce." (288:22-25). Bouncing means nystagmus. (287:8-8).

At trial, Anthony Palacios testified. Mr. Palacios is an expert in the National Highway Traffic Safety Administration impaired driving curriculum. (402:6-11). Mr. Palacios was a police officer for fourteen years, ten of which focused on DUI enforcement. (403:1-3). While working for the police department, he was assigned to the DUI task force for about two and a half years and the fatality accident investigation unit, which also dealt with DUI's. (403:3-6). Mr. Palacios's last four years in law enforcement he was a full-time impaired driving police instructor at the Georgia Police Academy. (403:7-10).

Mr. Palacios was familiar with the field sobriety testing and its purpose. (406:7-10). "The purpose of the standardized field sobriety tests are to assist officers using objective standardized tests to look for objective standardized clues to assist in making arrest decision during a DUI investigation." (406:7-10).

As part of the NHTSA training, on phased the officer is trained in is personal contact. (407:14-16). After reviewing the video of the contact with Mr.

Furman, Mr. Palacios noticed that Mr. Furman had no difficulty in walking around, or walking on the inclined area to the deputy's vehicle, or in following the request to walk to other locations. (407:21-408:7). It was Mr. Palacios's opinion that Mr. Furman showed good mental and physical faculties. (408:7-8).

During Mr. Palacios's review of the video, he did not note slurred speech and that Mr. Furman had no physical difficulties. (409:5-9).

Mr. Palacios also reviewed the administration of the field sobriety tests. After reviewing the administration of the HGN by Deputy Schneider, the deputy deviated or performed the test incorrectly at every step. (415:17-20).

Mr. Palacios also reviewed the one leg stand. (419:3-6). There were no clues based upon his review. (419:9). On the one leg stand, there were zero clues. (420:2-3). The one leg stand is the more reliable of the two physical test. (420:9-12).

After deliberation, the jury returned a verdict of guilty. (T17) The decision of the Count Court were affirmed on appeal to the Lancaster County District Court. (T36-51) This appeal timely follows.

SUMMARY OF THE ARGUMENT

The regulations of the Department of Health and Human Services related to breath testing must be admitted before a breath test may be received. These regulations are hearsay and inadmissible unless they meet the exception under Neb. Rev. Stat. 27-902(1). When the state fails to offer a certified copy of Tittle 177 NAC 1, the document is hearsay and inadmissible. When Title 177 NAC 1 is not admissible, the state has failed to establish the foundation for the breath tests and its admission is improper.

When an officer informs a person he is an officer and asserts his authority telling the citizen he must stay, he has made a seizure. In order to make a seizure, the officer is limited to his primary jurisdiction. Where the officer makes a seizure outside of his primary jurisdiction, it is in violation of the fourth amendment and a Motion to Suppress should be sustained.

When an officer seizes a citizen and places them in the secured area of an officer's patrol vehicle, he has made a seizure. An arrest occurs when under the facts and circumstances, a reasonable person would not feel free to leave. When

an officer makes an arrest, he must have probable cause to believe a crime was committed. Even when an arrest is not made, the officer must have reasonable suspicion to believe a crime has occurred. The odor of alcohol does not raise to the level of probable cause or reasonable suspicion authorizing a seizure of a citizen.

Before officers may request Standardized Field Sobriety Tests, the officer must have reasonable suspicion that the offense of Driving Under the Influence has been committed. The smell of alcohol, the admission to drinking the night before and bloodshot eyes, which are not uncommon, are insufficient to establish reasonable suspicion to request Field Sobriety Tests.

An officer may not testify that Horizontal Gaze Nystagmus (HGN) equates to impairment. When an officer states that if a person is not impaired, then there will be no nystagmus. An officer's opinion that equates HGN's presence to a person who is impaired is improper.

