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NEBRASKA SUPREME COURT
COURT OF APPEALS

A-22-0774

IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

STATE OF NEBRASKA,
Appellee,
v.

DAVID CARLSON,
Appellant.

APPEAL FROM THE DISTRICT COURT OF
SARPY COUNTY, NEBRASKA
Honorable George Thompson, District Court Judge

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The Appellant, David Carlson, appeals from a judgment and sentence rendered following a Bench Trial in County Court which was subsequently appealed and affirmed in District Court, pursuant to the authority granted by Neb. Rev. Stat. §25-1911 (Reissue 1995); Neb. Rev. Stat. §25-1912 (R.S. Supp. 2002); and Neb. Rev. Stat. §29-2301.

A final judgment was entered on September 27, 2022 when the District Court of Sarpy County affirmed the ruling of the County Court in the instant case. (T115)

The Notice of Appeal was filed October 19, 2022 and an Order to proceed in forma pauperis was granted on the same date. (T129)

This appeal is authorized by the Constitution of the State of Nebraska, Article I, Section 23, Neb. Rev. Stat. § 25-1912 and Neb. Rev. Stat. §29-2301 (Reissue 1995).

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is a criminal case in which Appellant was charged in a Criminal Complaint with Driving Under the Influence of Alcohol or Drugs after Count 2, Obstructing a Peace Officer was dismissed by the State prior to trial. (T3, T66).

The Appellant was tried and subsequently convicted of Driving Under the Influence of Alcohol. (T72).

B. ISSUES TRIED IN COUNTY COURT

Whether the Appellant committed the following act:

1: On or about September 11, 2020 at or near 3614 Twin Creek Dr., Sarpy County, Nebraska, did the Appellant operate or be in the actual physical control of a motor vehicle while under the influence of alcoholic liquor or any drug, or when he had a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his blood or eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath (Tested by SCLEC). (Class W Misdemeanor).

C. HOW THE ISSUES WERE DECIDED AND JUDGEMENT ENTERED

On January 13, 2022, the Appellant was found guilty pursuant to a verdict issued by the County Court on Count 1, Driving Under the Influence of Alcohol. (T72)

D. SCOPE OF APPELLATE COURT'S REVIEW

1. Ruling on a Defendant's Motion to Suppress

A trial Court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. U.S.C.A. Const.Amend. 4, *State v. White* 15. Neb.App. 486 (2007).

The Standard of review for reasonable suspicion for a *Terry* stop is de novo, but appellate court reviews the trial court's factual findings for clear error. U.S.C.A. Const. Amend. 4, *State v. White,* 15 Neb. App. 486 (2007).

2. Accepting Exhibits into Evidence over Objection

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

3. Insufficiency of the Evidence

In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Lavalleur, 289 Neb. 102, 853 N.W.2d 203 (2014).
State v. Matit, 288 Neb. 163, 846 N.W.2d 232 (2014).

ASSIGNMENTS OF ERROR

1. The trial court erred in overruling Defendant's Motion to Suppress Evidence;
2. The Trial Court erred in accepting exhibits 2, 3, 4, and 5 into evidence;
3. There was an insufficiency of evidence.

PROPOSITIONS OF LAW

I. While an anonymous tip will justify the initiation of a police investigation in most situations, it alone will rarely establish the level of suspicion required to justify a detention. *Alabama v. White*, 496 U.S. 325 (1990).

II. When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress. *State v. White* 15. Neb.App. 486 (2007).

III. Limited investigatory stops are permissible only upon a reasonable suspicion, supported by specific and articulable facts, that the person was, is, or is about to be engaged in criminal activity; 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. U.S.C.A. Const.Amend. 4, *State v. White*, 15 Neb. App. 486 (2007).

IV. An informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant in determining the value of his report ... they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question of whether there is "probable cause" to believe that contraband or evidence is located in a particular place. *Illinois v. Gates*, 462 U.S. 213 (1983).

V. An officer's prior knowledge, his experience, and his corroboration of the details of the tip may be considered in giving the anonymous tip the weight it deserves. Mere corroboration of details, however, that are easily obtainable at the time the information is provided will not support a finding of probable cause nor furnish the basis for reasonable suspicion. *Davis v. State*, 989 S.W.2d 859 (1999).

