No. _____

In the Supreme Court of the United States

COLTON W. SIEVERS,
Petitioner,

v.

STATE OF NEBRASKA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Illinois v. Lidster*, 540 U.S. 419 (2004), allows the police to stop a criminal suspect in the absence of reasonable suspicion on the ground that the stop is merely "information-seeking."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATUTES

CONSTITUTIONAL PROVISIONS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Colton W. Sievers respectfully petitions for a writ of certiorari to review the judgment of the Nebraska Supreme Court.

OPINIONS BELOW

The opinion of the Nebraska Supreme Court (Pet. App. 1a) is published at 911 N.W.2d 607, opinion modified on rehearing, 920 N.W.2d 443 (Neb. 2018). The relevant order of the trial court is available at Pet. App. 70a.

JURISDICTION

The judgment of the Nebraska Supreme Court was entered on December 7, 2018. Pet. App. 26a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This case involves a stop of a suspect who was driving away from a residence under police surveillance. The residence was under surveillance because a government informant told the police that he recently stole a large gun safe in York, Nebraska, and brought the safe to the residence. Pet. App. 3a-4a. According to the informant, he and others had then cut the safe

open to find a pistol, several shotguns, jewelry, $30,000 in cash, and gold coins. *Ibid*. The informant explained to the officers that the woman who lived at the residence was a methamphetamine dealer, and that he and his accomplice in the burglary had traded the contents of the safe for methamphetamine. *Id.* at 4a.

The informant directed the officers to the residence, which was a single-story, garage-type outbuilding behind the main home on a lot in Lincoln, Nebraska. *Ibid*. The informant told the officers that the black Volkswagen Beetle parked in the back of the lot next to the residence belonged to the methamphetamine dealer. *Ibid*. Officers confirmed that the Volkswagen's license plate was registered to the target address, and obtained a photograph of the suspected methamphetamine dealer, which matched the driver's license photograph of the registered owner of the Volkswagen. *Id.* at 5a.

Officers then set up a "pre-warrant investigation," with multiple surveillance units monitoring and observing activity there. *Ibid*. Narcotics officers in plain clothes and unmarked cars were located near the residence, while uniformed gang officers sat in a marked police cruiser two blocks away. *Ibid*. As part of the surveillance, a deputy sheriff for the Lancaster County Sheriff's office drove an unmarked van through the alley behind the residence. *Id.* at 6a. He noticed a white pickup truck parked next to the Volkswagen. *Ibid*.

Around 5:20 p.m., the deputy sheriff observed the white pickup truck drive down the alley and pull onto the street. *Ibid*. He contacted his supervisor and asked how to proceed. The supervisor instructed the

officers to make a traffic stop of the truck and to "search [the vehicle] for any items taken from the burglary in York County." *Ibid*. Officers stopped the truck within five blocks of the residence. *Id.* at 7a. They did not observe any traffic violation or other legal violation by the truck or its driver. *Ibid*.

The officers stopped the truck because it was suspected of carrying narcotics or contraband from the theft in York. *Id.* at 6a, 51a, 61a. They testified that the "sole reason for the stop was because his vehicle was parked in the driveway of the house in question." *Id.* at 67a. Their supervisor testified that he "believed [they] had sufficient probable cause to articulate a need to both stop the vehicle and search it for any items taken from the burglary." *Id.* at 51a.

Petitioner Colton Sievers was the driver of the truck. *Id*. at 7a. As the officers who stopped the vehicle approached the truck, they observed Sievers make "furtive movements" toward the center console. *Ibid*. Knowing that the residence they were investigating was suspected of housing stolen guns, they approached with caution and ordered Sievers to put his hands on the steering wheel. *Ibid*. They removed him from the car and searched the interior driver's side of the truck. The search revealed no drugs or stolen items. *Ibid*.

Additional officers arrived at the stop. *Ibid*. They took over contact with Sievers and sat him in the back of the police cruiser. *Ibid*. They informed Sievers that he was being detained because of a stolen property and narcotics investigation underway at the residence. *Ibid*. In response to the officers' questioning, Sievers admitted to smoking marijuana at the residence. *Id.*

at 7a-8a. The officers asked for consent to search the truck several times, but Sievers refused. *Id.* at 8a.

At the same time this was occurring, another group of officers locked down the residence. *Ibid*. They knocked and announced, and after 30 seconds observed movements inside. *Ibid*. They forced entry, took the resident into custody, and observed drug paraphernalia in plain view. *Ibid*. They then radioed their supervisor, who instructed officers to search Sievers' truck. *Ibid*. A search of Sievers' truck revealed two small plastic bags containing 3.1 grams of methamphetamine inside a soda can found near the center console. *Ibid*.

Sievers was charged by information with possession of a controlled substance. *Id*. at 9a. He moved to suppress the evidence obtained from the stop on the grounds that the stop and the search were unlawful. *Ibid*. The court held a hearing at which four officers and Sievers testified. *Ibid*. After hearing the testimony, the court orally concluded that the officers had reasonable suspicion to justify the stop, but asked the parties for additional briefing regarding the search. Two weeks later, the court issued an order denying the motion to suppress on the grounds that both the stop and the search were lawful. *Id.* at 10a.

The parties stipulated to a bench trial. *Ibid*. Sievers renewed his motion to suppress, which the court denied. *Ibid*. The court found Sievers guilty of possession of a controlled substance under Neb. Rev. Stat. § 28-416, and sentenced him to 90 days in county jail and one year of post-release supervision. *Ibid*. The court allowed Sievers to defer his sentence and post

bond pending appeal on the condition of drug and alcohol testing during the pendency of the appeal.

Sievers appealed to the Nebraska Court of Appeals, arguing that the court erred in denying his motion to suppress because the officers lacked reasonable suspicion to justify the stop. The State urged affirmance solely on the ground that the officers had reasonable suspicion. By order of the Nebraska Supreme Court, the case was moved from the Court of Appeals docket to the Supreme Court docket.

The Nebraska Supreme Court affirmed Sievers' conviction under a rationale neither party had briefed. According to the court, stopping the truck was constitutional without reasonable suspicion because it was a valid suspicionless information-seeking stop under *Illinois v. Lidster*, 540 U.S. 419 (2004). The court explained that seizures conducted "for the purpose of seeking information" can be reasonable under *Lidster* "even in the absence of reasonable articulable suspicion of criminal conduct." *Id.* at 11a-12a. Such stops could be reasonable in the absence of reasonable suspicion "to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others." *Id.* at 12a (quoting *Lidster*, 540 U.S. at 423).

Because the stop of Sievers' truck was merely an information-seeking stop, the court held, its constitutionality did not require reasonable suspicion. *Id.* at 17a. Instead, the constitutionality of the stop depended on the three-part balancing test from *Brown v. Texas*, 443 U.S. 47 (1979), that was applied in *Lidster*. *Ibid.* The balancing test required the court to consider the gravity of public concern served by the seizure, the

degree to which the seizure advances the public interest, and the severity of the interference with the public interest. *See id.* at 18a (citing *Brown*, 443 U.S. 47). The court then applied the *Brown* factors and concluded that the stop was reasonable. *See id.* at 18a-25a.

Sievers moved for rehearing. He argued that the purpose of the stop was to investigate him for crimes relating to narcotics and the burglary in York, and that *Lidster* does not apply when the person being stopped is a suspect, not merely a witness. In response, the court ordered the parties to submit simultaneous supplemental briefs. Sievers reiterated his arguments.

In its supplemental brief, the State agreed with Sievers that the stop could not be justified under *Lidster* as an information-seeking stop. "The stop was not authorized as an information seeking stop," the State argued. *Id.* at 85a (emphasis omitted). "This stop played out very differently from the stop contemplated by the *Lidster* decision," *id.* at 86a, because the "police treated Sievers closer to a suspect than as a potential witness to criminal activity," *id.* at 88a. "This was a classic traffic stop," the State agreed, "not a situation where police voluntarily sought the cooperation of a potential witness who happened to be in an automobile." *Ibid.*

The State's supplemental brief then acknowledged the profound problem with treating the stop of Sievers' truck as an information-seeking stop:

> Allowing police to stop a person who leaves a suspected drug house under the justification of an "information seeking" stop gives police too

> much discretion and sets up the potential that police can stop any person who leaves a location the police have under surveillance.

Ibid. According to the State, the "proper analysis in this case" was whether "traditional reasonable suspicion" existed. *Id.* at 85a.

Despite Sievers' and the State's positions, the Nebraska Supreme Court denied Sievers' motion for rehearing. *Id.* at 26a-30a. The court made only minor modifications to its original opinion that did not meaningfully change the court's holding or analysis. *Ibid.* According to the amended opinion, the stop of Sievers' truck was reasonable based on the *Brown* factors because "the officers' conduct was based on compelling reasons, was part of a specific purposeful plan, was narrow in scope, and was reasonable under the totality of the circumstances, as well as the fact that Sievers' privacy interests were not subject to an arbitrary invasion at the unfettered discretion of officers in the field." *Id.* at 30a.

REASONS FOR GRANTING THE WRIT

Reasonable suspicion is the bedrock constitutional requirement for seizing a suspect to investigate suspected criminal activity. *See, e.g.*, *Delaware v. Prouse*, 440 U.S. 648 (1979) (holding unconstitutional the stop of an automobile for the purpose of checking the driver's license and registration because there was neither probable cause nor reasonable suspicion to believe the vehicle or any of its occupants had violated any law); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) ("We decline to suspend the usual requirement of individualized suspicion where the police seek to

employ a checkpoint primarily for the ordinary enterprise of investigating crimes."); *United States v. Hensley*, 469 U.S. 221, 229 (1985) (holding that police may stop and briefly detain a driver who is the subject of a wanted flyer if there is "reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony").

In *Lidster*, 540 U.S. 419, the Court adopted an exception to the reasonable suspicion requirement for "information-seeking" stops. The police in *Lidster* set up a highway checkpoint to ask motorists for information regarding a fatal hit-and-run accident that had occurred in the same location a week earlier. *Id.* at 422. The Court held that the usual reasonable suspicion requirement did not apply when the government was "seeking information from the public," a context in which "the concept of individualized suspicion has little role to play." *Id.* at 424. Because the stops were "*not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others," the ordinary rule requiring reasonable suspicion did not apply. *Id.* at 423 (emphasis in original).

Lidster reasoned that when the "police expect[] the information elicited to help them apprehend, not the vehicle's occupants, but other individuals," individualized suspicion is not required because the "stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual." *Id.* at 423–25. When questioning non-suspects, stops can be reasonable without individualized suspicion because such stops will be "likely brief" and "are less likely to

provoke anxiety or to prove intrusive." *Id*. at 425. "The police are not likely to ask questions designed to elicit self-incriminating information" during such stops, the Court noted, and "citizens will often react positively when police simply ask for their help." *Ibid*. In that narrow circumstance, the stop can be justified as reasonable even in the absence of reasonable suspicion. *Id*. at 427.

This Court should grant the petition for certiorari because lower courts are divided on the scope of stops permitted by *Lidster*. The D.C. Circuit and the Supreme Courts of Kentucky and Maine have held, consistent with its plain language, that *Lidster* does not permit information-seeking stops of suspects without reasonable suspicion. In contrast, the Seventh Circuit and the Nebraska Supreme Court below have extended *Lidster* to permit stops of suspects on the ground that the stops are merely "information-seeking."

The Court should grant the petition to resolve the disagreement among the lower courts. In the alternative, the Court should grant the petition and summarily reverse the court below. *Lidster* means what it says. The *Lidster* exception applies only to witnesses. The reasonable suspicion requirement continues to provide the bedrock Fourth Amendment standard for stops of criminal suspects.

I. Lower Courts Are Divided on Whether *Lidster* Allows Police to Stop a Suspect Without Reasonable Suspicion.

Lower courts are divided on whether the police can conduct information-seeking vehicle stops of suspects under *Lidster*.

First, several lower courts have held that *Lidster* does not justify a stop of a suspect without reasonable suspicion. In *Mills v. District of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009), citizens of the District of Columbia challenged a police checkpoint set up to deter and prevent crime in a high-crime neighborhood. *Id.* at 1307. The government argued that the checkpoint was constitutional under *Lidster*. *Id.* at 1310.

The D.C. Circuit disagreed, holding that the stop had "nothing in common with the stop upheld in *Lidster* and everything in common with the unconstitutional stop in *Edmond*," in which this Court held unconstitutional a city's suspicionless stop at a drug interdiction checkpoint. *Id.* at 1311. While the police in *Lidster* were seeking "the voluntary cooperation of members of the public in the investigation of a crime," and "were *not* looking for suspects," the police in *Mills* were looking for "potential perpetrator[s]" of crimes "without individualized suspicion." *Id.* at 1311 (emphasis added) (citation omitted). By proscribing checkpoints such as those in *Edmond*, "the Court was concerned with placing a 'check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose.'" *Ibid.* The application of *Lidster* to the *Mills* checkpoint would "turn[] this paradigm on its head." *Ibid.*

Several state courts have similarly held that *Lidster* does not apply to suspicionless stops of potential suspects. In *Maine v. Whitney*, 54 A.3d 1284 (Me. 2012), the Maine Supreme Court rejected the application of *Lidster* to the stop of Whitney following a single-vehicle accident. The officer who stopped Whitney was engaged in a roving patrol 90 minutes after the accident to locate the vehicle's driver because the driver was

"involved in the criminal act of leaving the scene of an accident." *Id*. at 1285. The officer observed no illegal activity before stopping Whitney, but stopped him to "verify that he wasn't involved in the crash." *Id.* at 1286.