ARGUMENT

I

A CHEMICAL TEST IS NOT ADMISSIBLE UNLESS A COPY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES REGULATIONS SETTING OUT THE METHODS IN EFFECT AT THE TIME THE TEST WAS ADMINISTERED

Before a chemical test can be admitted, the state must offer a copy of the administrative code currently approved by the Department of Health and Human Services (DHHS). Neb. Rev. Stat. §60-6,201(3) and *State v. Gerber*, 206 Neb. 75 (1980). The rules and regulations of the DHHS are contained in Tittle 177 NAC 1. *State v. Montoya*, 305 Neb. 581 (2020). The state must prove the specific steps approved by DHHS before the test results are admissible. *Gerber* at 88. Understanding that the admission of Tittle 177 NAC is essential to the admission of a chemical test, the state failed to meet their obligation as follows:

a. *The state must submit a certified copy of the administrative code setting out the methods approved by DHHS, Tittle 177 NAC 1*

Hearsay is not admissible unless the rules provide for its admission. Neb. Rev. Stat. §27-802. A written statement is hearsay. Neb. Rev. Stat. §27-801(1).

However, an administrative code can be self authenticating when it bears the state seal. Neb. Rev. Stat. §27-902(1). Where a document fails to meet an exception to the hearsay rule, its admission is improper.

The requirement of a certified copy of the administrative code appears to be generally understood and there is limited case discussing the matter. In *State v. Grosshans*, 270 Neb 660 (2005), Grosshans complained the court erred in admitting a certified copy of the sales and use tax regulations of the Department of Revenue. The court found the admission was proper as "the regulations were certified by Nebraska's Secretary of State as having been adopted by the department of Revenue and approved by the offices of the Attorney General and the Governor." Under this circumstance, it was proper to receive the certified copy of the regulations.

A certified copy of the regulations of an administrative body are admissible since the certification makes them self authenticating. In this instance. Exhibit 14 (164:21), was not certified. Since the regulations were not certified, the hearsay objection should have been sustained and exhibit 14's admission was improper.

b. *A chemical test is not admissible unless the state establishes the test was conducted in compliance with the current administrative code of DHHS.*

In order for a chemical test to be admissible, the state must establish four foundational requirements. *Gerber*. "Before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) *That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health*; and (4) That there was compliance with any statutory requirements." *Id.* at 90-91 (emphasis added). The failure to meet these foundational elements means the state is prohibited from introducing a chemical

test result. If the state fails to establish the method applied to the chemical test is the one currently approved by DHHS, the test is improperly admitted.

In this instance, exhibit 14 is the documentation the state relied upon to establish the methods approved by DHHS. However, a review of exhibit 14 fails to show that these are the current methods approved by DHHS. The only statement is that the amended regulations replaced the regulations with the last effective date of May 4, 2014. (E14 164:21, p13).

When the state is required to submit evidence, they cannot rely upon assumptions. In this instance, there was no evidence submitted that the regulations are ones currently approved by DHHS. Since the state failed to submit evidence supporting the admissibility of the test, it was improperly received.

c. Sufficiency of the objection

An objection must be made at the time evidence is offered setting out the basis of the objection. Neb. Rev. Stat. §27-103(1)(a). Where the purpose of the objection is apparent from the proceeding, no further clarification is necessary. *State v. Huston*, 285 Neb. 11 (2013). The necessity of an authenticated copy of Title 177 NAC 1 has long been fundamental to the admission of a breath test. In the context of admission to a breath test, the objection to Tittle 177 NAC 1 based on hearsay and the subsequent offer of a breath test result, is unambiguous that the regulations have not been properly admitted for the admission of a breath test.

In this instance, when exhibit 14, a copy of Title 177 NAC 1, an objection to hearsay and foundation was made. (164:17-22). This objection was overruled. (164:21). Then when the State attempted to offer the breath test result, an objection was made regarding foundation. (344:10-16). Since *Gerber*, it is abundantly clear that part of the foundation necessary for a breath test is a properly admitted Tittle 177 NAC 1. In the context of this objection, there is no ambiguity that the objection to foundation was in the context of the improperly admitted regulations, and was therefore sufficient.

d. Tittle 177 NAC 1 is not self authenticating.