XII. Error may not be predicated upon a ruling which admits ... evidence unless a substantial right of the party is affected, and: (a) ... a timely objection or motion to strike appears of record, stating the specific ground of objection, if a specific ground was not apparent from the context. Neb. Rev. Stat. §27-103(1) (Reissue 2008)

XIII. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (1) A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution; (2) A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in subdivision (1) of this section, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
Neb. Rev. Stat. § 27-902 (Reissue 2008)

XVII. An appellate court shall review the sufficiency of the evidence to support a conviction by reviewing the evidence in the light most favorable to the prosecution. The analysis to be applied is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. McCave,* 282 Neb. 500, 805 N.W.2d 290 (2011)

STATEMENT OF FACTS

On October 15, 2020, a Complaint was filed in the County Court for Sarpy County Nebraska. Ultimately, the State dismissed Count 2 and the matter proceeded to trial on Count 1, Driving Under the Influence of Alcohol or Drugs.

On October 21, 2021 the matter proceeded to hearing on Defendant's Motion to Suppress. (13:16). The State called one witness, Sergeant Jason Melrose. His testimony is outlined below. The court overruled the Defendant's Motion to Suppress and the matter was set for trial. (T53).

On January 5, 2022, trial commenced on Count 1. (39:16) The first witness the State called was Sergeant Jason Melrose of the Bellevue Police Department. (45:23) He testified that on September 11, 2020 at approximately 11:00 pm he was dispatched to the Bakers at 3614 Twin Creek Dr. in Bellevue, NE. (47:24-48:5).

Sergeant Melrose testified that the dispatch stated that there was a possible intoxicated driver who had been stumbling around inside the Baker's and was then in a white Hyundai Elantra parked in the handicap spot out front of the Baker's. (48:8) On arrival the Sgt. Melrose observed a White Hyundai Elantra parked in the handicap spot in front of that Baker's. He further testified that the license plate on that vehicle matched the license plate given by dispatch. (48:15). Sgt. Melrose then testified that he did approach that vehicle and Counsel for the Defendant objected, reasserting the objection contained in the Motion to Suppress that was overruled by the Trial Court. (48:20).

Sgt. Melrose then testified that he approached the vehicle and saw a lone occupant that he identified as Mr. Carlson. He then identified Mr. Carlson in the courtroom. (50:5). Upon contact Sgt. Melrose smelled the odor of alcohol on Mr. Carlson's breath. Sgt. Melrose testified at that point his investigation became a DUI investigation. (50:16).

Sgt. Melrose then questioned Mr. Carlson regarding the circumstances of their contact. Mr. Carlson admitted to having had four drinks much earlier in the night. (51:12) He told Sgt. Melrose that his keys were on the ground outside of his vehicle. (50:21). He told Sgt. Melrose that he had been dropped off at that Baker's by a friend. (52:14). Mr. Carlson explained to Sgt. Melrose that he was waiting in the vehicle until he was sober enough to drive. (53:7) He also told Sgt. Melrose that he had placed his keys on the ground outside of his vehicle because he didn't want to drive. (56:5). Sgt. Melrose then testified that he picked up the keys to the vehicle from the ground and placed them on the roof of the vehicle in order to take them out of the realm of control of Mr. Carlson. (56:17). Sgt. Melrose then turned the DUI investigation over to Officer Jezek to conduct the chemical testing. (53:15).

Officer Jezek was called as the final witness for the State. (78:4). The State first introduced exhibit 3 which purports to be a copy of the Department of Health and Human Services Division of Public Health Class B Permit for the Datamaster. (80:8). Officer Jezek testified that it was a copy of the original and that every time he made a copy of it the copy came out with "VOID" stamped across it. (80:17). The State then offered exhibit 3, Defense Counsel objected on foundational grounds and exhibit 3 was received by the Court. (81:10).