The Maine Supreme Court held that the officer's "random, suspicionless stop of Whitney in an attempt to locate a criminal suspect is significantly distinguishable from a highway checkpoint stop aimed at gathering information from the public." *Id.* at 1288 (citing *Lidster*, 540 U.S. at 428). "Sanctioning the stop here would grant law enforcement unfettered discretion to randomly stop any given motorist more than an hour after a crime has been committed, in the absence of any reasonable articulable suspicion of criminal conduct, on the chance that the vehicle's occupants may have had something to do with the crime." *Ibid.* The court concluded that "because Whitney was seized in the absence of any reasonable articulable suspicion of criminal conduct during a police officer's roving patrol, the seizure was unconstitutional." *Id*. at 1290.

Similary, in *Singleton v. Kentucky*, 364 S.W.3d 97 (Ky. 2012), the Kentucky Supreme Court held that a checkpoint set up to detect violations of a city ordinance was unconstitutional. The court explained that "a checkpoint set up to stop vehicles without individualized indicia of suspicion on the random chance of catching a law breaker is too great a breach in the wall of protection provided by the Fourth Amendment." *Id.* at 104. Because the purpose was to enforce the law against the vehicles stopped, the stops could not be justified under *Lidster*. *Id.* at 106.

In contrast, two courts have held that *Lidster* justifies the stop of a suspect without reasonable suspicion.

In *United States v. Brewer*, 561 F.3d 676 (7th Cir. 2009) (Posner, J.), the Seventh Circuit considered the constitutionality of a stop of a vehicle leaving an apartment building soon after shots had been fired. The officer believed that the vehicle's occupants "may have been involved in the shooting." *Id.* at 679. The stop was constitutional regardless of whether there was reasonable suspicion, the court reasoned, because "as in *Lidster*, the police in this case had a compelling reason to ask questions of the driver or passenger of the sole vehicle departing from a building complex in which shots had been fired." *Ibid.* "[T]he natural first question to ask the driver was whether he had a gun, since he might be the gunman rather than a witness." *Ibid.* Indeed, the fact that the individual stopped was a potential suspect—not a witness—weighed *in favor* of the reasonableness of the stop, the court reasoned, because of the "need to stop potentially fleeing suspects until more information about the crime could be obtained." *Ibid*.

In so holding, Judge Posner acknowledged the stark differences from the checkpoint stop in *Lidster* where "the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Id.* at 678–79 (citation omitted). Even so, the court held that the officer acted reasonably "in deciding that the only car emerging from the apartment complex moments after he heard shots from within it should be intercepted," regardless of whether there was individualized suspicion. *Id.* at 679.

The Nebraska Supreme Court's decision below expressly adopted the Seventh Circuit's reasoning in *Brewer*. It explained that *Brewer* "found that even though there was no evidence the driver had committed any law violations," the stopping officer acted lawfully because he was "not acting randomly in deciding that the only car emerging from the apartment complex moments after he heard shots from within it should be intercepted." Pet. App. 27a (quoting *Brewer*, 561 F.3d at 679).

The lower courts are thus divided on whether *Lidster* permits a stop of a suspect without reasonable suspicion. In the decision below, Sievers' status as a suspect helped make the stop reasonable in the absence of reasonable suspicion because it suggested that the stop might reveal evidence: "[I]t was reasonable for the officer to infer the driver of the truck had information about criminal activity in the target residence and that the truck may contain evidence of criminal activity and to direct the stop of the truck." *Id.* at 29a. The decision treated the same suspicion that other courts have treated as grounds for information-seeking stops as grounds for *invoking* the doctrine.

II. This Case Is an Ideal Vehicle to Resolve the Lower Court Disagreement.

This case is a perfect vehicle to resolve the split among lower courts about whether *Lidster* permits the stop of a suspect. Both the petitioner and the respondent agree about the nature of the stop. The police treated Sievers as a suspect, not a witness.

The State was admirably candid about these facts in its supplemental brief before the Nebraska Supreme Court. As the State conceded:

- "Sievers was not the witness to a recently reported or recently discovered crime."
- "[T]he circumstances of this stop do not support that it was done to seek information."
- "The evidence suggests that police treated Sievers closer to a suspect than as a potential witness to criminal activity."
- "This was a classic traffic stop, not a situation where police voluntarily sought the cooperation of a potential witness who happened to be in an automobile."

Pet. App. 85a, 86a, 88a.

The State's view is borne out by the officers' testimony and actions. The officers testified during the suppression hearing that they stopped the truck because it was suspected of carrying narcotics or contraband from the theft in York. *Id*. at 51a, 61a. The officers pulled Sievers over with the intention of searching his truck for evidence of a crime. *Id*. at 51a. They approached the truck cautiously because they believed the truck could be associated with the residence, which was suspected of housing stolen guns. *Id*. at 7a. They testified that they were "extra assertive" and ordered Sievers to place his hands on the steering wheel and to get out of the truck. *Ibid*. They sat him in the back of a police cruiser and asked him questions designed to elicit self-incriminating information. *Ibid*. They also asked repeatedly to search the truck, which they intended to do even before they pulled Sievers over. *Id*. at 8a, 51a.

Because Sievers clearly was a suspect, and not merely a potential witness, this case presents an ideal

opportunity to decide whether *Lidster* extends to suspects.

III. The Nebraska Supreme Court's Decision Ignored this Court's Precedents and Would Undercut a Core Constitutional Protection.

The requirement of reasonable suspicion to stop a criminal suspect is a core constitutional command. The requirement limits government discretion to reasonable searches and ensures that people are not "subject to unfettered governmental intrusion." *Prouse*, 440 U.S. at 662–63. The decision below would vitiate that requirement and replace it with an amorphous general "reasonableness" requirement subject to ready manipulation when a stop happens to reveal evidence of a crime.

A leading example of the important role of the reasonable suspicion requirement is *Edmond,* 531 U.S. at 41. *Edmond* involved a suspicionless checkpoint stop for the interdiction of illegal narcotics. The Court held the stop unconstitutional because the interdiction of illegal narcotics was ultimately indistinguishable from the general interest in crime control. "When law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here," the Court held, "stops can only be justified by some quantum of individualized suspicion." *Id.* at 44, 47.

Lidster in no way changed the *Edmond* rule as applied to stops "to determine whether a vehicle's occupants were committing a crime." 540 U.S. at 423. Instead, it only carved out a separate and narrow rule when seeking the public's "help in providing

information about a crime in all likelihood committed by others." *Id*. at 423. In this unique setting, *Lidster* noted, "the concept of individualized suspicion has little role to play." *Id*. at 424. As in the case of "crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual." *Id*. at 425.

As the State frankly acknowledged, extending the category of "information-seeking stop" to permit the stop of a suspect "gives police too much discretion and sets up the potential that police can stop any person who leaves a location the police have under surveillance." Pet. App. 88a. If law enforcement only needs a "compelling reason to ask questions" to justify a stop, *Brewer*, 561 F.3d at 679; Pet. App. 28a, then it can stop anyone near a crime based on a mere hunch that the person is a suspect. Whether that hunch was reasonable would no longer matter.

There is no limit to this principle. After all, who better to answer questions about crimes than those who may have committed them? Criminals know much more about their crimes than mere witnesses. And if a stop of a suspect happens to yield important evidence of the crime under investigation, the successful stop is likely to seem "reasonable" viewed *ex post* even if it was only a shot in the dark viewed *ex ante*. That is precisely why investigative stops require that an officer's hunch be reasonable, and why the stop authorized by the Nebraska Supreme Court portends the kind of un-cabined "arbitrary invasion[]" of personal security that this Court has steadfastly rejected. *Prouse*, 440 U.S. at 654 (citation omitted).

IV. A Summary Reversal of the Nebraska Supreme Court Is Warranted

This Court occasionally summarily reverses a lower court decision that is plainly incorrect. *See Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam) (holding that the Court has "not shied away" from summarily reversing cases when "lower courts have egregiously misapplied settled law"); *see also Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (per curiam) (summarily reversing state-court decision that was "inconsistent with this Court's precedents"); *Martinez v. Illinois*, 572 U.S. 833, 843 (2014) (per curiam) (summarily reversing state-court decision that ran "directly counter to [the Court's] precedents").

This is such a case. On its face, *Lidster* is an exception that solely deals with witnesses who are not suspects. *Lidster*, 540 U.S. at 423 ("The stop's primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others."); *id*. at 428 (Stevens, J., concurring in part and dissenting in part) (joining the majority's opinion on the ground that "[t]here is a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier"). Extending *Lidster* to permit stops of suspects is inconsistent with *Lidster* itself.

Indeed, this is a rare case where *even the respondent* has agreed that the reasoning of the decision below

cannot stand. In the supplemental briefing before the Nebraska Supreme Court, the State agreed with the petitioner that this was not an appropriate case in which to apply *Lidster*. Pet. App. at 85a, 88a (arguing that "[t]he stop was not authorized as an information seeking stop" and arguing that the "traditional reasonable suspicion framework" should apply because "[t]he evidence suggests that police treated Sievers closer to a suspect than as a potential witness to criminal activity" (emphasis omitted)).

The Nebraska Supreme Court's decision is so plainly inconsistent with this Court's reasoning in *Lidster* that even the State does not try to defend it. Under the circumstances, petitioner respectfully contends, it would be appropriate to summarily reverse the Nebraska Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the Court should grant the petition and summarily reverse the Nebraska Supreme Court.

Respectfully submitted,

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March 7, 2019

APPENDIX

APPENDIX A

NEBRASKA SUPREME COURT

ADVANCE SHEETS
300 NEBRASKA REPORTS
STATE v. SIEVERS
Cite as 300 Neb. 26

No. S-17-518

STATE OF NEBRASKA,

Appellee,

v.

COLTON W. SIEVERS,

Appellant.

___ N.W.2d ___

Filed May 18, 2018

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1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.

2. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and

article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.

3. **Constitutional Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Search and Seizure.** Temporary detention of individuals during the stop of a moving automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.

4. **Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.

5. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Special law enforcement concerns, such as a police roadblock, checkpoint, or other detention, made for the gathering of information will sometimes justify the stop of a vehicle without individualized suspicion.

6. **Search and Seizure: Arrests.** Reasonableness of seizures that are less intrusive than a traditional arrest involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

7. **Constitutional Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** For purposes of determining the reasonableness, under the Fourth Amendment, of a vehicle stop made without reasonable suspicion, a central concern in balancing the public interest and the interference with individual liberty is to ensure that an individual's reasonable expectation of privacy is not subject to

arbitrary invasions solely at the unfettered discretion of officers in the field.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and Nathan J. Sohriakoff for appellant.

Douglas J. Peterson, Attorney General, and Joe Meyer for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, and STACY, JJ., and MOORE, Chief Judge, and ARTERBURN, Judge, and DOYLE, District Judge.

DOYLE, District Judge.

Colton W. Sievers appeals from his conviction for felony possession of a controlled substance. The issue presented is whether the stop of Sievers' vehicle for the purpose of gathering information about the presence of stolen firearms and other criminal activity at the residence he drove from, for which a search warrant was being sought, violated Sievers' constitutional right to be free from unreasonable searches and seizures. We determine that the stop of Sievers' vehicle was reasonable and affirm the decision of the district court.

BACKGROUND

In the early morning of February 22, 2016, the York County Sheriff's Department received a report of a burglary at a rural York, Nebraska, residence, where a large John Deere gun safe had been stolen. The safe contained a Ruger 9-mm semiautomatic pistol, several shotguns, jewelry, approximately $30,000 in cash, legal documents, and gold coins. Law enforcement officials immediately began an investigation. Two suspects were identified, and on February 24, the York

County Sheriff's Department obtained arrest warrants and arrested the suspects the next day. Investigators interviewed the suspects, and one of them confessed to the burglary and agreed to cooperate with investigators.

The burglar informant told York County investigators he took the safe to a residence in Lincoln, Nebraska; cut it open; and traded gold coins and money for methamphetamine. The informant stated the safe and firearms would still be at the Lincoln residence.

The next day, on February 26, 2016, officers transported the informant to Lincoln, at which time, a York County sheriff's deputy, Paul Vrbka, met with Sgt. Duane Winkler, a supervisor with the Lincoln-Lancaster County Narcotics Task Force, to confirm the location of the building which contained the stolen property. Following the informant's directions, Vrbka, Winkler, and the informant drove down an alley in a residential Lincoln neighborhood. The investigators and the informant stopped, and the informant pointed out the residence, located next to the alley. The residence was a single-story garage-type outbuilding on the same property but located to the rear of the main house, and was described by the investigators as the "target address."