Only public records that are properly certified may be admitted. Neb. Rev. Stat. §27-902(1) The proponent of the evidence is the party responsible for establishing the necessary foundation for the public record. *VKGS, LLC v. Planet*

Bingo, LLC, 309 Neb. 950 (2021). It is the proponent who must establish the evidence is what it purports to be. In the absence of a certification, Title 177 NAC 1, is not self authenticating and not admissible.

In this instance, the District Court, improperly determined that Exhibit 14 was a self authenticating document under Neb. Rev. Stat. 27-902(5). (T43) However, Title 177 NAC 1 is not a "Books, pamphlets, or other publications purporting to be issued by public authority." Tittle 177 NAC 1 is a record developed by the Department of Health and Human services. If the State seeks to admit it, it must be authenticated. It can be authenticated by being signed and bearing a seal of the agency. Failing to have those minimal requirements means the document was not self authenticating and should not be admitted.

In the event the breath test was improperly admitted, then the state must prove the error was harmless beyond a reasonable doubt. "An erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that error was harmless beyond a reasonable doubt." *State v. Johnson*, 255 Neb. 865, 875-876 (1998). If the state is unable to prove the verdict was clearly unattributable to the erroneous admission of the breath test, then the case should be remanded for a new trial. In this instance, there is a conflict in the evidence between whether Mr. Furman was impaired or unimpaired.

II

A SEIZURE BY ON OFFICER OUTSIDE HIS JURISDICTION
AND NOT MEETING ANY OF THE EXCEPTIONS
VIOLATES THE FOURTH AMENDMENT

Pursuant to Neb. Rev. Stat. §29-215(1) a law enforcement officer is only allowed to enforce the laws within their primary jurisdiction unless they meet one of the exceptions authorizing them to leave their primary jurisdiction. *State v. Ohlrich*, 20 Neb. App. 67 (2012). If the officer makes a seizure outside his primary jurisdiction, he may only do if he meets one of the exceptions of §29-215. Since the officer failed to meet one of the statutory exceptions to authorize a seizure outside of his primary jurisdiction, the seizure is illegal and the Motion to Suppress should have been sustained.

The Fourth Amendment guarantees the right to be free of unreasonable

search and seizure. This guarantee requires that an arrest be based upon probable cause and limits investigatory stops to those made *upon an articulable suspicion of criminal activity*." See *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). (emphasis added). *State v. Royer*, 276 Neb. 173, 178 (2008). "Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *Id.* In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop. *Id.* Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion, but less than the level of suspicion required for probable cause. *Id.*" *State v. Royer*, 276 Neb. 173, 178-179(2008).

Pursuant to Neb. Rev. Stat. §29-829 a peace officer may only stop a person he reasonably suspects of committing or has committed a crime. The officer may demand of him his name, address and an explanation of his actions. *Id.* Where the officer lacks reasonable suspicion or probable cause, the detention is improper and all evidence obtained must be suppressed.

A statute is to given its plain and ordinary meaning. When it comes to statutory construction of a penal statute, they will be strictly construed. *State v. Thacker*, 286 Neb 16 (2013). Ambiguities in penal statues are resolved in favor of the accused. *Id.* Where the statute sets out the specific circumstances of when an officer may act outside his jurisdiction, the officer is limited to those delineated actions.

Neb. Rev. Stat. §29-215(1) sets out the limitations on an officer's jurisdiction to make an arrest. Officers are limited to the political subdivision employing them.

> (1) A law enforcement officer has the power and authority to enforce the laws of this state and of the political subdivision which employs the law enforcement officer or otherwise perform the functions of that office anywhere within his or her primary jurisdiction.

§29-215(2) sets out when an officer can exercise the officer's authority outside of

their jurisdiction.