Officer Jezek then proceeded to testify at approximately 10:57 pm on September 11, 2020 he was also dispatched to the Baker's at 3614 Twin Creek Dr. in Bellevue, Ne. (82:5). On arrival Sgt. Melrose was next to the driver's door of a white Hyundai. He then identified Mr. Carlson as the occupant of that vehicle. (83:6). Officer Jezek stated that he took over the DUI investigation. (83:17). He testified that for a variety of reasons field sobriety tests were not administered. (83:23). Officer Jezek testified that among those reasons were the medical conditions that Mr. Carlson was suffering from. (95:7). He testified that those included an open heart surgery, diabetes, a partial amputation of the right foot, and that Mr. Carlson took blood thinning medication. (95:18). Officer Jezek then testified that all of those

medical conditions could have an effect on the way that he walks, talks, and further acts. (96:1). He further testified that he never observed Mr. Carlson operate the vehicle and that on arrival the vehicle was parked and off and at that time the keys to the vehicle were on the roof thereof. (96:6).

Officer Jezek further testified to all of the "impairment" that he observed from Mr. Carlson during their interaction to include slurred speech, staggering while he walked, and the odor of alcohol. (85:24). Which, as discussed above, is also attributable to the medical diagnoses that Mr. Carlson suffered from.

Officer Jezek then testified that he arrested Mr. Carlson and transported him to the Sarpy County Jail for Datamaster testing. (86:3) The State then offered exhibit 4 which purports to be an Infrared Absorption Checklist conducted by Officer Jezek. (91:7). Defense Counsel again made a foundational objection which was overruled and the Court received exhibit 4 into evidence. (91:15). Immediately following receipt of exhibit 4, the State offered exhibit 5, which purports to be the results of that Datamaster testing. Defense Counsel made the same objection as with exhibit 4. That objection was overruled and exhibit 5 was received by the Court. (92:8). Exhibit 5 purports to show that the results of that Datamaster Test were .112 grams of alcohol per 210 liters of breath. (92:14).

The State called Officer Abbott as their second witness. Officer Abbott had no interaction with Mr. Carlson, he was called to testify for foundational purposes as far as the Datamaster testing was concerned. (58:20). Officer Abbott testified that he was the Datamaster maintenance officer for the City of Bellevue. (59:23). Officer Abbott testified that he prepared a "Datamaster packet" for the State. (60:19). This was eventually marked and offered as exhibit 2 which the Trial Court accepted over Defense Counsel's objection. (74:2). Officer Abbott testified that the contents of the packet did not appear in the same way as their originals and he could not explain the reason for that. (74:22).

SUMMARY OF THE ARGUMENT

1. The trial court erroneously overruled the Defendant's Motion to Suppress because there was no reasonable suspicion or probable cause to stop the Defendant as the arresting officer relied on an unsubstantiated anonymous tip to detain the Defendant.

2. The trial court erroneously accepted exhibits 2, 3, 4, and 5 into evidence because the State failed to lay proper foundation as to the authenticity of exhibits 2, 3, 4, and 5 and because exhibits 2, 3, 4, and 5 were not properly authenticated pursuant to Neb. Rev. Stat. Sec. 27-901.

3. The trial court erred when it found the Defendant guilty of the crime of Driving Under the Influence of Alcohol because the Defendant was not in the actual physical control of a motor vehicle, thus the evidence was not sufficient to support such a finding.

ARGUMENT

1. THE COURT ERRED WHEN IT OVERRULED THE DEFENDANT'S MOTION TO SUPPRESS.

The Defense filed a motion to Suppress alleging that the State violated the Defendant's constitutional rights under the 4th amendment. Specifically the Defense alleged that there was no reasonable suspicion to detain the Defendant, that the Defendant's detention was in violation of his rights pursuant to *Terry v. Ohio*, that officers lacked sufficient indicia of reliability and corroboration of anonymous tips to justify the detention of the Defendant, and that the detention of the Defendant was in violation of his rights under the Constitution of the United States and the State of Nebraska. (T40).