Vrbka and Winkler observed a black Volkswagen Beetle parked in an offstreet driveway next to the outbuilding. The informant stated the Volkswagen was owned by the resident of the target address, who was a "'big methamphetamine dealer.'" The informant stated that when he delivered the stolen safe to the target address, he had witnessed the resident use a digital measuring scale to sell his accomplice 2 ounces of methamphetamine for $3,000 in cash. He stated the

resident had between 6 to 10 ounces of methamphetamine in the house at that time and that he had gone to her house to purchase methamphetamine on a prior occasion. Investigators in the task force confirmed that the license plate attached to the Volkswagen was registered to the person residing at the target address. With the informant's assistance, investigators obtained a photograph of the suspected methamphetamine dealer, which matched the driver's license photograph of the registered owner of the Volkswagen.

Winkler then set up "pre-warrant investigation" surveillance units to monitor and observe activity at the residence. Winkler informed plainclothes and uniformed officers that stolen items had been transported to the residence, that drugs had been purchased there, and that more drugs may be present. Winkler advised the surveillance officers that they were to help prevent evidence from leaving the target address before the investigation was completed. The officers exercised a higher level of caution due to the possible presence of firearms.

Plainclothes narcotics officers were located near and in sight of the target address, including Eric Schilmoeller, a deputy sheriff for the Lancaster County Sheriff's office who was driving an unmarked van. Two Lincoln Police Department uniformed "gang officers," Max Hubka and Cole Jennings, were recruited to participate in the surveillance. The gang officers made contact with the plainclothes narcotics officers and discussed the investigation.

At approximately 5 p.m., on February 26, 2016, the gang officers, in full police uniform, parked their marked police cruiser out of view of the target residence two blocks away. The gang officers were

positioned to be available to assist the plainclothes narcotics officers, including using the marked police cruiser with overhead emergency lights to stop a vehicle that left the area if so directed.

During this time, Vrbka and Winkler were in the process of preparing an affidavit for a search warrant for the residence and a camper-style vehicle located on the same property. Once surveillance units were in place, Vrbka and Winkler left the scene in order to present the warrant to a judge. Winkler continued to monitor the radio and supervise the surveillance officers, who were communicating with each other and Winkler.

Schilmoeller drove the unmarked van through the alley behind the target residence and observed a "white work type pickup truck" parked next to the Volkswagen. The truck had an open bed with a ladder rack and a large, closed toolbox against the truck's cab. The vehicles were parked side-by-side in the back yard of the target residence. The investigators recorded the license plates for both vehicles.

At 5:20 p.m., Schilmoeller observed the truck begin to drive away from the outbuilding via the alley. The truck turned onto a residential street and turned left to drive north on 10th Street. Schilmoeller notified other members of the task force and asked Winkler how to proceed. Winkler advised the officers to make a traffic stop to prevent the truck from leaving with any stolen items. According to Winkler, who was no longer at the scene under surveillance, there was a need to "both stop the [truck] and search it for any items taken from the burglary in York County." While following the truck, the officers verified the truck had the same license plate as the truck that was parked next to the Volkswagen. The gang officers activated the cruiser's

overhead emergency lights and stopped the truck. The stop occurred five blocks from the target address and was made without the observation of a traffic or other law violation.

Hubka observed the truck had only one occupant and saw the driver lean over and reach toward the center console area. Hubka considered the driver's actions to be "furtive movements," and consequently, he maintained a heightened security alert in case the driver was hiding something or reaching for a weapon. The officers testified they were "extra assertive" as they contacted the driver of the truck—in part because of the possible presence of a firearm. They ordered the driver, Sievers, to put his hands on the steering wheel and to not move as they helped remove him from the vehicle. The gang officers searched the interior driver's side of the truck and did not locate any weapons, narcotics, paraphernalia, or any stolen items.

The narcotics officers, who were following the truck in their unmarked vehicle, arrived simultaneously. Schilmoeller took over contact with Sievers, walked him to the cruiser, and sat him in the back of the cruiser with the door open and began questioning him. Sievers claims the officers had their guns drawn at this time, but not pointed at him. Sievers claims he was handcuffed during the officer's questioning. None of the officers remember any guns being drawn, and only Schilmoeller remembered when Sievers was handcuffed, which he stated occurred after the questioning was completed.

Schilmoeller informed Sievers he was not under arrest, but was being detained due to a stolen property and narcotics investigation underway at the residence he had just driven from. Sievers admitted he had just

been inside that residence and had just smoked marijuana before leaving, but "that was it." Schilmoeller attempted to obtain Sievers' consent to search the truck several times, but Sievers refused, stating that there were no illegal items inside the truck and that the truck belonged to his boss. Schilmoeller relayed to Winkler Sievers' admission that he had smoked marijuana at the target address and that Sievers had denied the request to search the truck.

As the truck was leaving, and at the same time he instructed the officers to stop the truck, Winkler also instructed another group of officers to "lock down" the residence to prevent anyone inside from destroying evidence. Winkler was concerned the person in the truck may have had an opportunity to contact a person inside the residence by cell phone. Those officers "knocked and announced and ordered any occupants to come to the door." After 30 seconds, they observed movements inside the residence which they believed indicated the destruction of evidence, at which point they forced entry and took the resident into custody. At that time, the officers observed several items of drug paraphernalia in plain view.

The officers at the residence relayed the information to Winkler, who radioed Schilmoeller to inform him about the presence of drug paraphernalia in the residence. Winkler advised Schilmoeller to search the truck.

Schilmoeller searched all areas of the truck and located two small plastic bags containing 3.1 grams of methamphetamine inside of a soda pop can found near the center console. He then arrested Sievers, and he testified that he placed Sievers in handcuffs at that time. The search warrant was signed approximately 1 1/2 hours later.

Sievers was charged by information with possession of a controlled substance, methamphetamine, a Class IV felony. He was arraigned and pleaded not guilty.

Sievers filed a motion to suppress evidence obtained from the stop. The court heard testimony from Hubka and Jennings, the gang officers who conducted the stop; Schilmoeller, the narcotics officer who questioned Sievers and conducted the search of the truck; Winkler, the supervisor who ordered the stop and search of the truck and the search of the target residence; and Sievers. Vrbka, the author of the warrant affidavit, did not testify.

The officers explained their knowledge of the situation at different points in the investigation, their process of relaying information to each other, and how they reacted based on their discovery of new information as the investigation progressed. None of the officers who testified, however, observed Sievers inside the residence, leave the residence, put anything into the truck, or enter the truck. The informant had not provided any information about Sievers or the truck.

Sievers asserted the officers had no way of knowing whether he had been in the residence prior to the stop. Schilmoeller disagreed, stating he had observed that the truck was unoccupied, he observed the truck leave, and when the truck was stopped, Sievers was driving the truck. But Schilmoeller admitted that at the time of the stop, the only reason he had to believe that Sievers had been in the target address was the fact the truck was parked in the driveway, next to the Volkswagen, and that he had observed it drive away from the residence. Schilmoeller admitted he was not in a position to see if someone came from the residence and got into the truck.

The trial court overruled the motion to suppress, stating it found the officers' testimony to be credible. The court stated that "there was an ongoing investigation and the officers had reasonable cause to believe that a crime had been committed and had reasonable suspicion to justify the stop even though the information was not complete or precise."

The matter proceeded to a stipulated bench trial. Sievers renewed his motion, which the court overruled. The court found Sievers guilty and sentenced him to serve 90 days in the county jail, with 3 days' credit for time served and 1 year's postrelease supervision. Sievers appeals.

ASSIGNMENT OF ERROR

Sievers assigns the trial court erred in determining reasonable suspicion existed to justify his stop and detention.

STANDARD OF REVIEW

In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[1]

ANALYSIS

The issue presented is whether the suspicionless stop of Sievers to gather information about stolen

[1] *State v. Baker*, 298 Neb. 216, 903 N.W.2d 469 (2017).

property and possible criminal activity at the residence he drove from, for which a search warrant was being sought, violated Sievers' Fourth Amendment rights. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.[2] Temporary detention of individuals during the stop of a moving automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment.[3] Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.[4]

There is no dispute in this case that a seizure of Sievers occurred when he was stopped by police. We note that Sievers has challenged only the initial stop by police; neither the probable cause search of the truck nor Sievers' arrest are at issue in this appeal.

Even a brief, limited governmental intrusion for the purpose of investigation must be justified at its inception by a showing of reasonable suspicion.[5] A seizure for the purpose of seeking information when police are investigating criminal activity that might pose a danger to the public, however, may be reasonable under the Fourth Amendment even in the absence of reasonable articulable suspicion of criminal

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[2] *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014).

[3] See, *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[4] *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017).

[5] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

conduct.[6] The U.S. Supreme Court has explained that "special law enforcement concerns," such as a police roadblock, checkpoint, or other detention made for the gathering of information, will sometimes justify a stop of a vehicle "without individualized suspicion."[7] "Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual."[8] In *Illinois v. Lidster*,[9] the U.S. Supreme Court scrutinized a highway checkpoint that was set up to solicit information from motorists regarding a fatal hit-and-run accident. The Court found that a suspicionless, "information-seeking" stop made pursuant to the checkpoint was constitutional.[10] The Court emphasized the "primary law enforcement purpose [behind the checkpoint] was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others."[11]

The facts of *Lidster* concerned a checkpoint set up 1 week after the accident, at the same time of night and in the same location. The checkpoint was "designed to

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[6] *State v. Woldt*, 293 Neb. 265, 876 N.W.2d 891 (2016). See, *U.S. v. Brewer*, 561 F.3d 676 (7th Cir. 2009); *Gipson v. State*, 268 S.W.3d 185 (Tex. App. 2008); *State v. Garrison*, 911 So. 2d 346 (La. App. 2005); *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935 (1982).

[7] *Illinois v. Lidster*, 540 U.S. 419, 424, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004).

[8] *Id.*, 540 U.S. at 424-25.

[9] *Lidster, supra* note 7.

[10] *Id.*, 540 U.S. at 426.

[11] *Id.*, 540 U.S. at 423 (emphasis in original).

obtain more information about the accident from the motoring public."[12] The Court distinguished an "information-seeking" stop, like the stop in *Lidster*, from the checkpoint program at issue in *Indianapolis v. Edmond*,[13] which involved a vehicle checkpoint established for the purpose of discovery and interdiction of drug crimes, an objective which the Court said served a "'general interest in crime control.'"[14] The Court found that the prohibition in *Edmond* on searches conducted pursuant to a "'general interest in crime control'" did "not refer to every 'law enforcement' objective" and stated that "special law enforcement concerns will sometimes justify highway stops without individualized suspicion."[15]

Although a suspicionless information-seeking stop is not per se unreasonable, that does "not mean the stop is automatically, or even presumptively, constitutional. It simply means that [a court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances."[16] In determining whether the stop of Sievers was reasonable, we apply the three-part balancing test outlined in *Brown v. Texas*,[17] which recognizes that warrantless seizures without reasonable suspicion may be reasonable under certain circumstances.

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[12] *Id.*, 540 U.S. at 422.

[13] *Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).

[14] *Lidster, supra* note 7, 540 U.S. at 424.

[15] *Id.*, citing *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).

[16] *Id.*, 540 U.S. at 426.

[17] *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. . . .

A central concern in balancing these competing considerations in a variety of settings has been to [en]sure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. . . . To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.[18]

In *Lidster*, the U.S. Supreme Court applied the balancing test from *Brown* and found that the suspicionless checkpoint stop at issue was reasonable.[19] We have also addressed the constitutionality of checkpoint stops. In *State v. Crom*,[20] we cited *Brown* and found that a motorist has a reasonable expectation of privacy which is not subject to arbitrary invasions solely at the unfettered discretion of police officers in the field. We found the checkpoints at issue

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[18] *Id.*, 443 U.S. at 50-51 (citations omitted).

[19] *Lidster, supra* note 7.

[20] *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986).

were unconstitutional, because they were not administered pursuant to an official plan and the officers were therefore free to subject motorists to arbitrary invasion at their unfettered discretion.[21]

More recently, in *State v. Piper*,[22] we applied *Brown* and cited *Lidster* in determining that the stop of a vehicle at a highway checkpoint conducted by the Nebraska State Patrol was reasonable. We noted that in *Michigan Dept. of State Police v. Sitz*,[23] the U.S. Supreme Court approved the use of sobriety checkpoints intended to prevent drunk driving. We considered the purpose of the checkpoint, the degree of intrusion, and the discretion of the officers. We found the stop was reasonable, because the checkpoint was intended to target alcohol violations, the degree of intrusion was minimal, and the checkpoint was authorized by an approved plan and conducted in a manner that complied with the plan and did not allow the officers to exercise unfettered discretion in administering the checkpoint.[24]

We addressed the constitutionality of an information-gathering stop of a vehicle that did not involve a checkpoint or roadblock in *State v. Woldt*.[25] In that case, an officer was investigating a report of knocked-over traffic cones when, while picking up the cones, he heard squealing tires, and he then stopped a vehicle he thought might be involved. After the first vehicle pulled over and stopped near the police cruiser, a second vehicle that the officer had seen driving

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[21] *Id.*

[22] *Piper, supra* note 2.

[23] *Sitz, supra* note 15.

[24] *Piper, supra* note 2.

[25] *Woldt, supra* note 6.

within a car length or less of the first vehicle parked across the street from the police cruiser. The officer approached the first vehicle and smelled the odor of alcohol and observed signs that the driver might have been impaired. The second vehicle reversed as if to drive away, but stopped when the officer signaled the driver to do so.