(2) Any law enforcement officer who is within this state, but beyond his or her primary jurisdiction, has the power and authority to enforce the laws of this state or any legal ordinance of any city or incorporated village or otherwise perform the functions of his or her office, including the authority to arrest and detain suspects, as if enforcing the laws or performing the functions within his or her primary jurisdiction in the following cases:

(a) Any such law enforcement officer, if in a fresh attempt to apprehend a person suspected of committing a felony, may follow such person into any other jurisdiction in this state and there arrest and detain such person and return such person to the law enforcement officer's primary jurisdiction;

(b) Any such law enforcement officer, if in a fresh attempt to apprehend a person suspected of committing a misdemeanor or a traffic infraction, may follow such person anywhere in an area within twenty-five miles of the boundaries of the law enforcement officer's primary jurisdiction and there arrest and detain such person and return such person to the law enforcement officer's primary jurisdiction;

c) Any such law enforcement officer shall have such enforcement and arrest and detention authority when responding to a call in which a local, state, or federal law enforcement officer is in need of assistance. A law enforcement officer in need of assistance shall mean (I) a law enforcement officer whose life is in danger or (ii) a law enforcement officer who needs assistance in making an arrest and the suspect (A) will not be apprehended unless immediately arrested, (B) may cause injury to himself or herself or others or damage to property unless immediately

> arrested, or C) may destroy or conceal evidence of the commission of a crime; and
>
> (d) Any municipality or county may, under the provisions of the Interlocal Cooperation Act or the Joint Public Agency Act, enter into a contract with any other municipality or county for law enforcement services or joint law enforcement services. Under such an agreement, law enforcement personnel may have such enforcement authority within the jurisdiction of each of the participating political subdivisions if provided for in the agreement. Unless otherwise provided in the agreement, each participating political subdivision shall provide liability insurance coverage for its own law enforcement personnel as provided in section 13-1802.

§29-215(4) sets out the definitions

> (4) For purposes of this section:
>
> . . .
>
> c) Primary jurisdiction means the geographic area within the territorial limits of the state or political subdivision which employs the law enforcement officer.

University of Nebraska Officer Backer was the person to call Mr. Furman into the dispatch center. (9:20-23) When UNL Officer Backer made the call, he was on Waverly Road, which is not University Property. (22:4-7)

UNL Officer Backer called to 911 to get them started before he had contact with the driver. (E1 15:24) UNL Officer Backer then told 911 he worked for UNL and was going to contact the driver.(E1 15:24) After stating he was going to have contact with the driver, he told 911 that he would not let him drive off. (E1 15:24)

UNL Officer Backer did not let Mr. Furman drive off or leave and maintained Mr. Furman's presence until the Sheriff's deputies arrived.

UNL Officer Backer, outside his jurisdiction, escalated the contact to either a tier two or tier three seizure of Mr. Furman.

"A tier-two police-citizen encounter involves a brief, nonintrusive

detention during a frisk for weapons or preliminary questioning. A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention. Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution"

State v. Hartzell, 304 Neb. 82 (2019).

If a seizure occurs, a citizen is protected under the Fourth Amendment. "A seizure in the Fourth Amendment context occurs only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave." *Newton v. Huffman*, 10 Neb.App. 390, 408 (2001). "Circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of a citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Id.* Thus, in determining the point at which an arrest or seizure occurs, the court must look at the totality of the circumstances viewed objectively under a "reasonable person" standard while applying the above pertinent factors." *Id.*

In order to make a seizure, the officer must have reasonable suspicion. Police may make "brief investigative stops of vehicles based on reasonable suspicion when a law enforcement officer has a "'particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *State v. Barbeau,* 301 Neb. 293 (2018). "[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 [F]ourth [A]mendment.'" *Id.* at 302. When the police contact a person with the intent to prevent them from leaving, a seizure has occurred requiring reasonable suspicion.

In this instance, UNL Officer Backer made clear his intent was to make a seizure when he called 911. (E1 15:24) UNL Officer Backer stated that he would not let the person leave.(E1 15:24) The UNL Officer stood at the jeep and contacted Mr. Furman.

Mr. Furman recalls that UNL Officer Backer stated he was an officer, that

911 was called and that he would have to wait until the sheriff's arrived before leaving. (109:7-9) When Deputy Sturdy arrived, UNL Officer Backer was still with Mr. Furman and handed him over to Deputy Sturdy. (103:15-17)

Once UNL Officer Backer identified himself as an officer and informed Mr. Furman that the sheriff's department was on their way, he then stood by the jeep, which would prevent Mr. Furman from leaving.