An evidentiary hearing on Defendant's motion commenced on October 21, 2021. (13:16). At that hearing the State called Sgt. Jason Melrose who testified that on September 11, 2020 he was on duty and was dispatched to Baker's Supermarket in Bellevue, Sarpy County. (15:14). Sgt Melrose indicated that an anonymous caller contacted

dispatch and told them that there was a white male stumbling around inside Bakers and that he was currently outside in their parking lot in a white Hyundai Elantra with Nebraska license plates. (16:2). Sgt. Melrose testified that he pulled into the parking lot and observed a vehicle matching that description parked in the Bakers's parking lot and that vehicle did have one white male inside of it. (16:20-17:1).

Sgt. Melrose testified that he approached the vehicle on foot and shined his light into the vehicle at which point the individual inside the vehicle, later identified as Mr. Carlson, opened the door. (17:8). Sgt. Melrose testified to substantially the same at trial. For the purpose of evaluating the Motion to Suppress Evidence, no further factual inquiry is necessary as any further evidence gleaned from this interaction would be fruit of the poisonous tree. The only relevant consideration is whether the detention of the Defendant was valid under the circumstances.

While an anonymous tip will justify the initiation of a police investigation in most situations, it alone will rarely establish the level of suspicion required to justify a detention. *Alabama v. White*, 496 U.S. 325 (1990). Limited investigatory stops are permissible only upon a reasonable suspicion, supported by specific and articulable facts, that the person was, is, or is about to be engaged in criminal activity; 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. U.S.C.A. Const.Amend. 4, *State v. White*, 15 Neb. App. 486 (2007). An informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant in determining the value of his report ... they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question of whether there is "probable cause" to believe that contraband or evidence is located in a particular place. *Illinois v. Gates*, 462 U.S. 213 (1983). An officer’s prior knowledge, his experience, and his corroboration of the details of the tip may be considered in giving the anonymous tip the weight it deserves. Mere

corroboration of details, however, that are easily obtainable at the time the information is provided will not support a finding of probable cause nor furnish the basis for reasonable suspicion. *Davis v. State*, 989 S.W.2d 859 (1999).

Analysis

In this situation we have an anonymous tip which was used to justify the Detention of the Defendant. Sgt. Melrose testified at the Motion to Suppress Evidence that at the time of dispatch he was unaware as to the identity of the caller. (19:19). He also testified that when he arrived on scene he was unaware of the identity of the caller (20:1). Because Sgt. Melrose was unaware as to the identity of the caller prior to detaining Mr. Carlson this is clearly an inquiry under the anonymous tipster analysis.

Under *Alabama v. White* Sgt. Melrose could initiate an investigation into these allegations based on the anonymous tip. However, that tip alone could not be used to justify a detention. *Id. Alabama v. White* does provide that this is not the case in every situation but *Illinois v. Gates* expands this inquiry slightly and clarifies the application in more cluttered situations. *Gates* says that in these situations we turn to the informant's veracity, reliability, and basis of knowledge to determine the value of the information provided. *Illinois v. Gates.* Because Sgt. Melrose had no knowledge as to the identity of the tipster none of the criteria identified by the Nebraska Courts of Appeal can be satisfied – therefore any exception provided by *State v. White* cannot apply in this situation and again, Sgt. Melrose could not justify the detention of the Defendant based on the anonymous tip alone.

Most importantly for this inquiry *Davis v. State* says that mere corroboration of details easily obtainable at the time the information was provided will not support a finding of reasonable suspicion much less probable cause. *Id.* The facts in *Davis* are analogous for our purposes in analyzing the anonymous tip issue. There an anonymous tipster called 911 to report a black Chevy Blazer with dealer's tags 5D1180 being driven recklessly and that the occupants were possibly

smoking marijuana. At the Motion to Suppress hearing the arresting officer testified that he pulled the vehicle over without having observed any traffic infractions and that the sole reason for the stop was the anonymous tip. *Id.* The court then held, as enumerated above, that mere corroboration of details easily obtainable at the time the information was provided will not support a finding of reasonable suspicion much less probable cause. *Id.*

As applied to this case we see that the details which Sgt. Melrose used to detain Mr. Carlson were exactly the type of easily obtainable details as outlined by the Court in *Davis.* Sgt. Melrose testified that he didn't observe any traffic violations or any criminal activity. (21:22). He testified that the reason for the detention was merely the anonymous tip as broadcast by dispatch. (22:3).