The officer wanted to speak with the second driver about the first driver's activities. The officer then observed the second driver was impaired, and the second driver was then arrested, charged, and convicted of driving under the influence. In applying the test from *Brown*, we determined the stop was reasonable because of the following: The circumstances presented a grave public concern; driving under the influence, which can rise to the level of a Class II felony, presents a threat to other citizens on the road; the stop advanced the public interest, because it was reasonable to conclude the second driver would have relevant information and the stop would have allowed the officer to obtain the driver's contact information and a witness statement; and the interference with the driver's liberty was slight, because he had already stopped.[26]

Since *Lidster*, courts have applied the special law enforcement concerns rationale to non-checkpoint stops and found such stops reasonable.[27] In *U.S. v.*

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[26] *Id.*

[27] See, e.g., *Brewer, supra* note 6; *Gipson, supra* note 6; *State v. Mitchell*, 145 Wash. App. 1, 186 P.3d 1071 (2008); *State v. Watkins*, 207 Ariz. 562, 88 P.3d 1174 (Ariz. App. 2004). See, also, *State v. Pierce*, 173 Vt. 151, 787 A.2d 1284 (2001) (applying *Brown* factors pre-*Lidster*); *In re Muhammad F.*, 94 N.Y.2d 136, 722 N.E.2d 45, 700 N.Y.S.2d 77 (1999) (same).

Brewer,[28] the Seventh Circuit applied *Lidster* and upheld a stop of a vehicle based upon a report of gunfire when it was the only vehicle seen driving from an apartment complex renowned for criminal activity. The court found that even though there was no evidence the driver had committed any law violations, the stopping officer was "not acting randomly in deciding that the only car emerging from the apartment complex moments after he heard shots from within it should be intercepted.[29]

The court further observed, "It was a natural surmise that whoever fired the shots had left the complex, and the street that the defendant's vehicle was driving on was . . . the only street leading from it, and he was driving away from rather than towards it . . . and, sure enough, there was no other traffic.[30]

The court balanced the dangerousness of the crime against the intrusion on the occupants of the vehicle and explained the vehicle stopped was the only vehicle on the road at that late hour in this high crime area, and it was pulled over and stopped for only moments before the officers making the stop learned that the SUV had been seen at the site of the shooting and that the occupants may have been involved in the shooting.[31]

This case presents a seizure that is less intrusive than a traditional arrest. Thus, the application of the *Brown* balancing test is appropriate.

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[28] *Brewer, supra* note 6.

[29] *Id*. at 679.

[30] *Id*. at 678.

[31] *Id*. at 679.

GRAVITY OF PUBLIC CONCERN

Under the first prong of the test from *Brown*, a court should consider the gravity of the public concern served by the seizure. The public concern presented by the facts of this case is the officers' investigation of the York County burglary, as well as their investigation of a distributor of large quantities of methamphetamine.

The criminal investigation produced evidence that stolen property was inside the target residence, including firearms, jewelry, approximately $30,000 in cash, and gold coins. The resident's receipt of stolen property constitutes theft.[32] The value of the stolen items in this case exceeded $5,000, which constitutes a Class IIA felony.[33] In addition, there is the apparent concern that a semiautomatic pistol and shotguns were stolen and unaccounted for. In the context of the investigation, these weapons could have been used in connection with narcotics transactions, which presents safety risks to police officers and the public. Further, the knowing receipt, retention, or possession of a stolen firearm is a Class IIA felony.[34]

In the officers' testimony, they articulated specific facts which led them to believe that methamphetamine was being sold from the residence. The officers learned from the informant, whose reliability has not been called into question,[35] and whose information was only 5 days old at the time, that between 6 and 10 ounces of methamphetamine were at the residence. The possession with the intent to distribute this

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[32] See Neb. Rev. Stat. § 28-510 (Reissue 2016).

[33] See Neb. Rev. Stat. § 28-518(1) (Reissue 2016).

[34] See Neb. Rev. Stat. § 28-1212.03 (Reissue 2016).

[35] See *State v. Bray*, 297 Neb. 916, 902 N.W.2d 98 (2017).

amount of methamphetamine constitutes a Class IB felony.[36]

The fact that the truck was stopped so that police could ask the motorist for information about a recent burglary and the presence of stolen property and narcotics weighs against the conclusion that the stop was constitutionally unreasonable.[37]

We conclude that the circumstances here involved ongoing criminal activity which presented a grave public concern.

DEGREE TO WHICH SEIZURE ADVANCES PUBLIC INTEREST

As to the second factor of the *Brown* test, a court should consider the degree to which the seizure advances the public interest. Courts have recognized that motorist stops may significantly advance the investigation of serious crimes in cases where motorists are stopped soon after the crime and in the vicinity where the crime occurred.[38] The investigative value of such a stop is significant, because the stopped motorists "might well have been in the vicinity of the crime at the time it occurred."[39]

At the time, the officers were preparing to execute a search warrant on the target residence. Vrbka and Winkler first identified the location of the house with assistance from the informant, who stated that the resident of the house was the owner of the Volkswagen parked at the residence and that he had witnessed the

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[36] See Neb. Rev. Stat. § 28-416(1) and (10)(a) (Supp. 2015).

[37] See *State v. Gorneault*, 918 A.2d 1207 (Me. 2007).

[38] *State v. LaPlante*, 26 A.3d 337 (Me. 2011).

[39] *Lidster, supra* note 7, 540 U.S. at 427.

resident sell $3,000 worth of methamphetamine 5 days prior. He said that the resident had more to sell and that officers could also find the gun safe in the living room hidden under a blanket.

When the task force first identified the residence, the truck was not present. A short time later, when Schilmoeller arrive on scene, he observed the unoccupied truck parked next to the Volkswagen. Thereafter, the target address was under police surveillance without interruption for 20 to 30 minutes until Schilmoeller saw the truck leave. Given the highly specific location of the truck, parked next to a small building suspected of containing narcotics and stolen firearms, and parked next to the suspect's vehicle on an offstreet driveway, the officers were reasonable to infer that Sievers had just been inside the residence and had made contact with the resident and that therefore, he could have information pertinent to the investigation.

The officers' testimony made clear they were faced with a dynamic situation in which drugs or firearms could soon be moved before the imminent acquisition and execution of a search warrant. Shortly before the stop, Winkler set up surveillance units in order to prevent the movement of stolen property. The stop was made pursuant to the specific information-seeking purpose of determining whether the lone vehicle observed leaving the residence contained property sought in the investigation.

Both the stop and ensuing investigation were diligently carried out. The reasonableness of the stop is supported by the presence of stolen firearms and other property; the use of the stolen property to purchase methamphetamine; the large store of methamphetamine at the target address, which to the

officers' knowledge had not yet been moved or destroyed; and the short period in which the felonies were occurring. Society's legitimate interests required the seizure based on special law enforcement concerns of specific, known, ongoing crimes, as opposed to a general interest in crime control.

This conclusion is further supported by the U.S. Supreme Court's decision in *Illinois v. McArthur*,[40] which found lawful a temporary detention made near a house suspected of criminal activity while officers were seeking a search warrant for the house. The Court found the temporary detention was tailored to the need of ensuring against the destruction of evidence in the house and was properly limited in time and scope. The Court said that the warrantless seizure was not per se unreasonable, because it involved a specially pressing or urgent law enforcement need, and that because the law enforcement concerns outweighed the individual privacy concerns, the stop was lawful.[41] The Court explained it had "upheld temporary restraints where needed to preserve evidence until police could obtain a warrant" and noted it had found no case in which it had "held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time."[42]

Here, the information-seeking stop of Sievers was limited in time and scope based on the task force's "pre-warrant investigation" of the residence and

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[40] *Illinois v. McArthur*, 531 U.S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001).

[41] *Id*

[42] *Id*., 531 U.S. at 334.

tailored to the need to ensure against the loss of stolen properly while police obtained a search warrant for the residence.

Based on the circumstances here, we conclude the stop advanced the public interest.

SEVERITY OF INTERFERENCE
WITH INDIVIDUAL LIBERTY

As to the last factor, we recognize the stop of Sievers restrained his liberty. Hubka activated his police cruiser's emergency lights to pull over Sievers while Sievers was operating his truck. Sievers' stop was more likely to cause alarm or anxiety than a roadblock, because upcoming roadblocks are clearly visible and Sievers did not have advanced notice that he would be stopped.[43] We reiterate, however, this fact does not render the stop per se unreasonable. "The Fourth Amendment does not treat a motorist's car as his castle."[44] In *Lidster*, the Court found the stop of a vehicle along a public road was no greater of an intrusion than an officer who approaches a person on the street to question the individual. The Court said the stop

> [a]nd the resulting voluntary questioning of a motorist is as likely to prove important for police investigation as is the questioning of a pedestrian. Given these considerations, it would seem anomalous were the law (1) ordinarily to allow police freely to seek the voluntary cooperation of pedestrians but

[43] See *LaPlante, supra* note 38.

[44] *Lidster, supra* note 7, 540 U.S. at 424.

(2) ordinarily to forbid police to seek similar voluntary cooperation from motorists.[45]

The balance under *Brown v. Texas* is between the public interest and an individual's right to personal security free from "'arbitrary interference by law officers.'"[46] The test is grounded in the reasonableness of the official conduct and the presence of limitations on official discretion. In this case, it is undisputed that the officers had established probable cause that felonies were occurring at the residence. Such determination was based on specific, objective facts provided by the informant and police surveillance, "indicating that society's legitimate interests require[d] the seizure of the particular individual."[47]

The "mission" of the stop was limited in scope. The stop was focused on gathering information about the presence of drugs and specific stolen property, and as the stop of the truck ensued, it almost immediately yielded further evidence of criminal conduct. Hubka testified that as he approached the truck, he observed Sievers' making furtive movements consistent with hiding evidence or reaching for a weapon. Deliberately furtive actions are a strong indication of mens rea.[48]

As noted, the sole issue presented is the reasonableness of the initial stop. The fact that the officers were "extra assertive" when they contacted Sievers is not probative of the reasonableness of the

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[45] *Id.*, 540 U.S. at 426.

[46] *Brown, supra* note 17, 443 U.S. at 50.

[47] See *id*., 443 U.S. at 51.

[48] See *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968).

initial stop, because the stop of the vehicle disclosed other reasons to escalate the detention of Sievers.[49]

There is no indication the officers did anything other than pursue a plan tailored to seeking information of ongoing crimes at the residence to be searched. The stop was a direct effort to temporarily maintain the status quo so that evidence of stolen property and narcotics at the target address could be preserved while officers concluded the final steps to obtain and execute a search warrant.

BALANCING *BROWN* FACTORS

In balancing the *Brown* factors, on our de novo review, we find that Sievers was lawfully stopped. Officers sought to temporarily stop and question the driver of the truck for the purpose of investigating specific and known felonies, as well as the presence of narcotics and firearms. The grave public concern at issue heavily weighs in favor of the reasonableness of the stop.

The stop of Sievers to see if he had any information about the target residence or stolen property advanced the task force's investigation. Police knew Sievers' truck had just arrived at the target address and was parked in the driveway to the outbuilding, behind a primary residence, next to a vehicle owned by a suspected dealer of methamphetamine. After surveilling the scene without interruption for 20 to 30 minutes, the officers saw the truck moving from the residence. The officers were reasonable to conclude the driver of the truck had information to provide.

Finally, although the stop was an intrusion upon Sievers' liberty, the initial stop was not unnecessarily

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[49] See *U.S. v. Casares-Cardenas*, 14 F.3d 1283 (8th Cir. 1994).

prolonged and the interference is not enough to counterbalance the officers' need to resolve grave and immediate threats to the public.

The critical mass of special law enforcement concerns presented in this case justifies the application of a rare exception to the rule against suspicionless searches and seizures. We do so only after ensuring that the officers' conduct was narrow in scope and that Sievers' privacy interests were not subject to arbitrary invasions at the unfettered discretion of officers in the field.

Although our reasoning differs from that of the district court, when all the factors are weighed, we conclude that the stop was reasonable under *Brown*.[50]

CONCLUSION

Based on the foregoing reasons, we conclude the stop of Sievers was lawful. The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT and FUNKE, JJ., not participating.

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[50] *Brown, supra* note 17.

APPENDIX B

NEBRASKA SUPREME COURT

ADVANCE SHEETS
300 NEBRASKA REPORTS
STATE v. SIEVERS
Cite as 300 Neb. 806

No. S-17-518

STATE OF NEBRASKA,

Appellee,

v.

COLTON W. SIEVERS,

Appellant.

___ N.W.2d ___

Filed December 7, 2018

SUPPLEMENTAL OPINION

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Joseph D. Nigro, Lancaster County Public Defender, and Nathan J. Sohriakoff for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and, on brief, Joe Meyer for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, and STACY, JJ., and MOORE, Chief Judge, and ARTERBURN, Judge, and DOYLE, District Judge.

PER CURIAM.

This case is before this court on the appellant's motion for rehearing concerning our opinion in *State v. Sievers*.[1] After reviewing the brief on rehearing, we requested supplemental briefing from both parties, which we have considered. We now overrule the motion, but we modify the original opinion as follows:

(1) We withdraw the first sentence of the first paragraph under the heading "ANALYSIS" [2] and substitute the following: "The issue presented is whether the stop of Sievers to prevent the truck from leaving with any stolen items from the residence that the truck had just left, a residence for which a search warrant was being sought, violated Sievers' Fourth Amendment rights."