UNL Officer Backer made a seizure of Mr. Furman. When UNL Officer Backer made the seizure, he was outside his primary jurisdiction and without authorization to do so. Since UNL Officer Backer made the seizure outside his primary jurisdiction, then it was improper and all subsequent evidence should be excluded.

III

THE SEARCHING OF THE ACCUSED AND PLACING HIM IN THE SECURED CAGE ARE OF A POLICE VEHICLE IS AN ARREST REQUIRING PROBABLE CAUSE OR A SEIZURE REQUIRING REASONABLE SUSPICION

Before an arrest can occur an officer must have probable cause. *State v. Van Ackeren*, 242 Neb. 479 (1993). " Probable cause for a warrantless arrest exists if, " 'under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime.' " *United States v. Fixen,* 780 F.2d 1434, 1436 (9th Cir.1986); *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)." *State v. Roach* , 234 Neb. 620, 625 (1990). An arrest can only occur when there are sufficient facts to believe the defendant has committed a crime. In the absence of those facts, an investigation may be allowed, but it cannot blossom into a full-blown arrest.

It is important to remember that it is the state who bears the burden of proof at a hearing on a motion to suppress for a warrantless search and seizure, or arrest. "We have stated that warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications." *State v. Gorup,* 279 Neb. 841 (2010). "In the case of a search

and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *State v. Smith,* 279 Neb. 918 (2010)." Where the state fails to prove the existence of probable cause when they secure a citizen in their car, the state has failed in their burden.

An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. *Beck v. Ohio*, 379 U.S. 89, 84 S.Ct. 223 (1964).

It is always important in reviewing a warrantless arrest that if the court would not have issued a warrant for arrest, had the police requested one, then probable cause did not exist. Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent then where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441.

This standard exists for the safety and security from government intrusions for all citizens. The court in *Wong Sun* noted that there is a history of use and abuse of the power to arrest, and they caution that the relaxation of the probable cause standards would "leave law-abiding citizens at the mercy of the officer's whim or caprice." *Wong Sun*, quoting *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879.

"A person is arrested or seized for fourth amendment purposes when there is a restraint on his or her freedom of movement in any significant way. . . that police have seized and individual 'only if, in view of all of the circumstances surrounding the incident, *a reasonable person would have believe that he was not free to leave' is commonly cited as the description of an arrest*. . . . a suspect's submission to an officer's show of authority also constitutes a seizure." *State v. Brooks*, 5 Neb. App. 463 at 471 (1997) (emphasis added).

The U.S. Supreme Court in *Florida v. Royer*, 460 US 491, 497 (1983)

citing *Dunaway v. New York*, 442 U.S. 200 (1979), "a police confinement which . . . goes beyond the limited restraint of a Terry investigatory stop may be constitutionally justified only by probable cause." The Court went on at 500, "the investigative methods employed should be the least intrusive means reasonably able to verify or dispel the officer's suspicion in a short period of time." And further explained at 499, "Detentions may be 'investigative' yet violative of the Fourth Amendment absent probable cause. . . . police may [not] seek to verify their suspicions by means that approach the conditions of arrest." An investigative stop exceeds its scope when the officer utilizes methods that are more restrictive than necessary to confirm or dispel his suspicions. When the officer utilizes these methods, the investigative stop becomes a full blown arrest.

The U.S. Supreme Court in *Royer* discussed some of the factors to consider when determining that an investigative stop has bloomed into a full blown arrest. The Court discussed the movement of the defendant from one area to another could be justified if there was a safety or security issue. *Id.* In *Royer* itself, the court noted, "There is no indication in this case that such reason prompted the officers to transfer the site of the encounter from the concourse to the interrogation room. It appears, rather, that the primary interest of the officers was not in having an extended conversation with Royer, but in the contents of his luggage, a matter which the officers did not pursue orally with Royer until after the encounter was relocated to the police room." *Id.* at 505.