This is exactly the situation discussed in *Davis* which the court there found impermissible. As such the County Court erred when it overruled Defendant's Motion to Suppress Evidence because the detention of the Defendant was based solely on the anonymous tip and any corroborated details were the type that would be easily obtainable. Additionally, there was no evidence adduced as to any traffic infraction or any other criminal activity which may provide a basis to detain the Appellant.

2. THE TRIAL COURT ERRED IN ACCEPTING EXHIBITS 2, 3, 4, AND 5 INTO EVIDENCE OVER THE DEFENDANT'S OBJECTION.

Exhibits 2, 3, 4, and 5 were all accepted into evidence over Appellant's objection. Exhibit 2 is a Datamaster Maintenance packet which was prepared by the State's second witness, Officer Christopher Abbott. (61:15)(ex 2). Exhibit 2 is a lengthy document made up of 21 pages. After counsel for the State spent a considerable period of time discussing Exhibit 2 it was offered into evidence at which time Defense Counsel lodged a foundation objection. Counsel argued specifically that the Class B permits located on pages 2 and 3 of exhibit 2 had "VOID" stamped across them. Additionally, page 17 contains testing done and

initialed by an officer not present to testify. (74:5). Defense counsel's objection was overruled and Exhibit 2 was received by the Court. (74:13).

Exhibit 3 purports to be a Class B permit obtained by officer Aaron Jezek.(ex 3). Similarly, Exhibit 3 is stamped "VOID". (Ex 3). Exhibit 3 was accepted by the Court when the Court overruled the Appellants foundational objection. (81:10).

Exhibit 4 purports to be an infrared absorption checklist conducted by Officer Jezek. (Ex 4). At the time that Exhibit 4 was offered Defense Counsel objected on foundational grounds. Specifically, counsel argued that there was no evidence that the witness was authorized to conduct any Datamaster testing because of the status of the "VOID" permit, and that there was no evidence that the test purportedly recorded by exhibit 4 was conducted pursuant to Title 177. (91:10). The Court overruled this objection and received Exhibit 4 (91:15).

Exhibit 5 purports to the Datamaster test results from the Sarpy County jail dated 9/12/2020 at 00:10 hours. (89:24). Defense Counsel made the same objection as they did when the State offered exhibit 4 into evidence. The Court overruled the Defendant's objections and received exhibit 5 into evidence. (92:8).

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Neb. Rev. Stat. § 27-901(1). By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: (a) Testimony that a matter is what it is claimed to be. Neb. Rev. Stat. § 27-901(2).

A proponent may authenticate a document under subsection (2)(a) of this section by the testimony of someone with personal knowledge that it is what it is claimed to be, such as a person familiar with its contents. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). Proper authentication may be attained by evidence of

appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, sufficient to support a finding that the matter in question is what it is claimed to be. *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007).

Analysis

Exhibits 2 and 3 both purport to be VOID copies of a once issued Class B permit, in addition to other items that were kept pursuant to Title 177 for maintenance of a Datamaster machine. The state offered them as they were, with the word "VOID" stamped across them. (74:2), (81:10) The State, the proponent of this evidence offered testimony from their witnesses, Sgt. Melrose and Officer Jezek respectively that these documents were *not* what they purported to be. That the Class B permits that they were copied from were in fact valid. As to exhibit 2 Officer Abbott testified that he had "no idea" why "VOID" was stamped across it. (74:24). Officer Jezek testified that exhibit 3 was stamped "VOID" when a photocopy was made of it. (80:17).

However, their testimony on the matter is irrelevant. The state offered into evidence documents which purported to be VOID copies of once issued Class B permits. Neb. Rev. Stat. § 27-901 says that a document is authenticated as a condition precedent to admissibility if there is evidence sufficient to support a finding that the matter in question is what it's proponent claims it to be. Neb. Rev. Stat. § 27-901. When the State offered exhibits 2 and 3 they claimed that the Document is what it appears to be on it's face. They offered "authentication testimony" that the documents are in fact *not* what they appear to be because the testimony offered by Officers Abbott and Jezek purports that the exhibits are actually valid Class B permits. The attempted authentication by the State as to the validity of exhibits 2 and 3 must fail because they have not complied with the strictures of Neb. Rev. Stat. § 27-901. As such the County Court erred when it accepted exhibits 2 and 3 into evidence because they were not properly authenticated as a condition precedent.