The remainder of the original paragraph remains unmodified.

(2) We withdraw the entirety of the paragraph immediately preceding the subheading "GRAVITY OF PUBLIC CONCERN"[3] and substitute the following:

Here, even though there was no evidence that Sievers committed any traffic violation before his stop, the officer directing the stop was "not acting randomly in deciding that the only" vehicle emerging from the target residence should be stopped. [4] Instead, the

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[1] *State v. Sievers*, 300 Neb. 26, 911 N.W.2d 607 (2018).

[2] *Id*. at 33-34, 911 N.W.2d at 613-14.

[3] *Id*. at 40, 911 N.W.2d at 617.

[4] See *U.S. v. Brewer*, 561 F.3d 676, 679 (7th Cir. 2009).

officer decided to authorize the stop based on the fresh, firsthand information he had of the presence of stolen guns, money, and a large quantity of methamphetamine at the target residence, the near contemporaneous observation of the pickup at the residence after it was identified by the informant, and the fact the pickup was present there for only a short time. In this complex of special law enforcement concerns, the officer had compelling reasons to ask questions of the driver of the sole vehicle departing from the target residence and the facts relied upon to stop the truck make the application of the *Brown*[5] balancing test appropriate.

(3) We withdraw the entirety of the last two paragraphs immediately preceding the heading "CONCLUSION"[6] and substitute the following:

Although our reasoning differs from that of the district court, when all of the factors are weighed, we conclude that the stop was reasonable under *Brown*.[7] In reaching this conclusion, we find that the officer at the hub of the collective intelligence gathered, taking into account the totality of the circumstances, had reasonable, objective bases for believing the truck had evidence of criminal activity even though no law violation was observed.

While Sievers conceded that the determination of whether an officer has a constitutional basis to stop and question an individual depends on the "totality of the circumstances . . . determined on a case by

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[5] *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

[6] *Sievers, supra* note 1, 300 Neb. at 46, 911 N.W.2d at 620-21.

[7] *Brown, supra* note 5.

case basis,"[8] he contended there was no specific and articulable facts sufficient to give rise to reasonable suspicion that Sievers had committed or was committing a crime.

However, "[a]rticulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"'"[9] "As such, the standards are 'not readily, or even usefully, reduced to a neat set of legal rules.'"[10] A particularized and objective basis for stopping a vehicle, which is believed to be engaged in or about to engage in criminal activity, is present when "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[11]

Under the totality of the circumstances and the individualized and specific knowledge of the criminal activity afoot and its grave risk to public safety, it was reasonable for the officer to infer the driver of the truck had information about criminal activity in the target residence and that the truck may contain evidence of criminal activity and to direct the stop of the truck.

Despite the unusual circumstances here, the totality of these circumstances arising from the critical mass

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[8] Brief for appellant at 7.

[9] *Ornelas v. United States*, 517 U.S. 690, 695, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)).

[10] *Id.*, 517 U.S. at 695-96.

[11] *Id.*, 517 U.S. at 696.

of law enforcement concerns was sufficient to justify this investigatory stop. We reach this conclusion only after ensuring the officers' conduct was based on compelling reasons, was part of a specific purposeful plan, was narrow in scope, and was reasonable under the totality of the circumstances, as well as the fact that Sievers' privacy interests were not subject to an arbitrary invasion at the unfettered discretion of officers in the field.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

WRIGHT and FUNKE, JJ., not participating.

APPENDIX C

IN THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

Case No. CR16-703

STATE OF NEBRASKA,

Plaintiff,

vs.

COLTON SIEVERS,

Defendant.

VOLUME I OF I
PROCEEDINGS & EXHIBITS
(Pgs. 1-159, incl.)
(Nos. 1-6, incl.)

BILL OF EXCEPTIONS

Proceedings had before the
HONORABLE DARLA IDEUS,
on June 22, 2016, and

Before the HONORABLE ROBERT R. OTTE,
DISTRICT COURT JUDGE,
on September 22, 2016, November 17, 2016,
January 19, 2017, February 1, 2017,
March 9, 2017, March 16, 2017,
May 11, 2017, at Lincoln, Nebraska.

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* * *

A. It wasn't me. I would guess one of the narcotics investigators.

Q. Do you see Colton Sievers in the courtroom [17] today?

A. Yes, ma'am, I do.

Q. Could you please explain for the Judge where he's seated and what he's wearing?

A. He's seated at the defense table. He's wearing a black T-shirt with red writing on the front.

MS. BOSN: Judge, I'd ask the record to reflect that Officer Hubka has identified Mr. Sievers.

THE COURT: It will do so.

BY MS. BOSN:

Q. Did all the events you testified to occur in Lancaster County, Nebraska?

A. Yes, ma'am, they did.

MS. BOSN: I don't have any additional questions for this witness.

THE COURT: Counsel?

MR. SOHRIAKOFF: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SOHRIAKOFF:

Q. Is it Officer Hubka?

A. Yes, sir.

Q. Where were you positioned exactly when you were – before you were asked to engage the defendant or to stop the vehicle? Where exactly –

A. Where were we parked?

[18] Q. Yeah.

A. I believe we were parked on 11th Street just north of Hill Street.

Q. You indicated that you were informed that you were there to assist in an investigation related to a target house.

A. Yes, sir.

Q. You were aware that there was a search warrant being sought to search the target house.

A. Yes, sir.

Q. You were aware that that search warrant had not yet been signed by a judge.

A. I guess so. I was not kept up to date on the exact phase of the search warrant, but I knew that they were in the process of acquiring one.

Q. Your job was to stop any vehicles that left the premises, if you were asked to.

A. That's correct.

Q. Okay. Were you informed of what vehicles were on the search warrant?

A. No, I was not.

Q. Did you ever look at the search warrant?

A. No, I did not.

Q. Okay. When you were asked to stop the vehicle and question – this white pickup truck?

[19] Is that a yes? That was a bad question. You were asked to stop a white pickup truck?

A. Yes, sir.

Q. When you were asked to stop that white pickup truck, you weren't told why, were you?

A. I knew that it was due to the reasons associated with the search warrant. I wasn't told an exact specific reason for that pickup truck.

Q. You were just told to stop the vehicle?

A. Well, I guess, because the relation that it had to the target house, yes, sir.

Q. You weren't told – did you observe that vehicle in relation to the target house at any point in time?

A. I did not personally observe it at the target house.

Q. You did not – you were not informed of any law violations that that vehicle committed.

A. I was informed of the belief –

Q. Answer the question. Did you – were you told of any law violations that that vehicle committed?

A. As far as traffic violations?

Q. Yes.

A. No, I was not informed of any violation.

Q. We can proceed under the assumption that all [20] the police officers thought there was a vehicle, namely, this white truck, connected to that house. And I'm asking whether or not there was a specific law violation. You indicated you did not know of any law violation at that point in time associated with that truck.

A. I did not know of any traffic violations.

Q. Okay. You didn't know of – you didn't know that that truck was specifically connected with any drug violations.

A. I knew that it was suspected of.

Q. Because it was parked at a house where you were seeking a warrant.

A. Where other investigators were seeking a warrant, yes, sir.

Q. So you did not know of an actual law violations, you did not observe a law violation, no officers had yet observed an actual law violation with that truck, correct?

A. I don't know what other officers –

Q. No one informed you of an actual law violation concerning that truck, correct?

A. Well, the reason –

Q. Is that correct or not?

A. I don't understand the question you're asking.

[21] Q. Had anyone told you that that truck broke the law or that the driver of that truck broke the law?

A. They had suspected –

Q. Because he was associated with that house?

THE COURT REPORTER: Okay. You're going to have to wait until he finishes his answer.

THE WITNESS: Because what –

BY MR. SOHRIAKOFF:

Q. Because that truck was parked near that house, that's the only connection to any law violation, correct?

A. Well, as far as I know, I guess that would be correct.

Q. And I'm only asking what you know.

A. Okay.

Q. And what you were told. And you were not told of any specific law violations involving that truck.

A. I was told of suspected law violations.

Q. Okay. So then you were told to stop the truck.

A. Yes, sir.

Q. When you stopped that truck, you did not observe any traffic violations.

A. That is correct.

Q. Okay. And you did not – when you stopped that truck you weren't aware that that truck is not listed [22] on the warrant, correct?

A. That is correct.

Q. Okay. When you approached the truck, at one point in time you drew your weapon.

A. I don't believe so.

Q. Okay. You said you were assertive in your commands to the defendant.

A. I don't believe that's my exact phrase. I think I was assertive in the contact.

Q. And what you meant by that is you demanded that he exit the vehicle.

A. I don't recall demanding that he exit the vehicle. I recall making sure that I could see his hands and that I knew he didn't have a weapon in his hands.

Q. He then was ordered to exit the vehicle.

A. I don't recall ordering him to exit the vehicle.

Q. He was pulled out of the vehicle.

A. I don't recall pulling him out of the vehicle, no.

Q. Were you the one who pulled him out of the vehicle?

A. Not that I recall.

Q. Did you observe anyone else pull him out of the [23] vehicle?

A. No, I did not.

Q. And you're maintaining that your firearm was not drawn?

A. Not that I recall, no.

Q. You are in a marked squad car.

A. Yes, sir.

Q. Okay. And it has lights.

A. Yes, sir, it does.

Q. It has a dash cam.

A. It does.

Q. Did you bring dash cam video to today's hearing?

A. No, I did not.

Q. There is no dash cam video for today's hearing – or for that contact, is there?

A. Not that I know of.

Q. Typical procedure, when you stop, lights turn on, dash cam video turns on; correct?

A. Yes, sir.

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BY MS. BOSN:

Q. Did all the events you testified to occur in Lancaster County, Nebraska?

A. Yes.

MS. BOSN: I don't have anything further.

THE COURT: Mr. Sohriakoff?

CROSS-EXAMINATION

BY MR. SOHRIAKOFF:

Q. Officer Jennings, when you began surveying – or began waiting in your parked location, you were aware that other officers and investigators were seeking a warrant; is that correct?

[43] A. Yes.

Q. And you were aware that that warrant hadn't yet been signed?

A. Correct.

Q. Did you – you did not have an opportunity or you do not actually – let me rephrase the question. You did not actually review the warrant; is that correct?

A. Correct.

Q. You did not know that no white pickup truck was listed on the warrant; is that correct?

A. Correct.

Q. You did not know if any vehicles were listed on the warrant?

A. Correct.

Q. Okay. You knew that you were looking for or that they were looking for stolen guns, stolen coins, and possibly narcotics?

A. Correct.

Q. When you were asked to stop or when your vehicle was asked to stop the vehicle, you heard that transaction over the radio, correct?

A. Yes.

Q. At no point in time did the – well, let me step back just a second.

[44] The people who told you to execute the stop, or told your vehicle to execute the stop, were they investigators?

A. I believe so, yes.

Q. Okay. When the investigators told you to execute the stop, did they say that they saw the defendant with firearms?

A. No.

Q. Did they say they just saw the defendant with coins?

A. No.

Q. Did they say they saw the defendant with drugs?

A. No.

Q. Okay. Are you aware if the vehicle in question, the white pickup truck, is usually parked in that house?

A. I do not know.

Q. Okay. All you know is that you were told to make a stop?

A. Correct.

Q. Okay. You weren't told of any specific law violations at that time?

A. We were just told that it was involved in the investigation that they were currently on.

Q. Okay. And that's all the information you have?

[45] A. Yes.

Q. Okay. You and Officer Hubka did not observe the vehicle commit any law infractions, correct?

A. Correct.

Q. You were just told to conduct a stop.

A. Yes.

Q. Okay. You did conduct that stop.

A. Correct.

Q. When you exited the vehicle, there were – there was an unmarked vehicle that was near your vehicle; is that correct?

A. Yes.

Q. That was a white van?

A. Yes.

Q. That white van had two plain clothes investigators in it.

A. Correct.

Q. They were dressed in standard tactical gear.

A. I guess I don't recall if it was really tactical gear.

Q. Okay. When you – how were they dressed?

A. Plain clothes and they might have had vests on to carry their radio and other stuff they needed, items they need.

Q. The investigate – sorry, I didn't mean to [46] interrupt you.

A. That's fine.

Q. The vest was over top of their clothes?

A. z believe so.

Q. And it would have had radio or any other tactical gear, or whatever you call that stuff?

A. Sure. Law enforcement items.

Q. We'll call it law enforcement items.

So they had all the law enforcement items on their vests.

A. Correct.

Q. Who initiated contact with the defendant?

A. From what z recall, Officer Hubka would have been one of the first ones to initiate contact with him.

Q. Where were the investigators when Officer Hubka initiated contact?

A. I don't remember.

Q. Okay. Did Officer Hubka draw his weapon?

A. I don't believe so.

Q. Did you draw your weapon?

A. No.

Q. Did any investigators draw their weapons?

A. Not that I know of.

Q. There was a concern that the defendant might [47] have been reaching for – or the occupant of the vehicle might have been reaching for a weapon; is that correct?