The Eighth Circuit in *U.S. v. Willis*, 967 F.2d 1220 (1992), discussed factors to consider in determining if the defendant was arrested prior to obtaining probable cause. In *Willis* at 1224, the court found that "the officers did not subject Willis to any unnecessary delays, handcuff him, or *confine him in a police car* . . ." (Emphasis added) When law enforcement increases the restrictions placed on the defendant, the stop has become an arrest. When the stop becomes an arrest, it must be justified by probable cause. If the encounter is not justified by probable cause, then the arrest is illegal and all subsequent evidence should be suppressed.

When Deputy Sturdy arrived, he made contact with the people around Mr. Furman's jeep. (99:7-10) The deputy escorted Mr. Furman up to the deputy's patrol car. (104:6-8). The deputy frisked Mr. Furman for weapons. (104:6-24).

After frisking Mr. Furman for weapons, the deputy told him to have a seat in the back of his patrol car and shut the door on Mr. Furman. (104:6-24)

The back of the patrol car was a secured area. (40:7-9) There was a cage between the front and the back, and the door was locked from the inside. (40:10-11) .

Even after Deputies Hoggins and Schneider arrived, they continued to secure Mr. Furman in the back of Deputy Sturdy's patrol car. Deputy Hoggins would open the door, talk to Mr. Furman and then close the door securing him the back of the cruiser. (40:19-22) Deputy Hoggins did this again. (41:4-7) Once again, demonstrating that Mr. Furman was not free to leave.

At the time Deputy Sturdy made the seizure, all he noticed was the odor of alcohol.(93:21-105:13) As discussed, it is not reasonable to think someone is impaired, and definitely does not reach the level of probable cause. The officer also noticed the car was stopped off the side of the road and that Mr. Furman had stated he was a heavy sleeper and that Mr. Furman had intentionally stopped to catch some rest. (253:8-11)

Even if an arrest did not occur, there was still a tier II detention. In order to detain Mr. Furman, Deputy Sturdy needed reasonable suspicion that a crime had been committed. In this instance, there was insufficient reasonable suspicion to seize Mr. Furman and place him in the back secure area of the patrol vehicle.

Deputy Sturdy, prior to securing Mr. Furman in his vehicle, noted the smell of alcohol. While no case is directly on point in Nebraska, the following Texas quote is illustrative of what the smell of alcohol means.

> so long as consumption of alcohol is not illegal in and of itself, a standard permitting or requiring detention and investigation of persons for public intoxication based solely on whether the odor of alcohol on a person's breath is "strong," "moderate," "weak" or some other such subjective classification invites unwarranted police intrusions into the affairs and freedom of persons."

Domingo v. State, 82 S.W.3d 617, 622 (Tex. App. 2002).

Also, in *State v. Brewer*, 2010 WL 2891518, 2010-Ohio-3441 (Ohio App. 2 Dist. Jul 23, 2010) (NO. 23442) citing *State v. Spillers* (March 24, 2000), the court

noted that,

> Traffic violations of a de minimus nature are not sufficient, combined with a slight odor of an alcoholic beverage, and an admission of having consumed a "couple" beers, to support a reasonable and articulable suspicion of DUI.

And in *State v. Segi*, No.18267 (Ohio App. District 2), dated August 18, 2000

> Odor of an alcoholic is insufficient, by itself, to trigger a reasonable suspicion of DUI, and nominal traffic violations, being common to virtually every driver, add nothing of significance... The law prohibits drunken driving, not driving after a drink... Smelling too drunk to drive, without other reliable indicia of intoxication is not enough to constitute probable cause to arrest.

The smell of alcohol is insufficient to raise to the level of reasonable suspicion for a search. *City of Hutchison v Davenport*, 30 Kan. App.2d 1097 (2002). In order to expand the scope of a detention, the officer must have reasonable suspicion that a crime has occurred, not that a person may have consumed alcohol. The smell of alcohol, without more, is not enough to believe the crime of DWI occurred.