Because exhibits 2 and 3 and improperly admitted because of their authenticity issues as outlined above, then exhibits 4 and 5 are

as well. The admissibility of Exhibits 4 and 5 are in part governed by Title 177 which had been admitted without objection as Exhibit 1. Exhibit 1 stipulates that in order to conduct Datamaster testing certain requirements must be met. This includes possession of a valid Class B permit. (ex 1, pg 8).

Because the State failed to properly authenticate Exhibits 2 and 3 as discussed above the State failed to meet the threshold admissibility requirements for Datamaster testing as outlined in Exhibit 1. Because the State failed to show that any testing was conducted in congruence with Title 177 the State failed to meet the minimum foundational requirements for admission of the actual tests which are purportedly contained in Exhibits 4 and 5. Therefore the Trial Court erred when it admitted exhibits 4 and 5 over Appellant's objection.

3. THERE WAS AN INSUFFICIENCY OF EVIDENCE.

The Trial Court erred when it found the Defendant guilty of the charge of Driving Under the Influence of Alcohol because the evidence was insufficient to support such a finding. Specifically, the Defendant was not in the actual physical control of a motor vehicle because the keys to that vehicle were found outside of it Additionally, Sgt. Melrose testified as to statements made by the Appellant indicating that he had no intent to be in control of the motor vehicle. (56:5).

Being in "actual physical control" is distinct from "operating" a motor vehicle and is interpreted broadly to address the risk that a person not yet operating a motor vehicle might begin operating that vehicle with very little effort or delay. *State v. Pester*, 294 Neb. 995, 885 N.W.2d 713 (2016). Operation or physical control of an auto may be established by circumstantial evidence. *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977).

Analysis

In this case the keys to the vehicle were found outside of that vehicle. Additionally, the Appellant made statements to Law

Enforcement that he had no intent to operate or be in the actual physical control of the motor vehicle because he knew he was intoxicated and didn't want to drive.

The State adduced no evidence that the Appellant was actually operating the motor vehicle, thus we must proceed under the theory that the Appellant was in the actual physical control of a motor vehicle. As outlined by *Orosco*, physical control can be established by circumstantial evidence. However, there is none offered by the State here. The State argued in closing that because the Defendant knew where the keys were and because they were just outside the vehicle that he was in the actual physical control of that vehicle. (98:20). However, without access to the keys and with no intent to have access to them and with specific intent to not drive or be in the actual physical control of that motor vehicle the Appellant could not have been in the actual physical control of the motor vehicle.

It is worth noting at this point the strong public policy implications of a decision on par with this. This type of behavior is important to encourage in our community. If an individual recognizes that they are too intoxicated to drive they shouldn't drive. If they're in a place where the only shelter that they have access to is their vehicle they should not be penalized for waiting, sleeping, or otherwise occupying their vehicle until they become sober. This is true especially where that individual takes specific steps to ensure that they are not going to be in control of that vehicle – such as removing the keys from their possession.

For these reasons, the Trial Court erred when it found the Appellant guilty of driving under the influence of alcohol because the Appellant was not in the actual physical control of the motor vehicle.

CONCLUSION

Because of the errors at law and fact, the case should be reversed.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

I certify that the accompanying brief complies with Neb. Ct. R. § 2-103(C), in that it was prepared using Century Schoolbook 12-point typeface and contains 5380 words, excluding this certificate. This certificate was prepared in reliance on the word-count function of Microsoft Word, part of Microsoft Office Professional Plus 2016.

DATED this 19th day of December, 2022.

Certificate of Service

I hereby certify that on Monday, December 19, 2022 I provided a true and correct copy of this *Brief of Appellant Carlson* to the following:

State of Nebraska represented by Douglas J Peterson (18146) service method: Electronic Service to **katie.beiermann@nebraska.gov**

Signature: /s/ BURMEISTER, COLE S (27026)