A. That's correct.

Q. Would it have been – you say you don't remember whether weapons were drawn; is that correct?

A. Right.

Q. Would it have been outside the realm of possibility in that situation for your weapons to have been drawn?

MS. BOSN: Judge, I'm going to object. It calls for speculation.

THE COURT: It does a bit. And I think it's been answered. BY MR. SOHRIAKOFF:

Q. Okay. So I'm going to ask, when you approach a vehicle that you're aware may contain weapons and you see the individual reaching for a weapon – or for something in the center console, is that a time you typically draw your weapon?

A. I guess it would depend on – I mean, if we actually see a weapon or not.

Q. Okay. As Officer Hubka, you, and the investigators converged on the vehicle, were any orders made of Mr. Sievers?

[48] A. Not that z remember.

Q. Did the investigators – or did the officer, Officer Hubka, order him to put his hands in the air?

A. I can't say because z was on the other side of the vehicle.

Q. So you were on the back passenger's side of the vehicle?

A. Correct.

Q. Did Mr. Sievers – Mr. Sievers was then ordered to exit the vehicle.

A. At some point he was asked to exit the vehicle, yes.

Q. When you say asked, do you recall the words that were used?

A. I don't.

Q. Okay. He was then handcuffed.

A. I don't remember if he was handcuffed at that time or not.

Q. And then he was placed in the back of your squad car.

A. That's correct.

Q. Okay. And at the point in time that he was placed in the back of the squad car, had – did you – or were you aware of whether the warrant had been signed yet?

[49] A. I was not aware.

Q. Okay. About how much time passed before a search was executed of his vehicle?

A. I – I can't recall exactly how much time passed between him being placed in our vehicle and the search being conducted.

Q. Okay. Can you give us an idea from the time that you began executing the stop to when the search was conducted?

A. I'd say approximately 10 to 15 minutes.

Q. Okay. The search was conducted on the side of the road on 10th.

A. On 10th.

Q. On the – 10th is a one-way street going northbound.

A. Northbound.

Q. And it was conducted on the far left lane, which would be the far west lane.

A. Correct.

Q. The vehicle was eventually moved.

A. Yes.

Q. Into the parking lot?

A. Yes.

Q. Was that before or after the search?

A. After.

[50] Q. Mr. Sievers was in the back of the squad car the entire time.

A. Correct.

Q. And you can't remember if he had handcuffs on.

A. I can't.

Q. Was he free to leave?

A. At that time, no.

Q. Okay. So the moment that you executed the stop, he was not free to leave; is that correct?

A. Correct.

Q. Okay. And this wasn't a traffic stop in the sense that there wasn't a law violation that occurred.

A. In a sense that there wasn't a traffic violation that occurred, correct.

Q. Right.

The purpose of the stop was to prevent the vehicle in question from leaving with any of the stolen goods.

A. Correct.

Q. And the stop was executed prior to the warrant being signed.

A. Correct.

Q. And you're not aware of any other – let me be very specific if I can.

Aside from the truck being located in the [51] driveway of that house, you're not aware of any other law violations that were conducted by that truck – committed by that truck.

A. No.

Q. Okay.

MR. SOHRIAKOFF: No further questions.

THE COURT: Anything further?

MS. BOSN: No.

THE COURT: All right. Officer, thank you for coming today. You are excused.

MS. BOSN: Can I step out and get my next witness?

THE COURT: You may.

MS. BOSN: Judge, State would call Duane Winkler.

THE COURT: Good morning. Please come forward and raise your right hand.

Do you swear to tell the truth, the whole truth, and nothing but the truth under penalties of perjury?

THE WITNESS: I do.

THE COURT: Have a seat there, sir.

Counsel?

MS. BOSN: Thank you, Your Honor.

[52] DUANE WINKLER,

having been called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. BOSN:

Q. Sergeant, can you please state and spell your first and last name for the record.

A. Duane Winkler. D-U-A-N-E W-I-N-K-L-E-R.

Q. How are you employed?

A. I'm a supervisor with the Lincoln Lancaster County Narcotics Task force from the Lincoln Police Department.

Q. How long have you been employed by the Lincoln Police Department altogether?

A. Since December of 2000.

Q. And how long have you been involved with the narcotics unit in that capacity?

A. Since about March of 2014.

Q. Were you on duty in that capacity as a supervisor for the Lincoln Police Department Narcotics Unit on February 26th of 2016?

A. Yes.

Q. And can you explain for the court what your job duties entailed about that time?

A. Acting as a supervisor for the narcotics task [53] force, directing investigators and so forth.

Q. Were you involved with an investigation into, essentially, a York County burglary where property was suspected to be located at an address here in Lancaster County, Nebraska?

A. Yes.

Q. And are you aware of what that address is, what that target location is?

A. If I recall correctly, it was 2612 South 9th.

Q. Who were the investigators that you were directing as it related to that investigation?

A. The second shift members of the narcotics task force, Investigator Schilmoeller, a couple other investigators.

Q. Mainly, Investigator Schilmoeller was involved as it relates to this case; is that correct?

A. That's correct.

Q. And are you on scene at the South 9th Street location?

A. No.

Q. Are you aware of whether or not Investigator Schilmoeller is?

A. Yes.

Q. And what was your understanding of why he is at the 2612 South 9th Street location?

[54] A. The information we had received from York County was that there would be stolen items and other items sought from the burglary and arson at that location. York County informed us that they believe they had been – items had been transported there and traded for methamphetamine or some other narcotics.

Once we had established what the address was, the investigators were set up basically to observe and perform surveillance on the address, hopefully to prevent stolen items from leaving the address.

Q. Are you aware of what York County, at least what the allegations of the stolen items, what they were specifically?

A. It was items taken from a very large century type safe to include firearms, some gold coins, some U.S. currency, and some certificates, paperwork, so forth.

Q. Did the fact that the alleged property that had been stolen included firearms, did that heighten the involvement of the narcotics unit in this case or would it have mattered if it was just the gold coins?

A. The possible presence of firearms increased our caution.

Q. Specifically, what were you doing as it related to this investigation?

[55] A. I was assisting Lieutenant Vrbka of York County in preparation of a search warrant affidavit.

MS. BOSN: Judge, may I approach the witness?

THE COURT: You may.

(Exhibit No. 1 marked for identification.)

BY MS. BOSN:

Q. Sergeant Winkler, I'm handing you what's been marked as Exhibit No. 1. Do you recognize Exhibit No. 1?

A. Yes, it appears to be the search warrant return from the address.

Q. And there's a number of pages with that document; is that correct?

A. Yes.

Q. So the top page you've referred to as a return?

A. Yes.

Q. Thumbing through that a little bit, does it also include the actual search warrant that was applied for and granted in this case?

A. Yes. It contains the receipt, the search warrant affidavit, and the search warrant order itself.

Q. So it would be the entire search warrant [56] packet; is that fair to say?

A. Yes.

Q. Is that a true and accurate copy to the best of your recollection?

A. Yes.

MS. BOSN: Judge, I would offer Exhibit 1.

THE COURT: Any objection?

MR. SOHRIAKOFF: No objection.

THE COURT: One is received.

(Exhibit No. 1 is hereby made a part of this bill of exceptions and can be found at the conclusion of this volume.)

BY MS. BOSN:

Q. And your testimony was that you were working with a lieutenant out of York County in preparation of this search warrant?

A. Yes.

Q. Tell me what else you were doing once that preparation was concluded.

A. After the preparation was concluded, I was monitoring the radio as well as transporting Lieutenant Vrbka to a Lancaster County judge to have the warrant signed.

Q. And why are you monitoring the radio?

A. We wanted to be certain that no items had – no [57] items that were sought from the burglary left the residence prior to the search of the search warrant. I was informed shortly after Lieutenant Vrbka and I completed the affidavit that a vehicle had left the residence.

Q. And did you receive that information based on what you observed yourself or based on another officer who was sitting pre-warrant surveillance on the location?

A. Based off another officer.

Q. Okay. And those officers – what is pre-warrant surveillance, can you explain that for the court?

A. Essentially, officers set up in a perimeter around the targeted location to monitor for any possible activities, any additional threats or dangers

that might arise during the waiting period before the affidavit is signed. And hopefully to contact any individuals, perhaps, leaving with evidence.

Q. And the items in this case would have been easily moved in a pickup truck; is that a fair statement?

A. Yes.

Q. Do you recall who it was that first alerted you to the white pickup leaving the address at 2612 South [58] 9th Street?

A. I don't recall who the first person was.

Q. Okay. In any event, you became aware of that fact?

A. Yes.

Q. And tell me what you did next.

A. I directed them to contact the vehicle as I believed we had sufficient probable cause to articulate a need to both stop the vehicle and search it for any items taken from the burglary in York County.

Q. What information had you been told as far as where the vehicle was in relation to the house and where it was going when you made that call?

A. I had been informed that the vehicle had been parked immediately behind the residence. It was supposably next to the vehicle identified as the potential source for the traded methamphetamine as well as the resident of the address.

Q. So there's essentially two vehicles parked behind the address at 2612 South 9th Street?

A. Correct.

Q. And your testimony is that one of those vehicles was registered to the person that lived at that address?

[59] A. Correct.

Q. What kind of car is that, just so we're not getting confused here?

A. I believe it was a black Volkswagen.

Q. So we have a black car and a white pickup?

A. Correct.

Q. And the information that you receive is the white pickup is leaving the address?

A. That's correct.

Q. And at that point in time, and it was your call, somebody needs to stop that vehicle?

A. Yes.

Q. And you convey that information to an investigator who is on the scene?

A. Correct.

Q. If an investigator is wearing plain clothes, would it have been appropriate for them to have actually stopped the vehicle?

A. If it was absolutely necessary in an emergency. However, typically they prefer to contact a uniformed patrol officer in a marked cruiser.

Q. Is that sort of the standard preference for the Lincoln Police Department overall?

A. Yes.

Q. Are you aware of whether or not the stop was [60] done by the plain clothes investigators or marked cruiser officers in uniform?

A. I was informed that the stop was performed by Officer Jennings and Officer Hubka, who were at that time in a marked unit and in full uniform of the police department.

Q. At that point in time had the warrant been signed?

A. No.

Q. Okay. Approximately what time is it, if you recall?

A. It was still daylight. I would guess it was perhaps around 5 p.m. or so.

Q. When Officers Hubka and Jennings stopped the vehicle, is that radioed to you? Are you aware of that stop?

A. Eventually.

Q. Okay. When you say eventually, you're not made aware immediately; is that fair to say?

A. No.

Q. Okay. How long, if you recall, between the period of time that you're made aware that Hubka and Jennings have stopped the vehicle and when the search warrant was signed by a judge?

A. It would have been some time, perhaps, an hour [61] and a half.

Q. In the meantime, had other officers gone – actually physically gone to the residence?

A. Yes.

Q. Tell me why.

A. There was some concerns that the people in the white pickup truck may have had an opportunity to contact them by phone and potentially encourage them to destroy evidence that might still be at the residence.

Q. And is that based on information that you, through Officers Hubka and Jennings, received about the cell phone in the white pickup?

A. That's pretty much standard procedure.

Q. Okay. When the officers that are at the target location on south – 2612 South 9th Street arrived, did they make any observations before they enter the home?

A. As I recall, they knocked and announced and ordered any occupants to come to the door. After approximately 30 seconds they observed the occupants to be moving around in actions they believed were destroying evidence, at which point they forced entry and took them into custody.

Q. So the individual that was ultimately taken [62] into custody did not come to the door to be taken into custody?

A. Correct.

Q. Did you at any point in time go to where the white pickup truck was stopped, to that location?

A. No.

Q. Tell me what, if any, involvement you had with making the decision to search that vehicle.

A. I believe Investigator Schilmoeller contacted me over the radio and asked how to proceed. At that point,

considering that the vehicle had left the residence prior to us being able to serve the search warrant, we had sufficient probable cause developed to apply for a search warrant to search that residence to look for stolen item that were easily movable.

To me, this increased the likelihood that there might be items of evidentiary value in the pickup. Plus the information, and I think it was from Investigator Schilmoeller, that the occupant of the pickup had admitted to narcotics use or he believed there was sufficient probable cause to search, directing him to go ahead and search the vehicle.

Q. So your testimony is that the information that you had at the time that was relevant as to why the pickup could be searched was that the stolen property [63] you believed was in the house and was the subject of the warrant had been potentially or very likely put into this pickup and driven away from the location?

A. That's correct.

Q. You additionally had the driver of the white pickup or information from Deputy Schilmoeller, Investigator Schilmoeller, that driver of the white pickup had acknowledged that he had left that residence and prior to leaving that residence smoked marijuana?

A. That's correct.

Q. And your testimony previously was that the stolen items at that location were potentially being traded for methamphetamine?

A. That's correct.

Q. So it's not just the stolen items, but it's also narcotics that you're concerned about at this point in time?

A. Yes.

Q. Anything else that you recall went into your thought process as to why the search of the vehicle was necessary at that time?

A. There was also the potential that there might be firearms included in the vehicle which would have presented an officer safety concern at that point.

[64] Q. Any other involvement that you had in this investigation?

A. Not concerning the investigation of the pickup. I continued to assist with the search warrant.

Q. But that's back at the – there was never a search warrant done for the pickup; is that correct?

A. That's correct.

Q. So the search that you're referring to was 2612 South 9th Street?

A. Correct.

Q. Anything else that you were involved with as it relates to the investigation involved with the white pickup and Colton Sievers' involvement?