In this instance, Deputy Sturdy moved Mr. Furman from the area around the jeep, into the secured area of the deputy's car. There was no exigency in doing so, but it was only because he wanted to talk to the other witnesses outside the presence of Mr. Furman. (101:9-14) Mr. Furman was cooperative and was no threat to Deputy Sturdy. (E26 259:18) There was plenty of room to separate people without confining Mr. Furman to the officer's secured area. (E26 259:18)

Confining a person in the back of a secured cage area of a patrol vehicle would lead a reasonable person to believe that they were not free to leave. As the court in *Willis* noted, confining a person in a police car would be an indiction the person was under arrest.

In this instance, at the time a seizure occurred, Deputy Sturdy had minimal information to establish reasonable suspicion for a detention or probable cause for an arrest. The Deputy noted the smell of alcohol. That smell is not sufficient to either detain or arrest Mr. Furman.

Since there was no exigency, no need to protect officers and no risk to

evidence, Deputy Sturdy was not in a position where he needed to confine Mr. Furman. There was no need to secure Mr. Furman in the back of the patrol car. When Deputy Sturdy did so, he effected an arrest without probable cause or a detention without reasonable suspicion. The court should have sustained the Motion to Suppress.

IV

IN THE ABSENCE OF REASONABLE SUSPICION
AN OFFICER MAY NOT HAVE A CITIZEN
SUBMIT TO FIELD SOBRIETY TESTS

Before an officer may conduct a search, they must have specific facts to believe a person has committed a crime. "We hold that field sobriety tests may be justified by a police officer's reasonable suspicion based upon *specific articulable facts* that the driver is under the influence of alcohol or drugs." *State v. Royer*, 276 Neb. 173, 179 (2008). (emphasis added) The officer must be able to articulate facts to reasonably lead to a conclusion that a crime has been committed. *It cannot be a hunch*. The officer must be able to reasonably believe that based on those facts, a crime has been committed.

"Reasonable suspicion entails some minimal level of objective justification for detention, *something more than an inchoate and unparticularized suspicion or 'hunch*' but less than the level of suspicion required for probable cause." *State v. Pickinpaugh* 17 Neb. App. 329, 334 (2009) (emphasis added). Where the officer has insufficient information to believe the driver is operating while under the influence, the officer improperly requests field sobriety tests.

When an officer lawfully stops a vehicle, he may detain it to conduct an investigation related to the purpose of the traffic stop. *Royer*. "In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond which that which initially justified the stop." *Id.* at 178. The mere fact the officer has made a stop does not justify a continued detention, only if there is reasonable, articulable suspicion to believe the motorist is engaged in other criminal activity may law enforcement extend the detention.

An officer must have specific facts to believe a person has committed a

crime before they may conduct a search. "We hold that field sobriety tests may be justified by a police officer's reasonable suspicion based upon *specific articulable facts* that the driver is under the influence of alcohol or drugs." *State v. Royer*, 276 Neb. 173, 179 (2008). (emphasis added) The officer must be able to articulate facts to reasonably lead to a conclusion that a crime has been committed. The officer must be able to reasonably believe that based on those facts, a crime has been committed.

When it comes to driving while under the influence of alcohol, the officer must have reasonable suspicion, based on specific articulable facts, that the driver is intoxicated. *Id.* In *Pickinpaugh*, the officer was found to have reasonable suspicion to request field sobriety tests where the officer noted the driver's eyes were watery and bloodshot, the officer detected a strong odor of alcohol on the driver's breath, the driver admitted to consuming alcohol and there was slurred speech. In *Royer*, the officer observed bloodshot watery eyes, a strong odor of alcohol on Royer's breath, an admission to drinking four or five alcoholic beverages and Royer was swaying and stumbling on his way back to the police cruiser.

The actions of the driver in each instance provides some articulable facts to believe a crime is being committed. The presence of alcohol combined with things such as slurred speech or stumbling clearly provides reasonable suspicion to conduct field sobriety tests. However, the mere smell of alcohol would not be enough. A review of the statutes fails to show any crime for having consumed an alcoholic beverage. It is only when the driver may be impaired that a crime has been committed.