A. No, ma'am.

Q. Did all the events that you testified to occur in Lancaster County, Nebraska?

A. Yes.

Q. Did you ever make contact with Colton Sievers?

A. No.

MS. BOSN: Okay. I don't have anything further for this officer.

THE COURT: Mr. Sohriakoff?

MR. SOHRIAKOFF: Thank you, Your Honor.

[65] CROSS-EXAMINATION

BY MR. SOHRIAKOFF:

Q. Your prior involvement with this case was investigative; is that correct?

A. Supervisory, primarily. But, yes.

Q. You drafted the affidavit for search warrant.

A. I assisted with the drafting of it.

Q. Okay. The search warrant was being – or affidavit for search warrant was being drafted when Colton Sievers' pickup truck left the premises; is that correct?

A. That's correct.

Q. Okay. It had not even been placed in front of a judge yet.

A. That's correct.

Q. Okay. When the officers arrived on scene, the pickup truck was there.

A. Yes.

Q. They didn't see Mr. Sievers arrive.

A. That's correct.

Q. Okay. You didn't ask for permission to search in the search warrant, you didn't ask for permission to search either the VW or the pickup; is that correct?

A. I believe that's correct.

[66] Q. And you were not granted permission to search either the VW or pickup truck; is that correct?

A. That's correct.

Q. When you were drafting the warrant, you do reference the pickup truck –

A. Yes.

Q. – in the affidavit.

A. Yes.

Q. But you do not request permission to search that pickup truck.

A. No.

Q. And you were also aware that the VW was parked there; is that correct?

A. Yes.

Q. You were aware that there was a VW bug style – not – I'm sorry.

You were aware that there was a motor home also on the premises; is that correct?

A. I don't specifically recall that.

Q. You were aware of an open camper style vehicle located on the property; is that correct?

A. I believe I reference that during the affidavit.

Q. And you were granted permission to search the open camper style on the property; is that correct?

[67] A. I don't recall that.

MR. SOHRIAKOFF: May I approach, Your Honor?

THE COURT: You may.

BY MR. SOHRIAKOFF:

Q. You had an opportunity to review the search warrant, right?

A. Yes.

Q. You helped draft the search warrant.

A. Yes.

Q. If you were shown the search warrant, that would jog your memory about what was contained in the search warrant; is that correct?

A. Yes.

Q. Okay. I would direct you to the third paragraph on page 1 of the search warrant, starting with the words therefore. Could you read that silently to yourself and look up at me when you're done?

Is your memory refreshed?

A. Yes.

Q. Do you now recall that a – you were granted permission to search an open camper style vehicle on the premises?

A. Yes.

[68] Q. Do you now recall that you were not – well, you've already said you were not given permission to search either the black VW or the white pickup truck; is that correct?

A. That's correct.

Q. You reference both vehicles in your request for a search warrant.

A. Yes.

Q. But permission was not granted to search either vehicle.

A. That's correct.

Q. Okay. When the stop was executed, it was about 5 o'clock, 5:20, I think?

A. Somewhat – that sounds about correct, yes.

Q. Okay. How much time passed before you granted permission for the officers on the scene to search the pickup truck?

A. Between the stop and the granting permission?

Q. Correct.

A. Not very long. I would say within about five to ten minutes.

Q. Okay. And the warrant was still being drafted that the point in time.

A. That's correct.

Q. It hadn't even been placed in front of the [69] judge yet.

A. That's correct.

Q. And the first information that you ever have about this particular white pickup truck was when you were told by the officers who were doing the pre-warrant – what did you call it?

A. Pre-warrant surveillance.

Q. Pre-warrant surveillance.

So the first information you had about this particular white pickup truck was when you were told by the investigators who were doing pre-warrant surveillance that it was parked in the driveway.

A. I believe that's correct.

Q. That was the first knowledge you had of that pickup truck.

A. Yes.

Q. At no other time had you been told in relation to this case that Colton Sievers might be implicated?

A. Prior to the stop of the pickup truck?

Q. Right.

A. I believe that's correct, yes.

Q. Okay. So in relation to this case, the first time you became aware that my client, Mr. Sievers, and the white pickup truck might be involved was because his pickup truck was parked in the driveway of the [70] house in question.

A. Yes.

Q. Okay. When – when the pickup truck left the residence, you instructed the investigators to lock down the house.

A. Yes.

Q. Okay. And stop the pickup truck.

A. That's correct.

Q. And the entire basis for the stop was that your investigators and you suspected that it might have contraband in it from the theft in York.

A. Correct.

Q. Did your investigators see Mr. Sievers leave the house?

A. I don't recall.

Q. Did – you don't recall whether they communicate that to you?

A. That's correct.

Q. Okay. Do you recall if anybody communicated to you whether they saw Mr. Sievers carrying anything to the truck?

A. I don't recall.

Q. What kind of guns were stolen?

A. I don't recall specifically. Some shotguns were mentioned.

[71] Q. Okay. Is it easy to conceal a shotgun on your person without a bag?

A. It depends on the size of the shotgun.

Q. Okay. But there was no indication, to your recollection, that anybody saw Mr. Sievers carrying anything like that?

A. I don't recall anyone saying anything about Mr. Sievers carrying anything.

Q. Okay. Would be an important fact if someone did see him carry something?

A. Yes.

Q. Okay. You weren't at the scene of the stop so you wouldn't be able to say what procedures took place at the stop; is that correct?

A. I was not at the stop, correct.

Q. Okay. You executed a – not you.

You authorized a pre-warrant search of the exterior of the house, the cartilage, I guess, if you want to call it something; is that correct?

A. Yes.

Q. And that was because the vehicle left the house?

A. That was because we feared potential for compromise after the vehicle had left the house.

Q. Okay. Did your officers indicate that Mr. [72] Sievers, when he was stopped, attempted to contact anybody on his cell phone?

A. No.

Q. Do you know if they saw him pick up his cell phone?

A. I don't know if they saw him pick up his cell phone.

Q. You were not told about that?

A. No.

Q. Okay. In any event, the search warrant wasn't even in front of the judge yet?

A. That's correct.

MR. SOHRIAKOFF: No further questions.

THE COURT: Any follow-up?

MS. BOSN: No.

THE COURT: May this officer be excused?

MS. BOSN: Yes, please.

MR. SOHRIAKOFF: Judge, may I have just a moment – the witness can go, but I need to e-mail another court to let them know that I'll be not making it.

THE COURT: All right. Sir, you're excused. Thank you for coming.

MS. BOSN: While Mr. Sohriakoff is doing that, can I get my next witness?

[73] THE COURT: You may.

* * *

Q. And are you the officer who actually arrested him, placed him in handcuffs?

A. I believe I did.

Q. Do you see Colton Sievers in the courtroom today?

A. Yes.

Q. I believe I already had you do that. I'm sorry.

Did all the events that you've testified to occur in Lancaster County, Nebraska?

A. Yes.

MS. BOSN: Judge, I don't have any [94] additional questions for this witness.

THE COURT: Mr. Sohriakoff?

CROSS-EXAMINATION

BY MR. SOHRIAKOFF:

Q. How long had you been observing the house in question before you saw the truck leave the house?

A. I don't know for certain. I would say maybe 20 minutes, half hour.

Q. Okay. The truck was there when you arrived there?

A. I believe so.

Q. Okay. You were not in a position to see him exit the house and get into the truck?

A. I don't remember him doing that, so, no. I would say no.

Q. So it's possible he was in the truck for that entire period of time?

A. He was not in the truck the entire time because I did drive through the alley to verify which vehicles were parked there and I would have been able to see him inside that truck.

Q. What if he was laying down?

A. I guess it's possible.

Q. So you can't say with certainty that he was in the house, because you never saw him exit the house?

[95] A. Beside his statement saying that he had been in there.

Q. I'm not asking about his statements, but at the time you made the stop, you did not know whether he had ever been in the house. You guessed based on the fact the pickup truck was parked in the parking lot, or in the driveway.

A. From my own knowledge, correct.

Q. Okay. And you started following the truck?

A. Correct.

Q. And you were in a white police van; is that correct?

A. No, that's not correct.

Q. Is it a police van?

A. It was a van, yes.

Q. Okay. When Investigator – or when Officers Hubka – and the other officer, I've forgotten his name at this moment, but when the two officers who made the stop were approaching the vehicle, you said there was a heightened sense of security?

A. Yes.

Q. They were issuing commands at the defendant.

A. I believe so, yes.

Q. Okay. For instance, they commanded him to keep his hands in view.

[96] A. Correct.

Q. And eventually commanded him to exit the vehicle.

A. Yes.

Q. Okay. Do you recall whether or not their or your guns were unholstered and out, not pointed at the defendant, but out?

A. I don't recall them being out. It's possible, but I don't remember that.

Q. You don't remember either way?

A. Correct.

Q. Okay. When he was commanded to exit the vehicle, do you recall whether he was handcuffed?

A. From my recollection, I don't know – I don't think he was.

Q. You don't remember, though?

A. I don't remember him being handcuffed.

Q. Okay. You asked for consent to search the vehicle immediately, right?

A. Shortly thereafter being placed in the back seat, yes.

Q. And you asked a couple more times before you got the go-ahead with PC search, right?

A. Yes, I did.

Q. And you were denied consent every time you [97] asked.

A. Correct.

Q. Your supervisor didn't grant you consent – sorry.

Your supervisor didn't grant you permission to search the vehicle until after the residence had been locked down and items were observed in plain view that were illegal; is that correct?

A. Correct. It was happening at the same time.

Q. Okay. So the residence was being locked down, items were observed, that was radioed to your supervisor, your supervisor then radioed to you that you could search; is that correct?

A. Correct.

Q. Okay. The defendant's vehicle was not stopped based on any traffic violations; is that correct?

A. Correct.

Q. The sole reason for the stop was because his vehicle was parked in the driveway of the house in question.

A. Correct.

Q. And the stop was executed before the warrant was even in front of the judge.

A. I don't know when the warrant was taken. I wasn't there.

[98] Q. Fair enough.

You know when the warrant was executed, though?

A. Roughly. I don't know what time.

Q. The stop and search had been completed before the warrant was executed; is that correct?

A. I believe so.

Q. Okay. You indicated that your conversation with the defendant in the back of the cruiser took approximately ten minutes.

A. If that. I don't know for sure.

Q. Could have been a little bit more?

A. Possibly. I don't know.

Q. Could have been less?

A. Correct.

Q. But it was in that time frame?

A. Correct.

Q. And the defendant was not free to leave at any point in time after the stop was made; is that correct?

A. Correct.

MR. SOHRIAKOFF: No further questions.

THE COURT: Ms. Bosn?

MS. BOSN: Nothing further.

THE COURT: All right. May this witness be excused?

[99] MS. BOSN: Yes.

THE COURT: All right. Thank you, sir.

You're excused.

Ms. Bosn?

MS. BOSN: Thank you, Your Honor.

I would ask that the court make a finding that the basis for the stop, that there was probable cause to stop him and ultimately search the vehicle –

* * *

APPENDIX D

IN THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

Case CR16-703

STATE OF NEBRASKA,

Plaintiff,

v.

COLTON SIEVERS,

Defendant.

ORDER

(Overruling Motion to Suppress)

THIS MATTER came before the court on September 22, 2016, upon the Defendant's Motion to Suppress. The State was represented by Carolyn Bosn and the Defendant was present with and represented by Nathan Sorhialcoff. Evidence was adduced. The parties submitted their respective briefs on the issues. The court, being fully advised, enters the following findings and order.

1. Background, facts and issue.

The issue before the court in regard to the Defendant's Motion to Suppress is whether there was reasonable suspicion for the original stop and, if there was such a reasonable suspicion, whether the vehicle at issue was subject to search.

In essence, the Lincoln Police and Sheriff Departments were conducting surveillance on a residence.

They were investigating reports from York County that guns, coins and money were illegally taken from a private safe. These officers were assisting the York County Sheriff in the investigation. As they were conducting their surveillance, the Defendant left the residence being watched. The surveilling officers asked the narcotic unit officers to stop the Defendant.

The Defendant was stopped about five blocks from the residence. The narcotics officers actually saw the Defendant leave the residence, and according to the testimony of the officers, they never lost sight of the Defendant.

2. Analysis.

a. Stop.

An investigatory stop only requires specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. *State v. Bol,* 288 Neb. 144, 846 N.W.2d 241 (2014). Reasonable suspicion is some *minimal* level of objective justification for detention, something more than an inchoate and umparticulariz ed hunch, but less than the level of suspicion required for probable cause. *State v. Au,* 285 Neb. 797, 829 N.W.2d 695 (2013).

The facts of this case distinguish it from a case like *State v. Ellington,* 242 Neb. 554, 495 N.W.2d 915 (1993). In *Ellington,* the Nebraska Supreme Court held an officer did not have reasonable suspicion to stop a defendant, listing several factors that suggested the activity did not amount to a reasonable suspicion of drug-related activity warranting an investigatory stop. In this case, there was an ongoing investigation and the officers had reasonable cause to believe that a crime had been committed and had reasonable

suspicion to justify the stop even though the information was not complete or precise.