When the officer's contacted Mr. Furman in the back of Deputy Sturdy's car, they noted the slight smell of alcohol, blood shot eyes and an admission to drinking the night before. At that point, they decided to conduct field sobriety tests. As they officers noted, it is not reasonable to believe someone is impaired due to the smell of alcohol.

In this instance, there was no reasonable suspicion to conduct the Field Sobriety Tests and the results should have been excluded.

IV

AN OFFICER MAY NOT TESTIFY THAT THE RESULTS OF THE HORIZONTAL GAZE NYSTAGMUS TEST MEANS A PERSON IS IMPAIRED

The Court in *State v. Baue*, 258 Neb 968 (2000), set forth the extent to which the HGN could be used to determine impairment. "We agree with the conclusion of the court in *Ballard v. State,* 955 P.2d 931, 940 (Alaska App.1998):

> While HGN testing may not, of itself, be sufficient to establish intoxication, HGN test results are admissible as a factor to be considered by the fact-finder when determining intoxication. Testimony concerning a defendant's performance on a properly administered HGN test is admissible on the issue of impairment, provided that the prosecution claims no greater reliability or weight for the HGN evidence than it does for evidence of the defendant's performance on any of the other standard field sobriety tests, and *provided further that the prosecution makes no attempt to correlate the HGN test result with any particular blood-alcohol level, range of blood-alcohol levels, or level of impairment*."
> (Emphasis added)

"Accordingly, we hold that the HGN field sobriety test meets the *Frye* standard for acceptance in the relevant scientific communities, and when the test is given in conjunction with other field sobriety tests, *the results are admissible for the limited purpose of establishing that a person has an impairment which may be caused by alcohol*." *Id.* at. 985 (emphasis added).

The HGN is only admissible for a limited purpose. When the HGN is properly administered, there are no indicators of impairment, but only the results that go into the opinion of possible impairment. Any opinion that states the presence of HGN establishes impairment is improper.

At trial, Deputy Schneider was asked about Horizontal Gaze Nystagmus. (286:23-25) The Deputy was asked, "if someone is not under the influence of alcohol, what should the eyes do." (287:10-11). An objection was made, and overruled. (287:12-14). The deputy then testified "Their eyes will be very

smooth. They'll track equally and they'll be very smooth. They won't tick or bounce." (288:22-25). Bouncing means nystagmus. (287:8-8).

The state was improperly allowed to obtain an opinion that if a person is not impaired, then there will be no HGN. The clear implication is that its presence equates to impairment. Since *Baue* makes clear that opinion is improper, the objection should have been sustained.

Due to the improper admission of the opinion about HGN and impairment, this matter should be reversed for a new trial.

REMEDY FOR IMPROPER ADMISSION OF EVIDENCE

In the event any evidence was improperly received, then the case needs to be remanded for a new trial. "In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt." *State v. Hingst*, 251 Neb. 535, 538 (1997). Where both theories of the state's case were contested, the state cannot prove the admissions were harmless beyond a reasonable doubt.

As the court stated in *Hingst* at 538-539, "In the instant case, we cannot determine which evidence the jury relied on in convicting Hingst. As such, we cannot say the State has proved that the erroneous admission of Hingst's breath test results was harmless beyond a reasonable doubt." There is no way to determine what evidence the jury relied upon in reaching its verdict. The validity of the test was challenged, as well as the officer's opinions regarding impairment. The remedy for the improper admission is to remand for a new trial.

CONCLUSION

For the preceding reasons, Mr. Furman requests the Court reverse for a new trial and with directions to sustain his Motion to Suppress.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief does comply with the word count pursuant to Rule 2-103(4). The brief has 9,418 total words (WordPerfect X9 Version: 19.0.0.325). The foregoing brief complies with the typeface requires of Rule 2-103(4).

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Certificate of Service

I hereby certify that on Tuesday, January 16, 2024 I provided a true and correct copy of this *Brief of Appellant Furman* to the following:

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