It is the Defendant's position that there was no reasonable suspicion for the stop. While taking that position, the Defendant cites no authority that the stop, under the circumstances, was improper. The officers surveilling the house were conducting pre-warrant surveillance with the understanding there was a potential that the occupants were involved in the York crime. The officers appeared credible in their testimony, and articulated the specific facts upon which the stop was completed. The officers had reasonable suspicion to justify the stop given the information known at the time.

b. Search.

The Defendant takes the position that the police had no right to search the Defendant's pickup without a warrant after the Defendant had been detained. The Defendant relies on the overarching principles involving Fourth Amendment rights. In particular, the Defendant cites generalized authority suggesting the police must get a search warrant when there is no risk that the automobile will leave the jurisdiction. On the other hand, the Nebraska Supreme Court has stated, "The automobile exception has no separate exigency requirement and applies if the vehicle is readily mobile and probable cause exists to believe it contains contraband." *State v. Alarcon-Chavez,* 284 Neb. 322 (2012) (citing *Maryland v. Dyson,* 527 U.S. 465 (1999)). In *Alarcon-Chavez,* because the vehicle was operational, it was therefore readily mobile as it could be moved out of the jurisdiction, had the agents taken the time to obtain a warrant. "Searches of automobiles are subject to less rigorous requirements than searches of one's home or office, but not only

because of element of mobility, but also because expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *State v. Konfrst,* 251 Neb. 214 (1996). "Where police officers have legitimately stopped an automobile with probable cause to believe that contraband is concealed within it, they may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant "particularly describing the place to be searched." *U.S.* v. *Ross,* 456 U.S. 798 (1982).

As a result, the court finds the search of the vehicle proper and within Constitutional boundaries.

3. Conclusion.

For the foregoing reasons, the Defendant's Motion to Suppress should be and is hereby denied.

THE DEFENDANT IS ORDERED TO APPEAR IN COURTROOM 34, 575 SO. 10th STREET, LINCOLN, NE., FOR THE COURT'S NEXT DOCKET CALL SET FOR November 17, 2016, AT 1:30PM.

SO ORDERED on the 2nd day of November, 2016.

BY THE COURT:

/s/ Robert R. Otte
ROBERT R. OTTE
DISTRICT JUDGE

APPENDIX E

IN THE NEBRASKA SUPREME COURT

No. S-17-518

STATE OF NEBRASKA,

Appellee,

v.

COLTON SIEVERS,

Appellant.

APPEAL FROM THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

The Honorable Robert Otte, District Judge

SUPPLEMENTAL BRIEF OF APPELLEE

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Table of Contents

Table of Authorities

CASES CITED:

Statement of the Case

A. Nature of the Case

Sievers appealed his conviction for Possession of Controlled Substance, assigning error to the district court's denial of his Motion To Suppress. The ultimate issue in the case is the justification of the traffic stop of a pickup truck Sievers was driving.

After oral argument, this Court issued an opinion on May 18, 2018, justifying the traffic stop as an "information seeking" stop in line with *Illinois v. Lidster*. The Court did not conduct an analysis of reasonable suspicion. Sievers filed a Motion For Rehearing and this Court has ordered supplemental briefing.

Propositions of Law

I.

> The categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched.
>
> *Bailey v. United States*, 568 U.S. 186, 199 (2013).

II.

> If officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards, includeing, of course, a brief stop for questioning based on reasonable suspicion or an arrest based on probable cause.
>
> *Bailey v. United States*, 568 U.S. 186, 202 (2013).

III.

> To determine the reasonableness of "information seeking" stops, courts use a three-factor analysis, balancing: (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty.
>
> *Illinois v. Lidster*, 540 U.S. 419, 426 (2004).

IV.

An officer is allowed to make an "information seeking" stop whenever:

> (i) The officer has reasonable cause to believe that a misdemeanor or felony, involving danger of forcible injury to persons or of appropriation of or danger to property, has just been committed near the place where he finds such person, and
>
> (ii) the officer has reasonable cause to believe that such person has knowledge of material aid in the investigation of such crime, and
>
> (iii) such action is reasonably necessary to obtain or verify the identification of such person, or to obtain an account of such crime.
>
> Model Code of Pre-Arraignment Procedure § 110.2(1)(b) (1975).

Statement of Facts

The State incorporates its Statement of Facts from its initial brief. See Brief of Appellee, pp. 2-4.

To summarize, York County authorities traced stolen goods from a residential burglary in that county to Lincoln. During the course of that investigation, they

also developed probable cause that a woman was dealing methamphetamine out of a residence in Lincoln.

While York County authorities drafted an affidavit requesting a search warrant, Lincoln police conducted surveillance of the target residence. The purpose of the surveillance was to prevent stolen goods from leaving the premises. (54:9-10). During the surveillance, police noticed people walking from the residence to an open style camper located on the property with objects apparently concealed in their hands. (Ex. 1). Some of these people got into a pickup truck that left the scene. (Ex. 1).

Lincoln police stopped the pickup, driven by Sievers, about five blocks away from the target residence. Sievers was the only person inside the pickup truck. Police were "extra assertive" during the stop because the pickup truck was believed to be connected to the burglary where guns were stolen and because Sievers made furtive movements when he was first pulled over. (14:5). Sievers was almost immediately ordered out of the truck and taken to the back of a patrol cruiser. (82:22-83:5). An officer told Sievers that he was "being detained due to an investigation that was being done at the address that he had just left from." (83:3-5). The officer did not ask him specific questions about the burglary or drug use inside the residence. (84:17-85:1). After being told he was being detained, Sievers told police the suspected drug dealer was still in the residence and admitted to smoking marijuana before he left the residence. (84:14-16).

Police eventually searched the pickup truck, uncovering methamphetamine.

Argument

After Sievers filed a Motion For Rehearing, this Court ordered supplemental briefing "addressing how the confluence of the following lines of cases is relevant under the facts of this case: 1) Cases involving reasonable suspicion to stop an automobile; 2) Cases addressing permissible or impermissible activities of law enforcement while waiting for the issuance of a search warrant; and 3) Cases involving checkpoints." The State will address each line of cases in turn.

1. Cases involving reasonable suspicion to stop an automobile.

The State incorporates its reasonable suspicion analysis from its original brief. See Brief of Appellee, pp. 4-9.

2. Cases addressing permissible or impermissible activities of law enforcement while waiting for the issuance of a search warrant

Police, while waiting for the issuance of a search warrant, are authorized to impound the premises to be searched and, by implication, can seize persons who are on the scene of a premises to be searched, at least to the extend they can prevent persons from entering the premises without a police escort.

Temporary restraints to preserve evidence

In *Illinois v. McArthur*, 531 U.S. 326 (2001), Terra McArthur asked two police officers to accompany her to the trailer where she lived with her husband, Charles, so that they could keep the peace while she removed her belongings. The officers remained outside while Tera went inside, but Tera came outside and told the officers to check the trailer because "Chuck had dope in there." Tera added that she had seen Chuck

"slide some dope underneath the couch." The police knocked on the door, told Charles what Tera had said, and asked for permission to search. Chuck denied permission and police began the process of obtaining a search warrant. Police told Charles, who was on the porch at this time, that he could not reenter the trailer unless a police officer accompanied him. Police obtained a search warrant within two hours and searched the trailer, finding marijuana. *Id.* at 328-29.

The *McArthur* Court held that the seizure of Chuck was reasonable, because (1) police had probable cause to believe that the trailer contained evidence of crime and contraband, (2) the police had reason to fear that, unless restrained, Chuck would destroy the drugs before they could return with a warrant, (3) the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy, and (4) the police imposed the restraint for a limited period of time. *Id.* at 332. In its analysis, the Court highlighted previous decisions that assumed that police, armed with reliable information that the apartment contained drugs, might lawfully have sealed the apartment from the outside, restricting entry into the apartment while waiting for a warrant. *Id.* at 333.

Seizure of former occupants of a place to be searched

In *Bailey v. United States*, 568 U.S. 186 (2013), the Supreme Court examined the underlying rule allowing police to seize occupants of a place to be searched announced in *Michigan v. Summers,* 452 U.S. 692 (1981), and whether it extended to allow police to seize persons who had left the place to be searched before the search occurred.

The *Summers* Court recognized three law enforcement interests that, taken together, justify the detention

of an occupant who is on the premises during the execution of a search warrant: (1) officer safety, (2) facilitating the completion of the search, and (3) preventing flight. The *Bailey* Court held that:

> In sum, of the three law enforcement interests identified to justify the detention in *Summers,* none applies with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises to be searched. Any of the individual interests is also insufficient, on its own, to justify an expansion of the rule in *Summers* to permit the detention of a former occupant, wherever he may be found away from the scene of the search. This would give officers too much discretion.

568 U.S. at 199. Therefore, the *Bailey* Court held, "[t]he categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched." *Id.*

Because police do not have authority to detain a person outside the immediate vicinity of the premises to be searched when they have a warrant, there is no reason to believe police would have authority to make such a detention before they obtain a warrant.

3. Cases involving checkpoints

The seminal case from the United States Supreme Court regarding checkpoints, or "information seeking" stops, is *Illinois v. Lidster*, 540 U.S. 419 (2004). In *Lidster*, police set up a checkpoint to stop cars and ask occupants about a fatal hit and run that had occurred in the area a week prior. The Court cited to a previous checkpoint case where the police had set up a checkpoint primarily for general "crime control purposes."

The *Lidster* Court found the facts of the case at bar distinguishable, stating:

> The checkpoint stop here differs significantly from that in *Edmond.* The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.

Id. at 423. The Court analogized the police stopping vehicles at an information seeking checkpoint to police's ability to approach a pedestrian and ask questions, stating "it would seem anomalous were the law (1) ordinarily to allow police freely to seek the voluntary cooperation of pedestrians but (2) ordinarily to forbid police to seek similar voluntary cooperation from motorists" *Id.* at 426.

To determine the reasonableness of "information seeking" stops, the Court used a three-factor analysis from an earlier case, balancing: (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty. *Id.* at 427.

Other courts have taken the "information seeking" stop outside of the context of checkpoints, applying it to situations where police stop potential witnesses of recently committed crime. *See U.S. v. Brewer*, 561 F.3d 676 (7th Cir. 2009), *Gipson v. State*, 268 S.W.3d 185

(Tex. App. 2008), *State v. Garrison*, 911 So. 2d 346 (La. App. 2005), *Baxter v. State*, 274 Ark. 539 (1982).

In fact, this Court recently approved of an information seeking stop of a potential witness in *State v. Woldt*, 293 Neb. 265 (2016). In *Woldt,* police responded to a report of a white pickup truck knocking down multiple traffic cones on the main street in Wisner. The officer stopped to pick up the cones and, while doing so, heard squealing tires nearby. The officer returned to his cruiser and began looking for the pickup. The officer found the white pickup nearby, recognized the driver, and motioned for the driver to pull over. Woldt was driving another pickup and pulled over behind the white pickup. While the officer was conducting a DUI investigation of the driver of the white pickup, Woldt reversed his pickup as if to drive away. The officer motioned for Woldt to stop and come over toward the officer. Woldt was later arrested for driving under the influence and challenged the stop under the Fourth Amendment. *Id.* at 266-69.

This Court, utilizing the three-factor balancing test, upheld the stop. Specifically, this Court found that the gravity of public concern involved drunken driving, a "serious threat to public safety," that stopping Woldt advanced that interest because Woldt was apparently driving with the pickup driver who was allegedly drunk, and the severity of the interference was not great. *Id.* at 272-76. In particular, under the third factor addressing the severity of the interference with individual liberty, the Court stated "[t]his was not a question of [the officer] sounding his patrol car's siren and activating its lights to pull over Woldt while Woldt was operating his vehicle. Rather, this was [the officer] waving, and possibly verbally requesting, that Woldt stay where he was so that [the officer] could ask him

questions relating to [the other driver]'s activities." *Id.* at 275.

4. Application to Sievers' case.

The proper analysis in this case is under the traditional reasonable suspicion framework because the other two lines of precedent do not apply.

The stop was not authorized
as an information seeking stop

Sievers was not the witness to a recently reported or recently discovered crime. For guidance to determine when police can make an "information seeking" stop, the State looks to the American Law Institute's Model Code of Pre-Arraignment Procedure, which proposes that an officer be allowed to make such a stop whenever:

> (i) The officer has reasonable cause to believe that a misdemeanor or felony, involving danger of forcible injury to persons or of appropriation of or danger to property, has just been committed near the place where he finds such person, and
>
> (ii) the officer has reasonable cause to believe that such person has knowledge of material aid in the investigation of such crime, and
>
> (iii) such action is reasonably necessary to obtain or verify the identification of such person, or to obtain an account of such crime.

Model Code of Pre-Arraignment Procedure § 110.2(1)(b) (1975). This proposal is in line with cases like *Brewer*, *Gipson, Garrison*, *Baxter*, and *Woldt*, where there was a report of a crime that had just been committed or officers were reacting to suspicious behavior they had witnessed themselves.

There was no report or discovery of a just completed crime in this case. This case involved pre-warrant surveillance resulting from a police investigation that had been progressing for days.

Furthermore, the circumstances of this stop do not support that it was done to seek information. Because "information seeking" stops are inherently done without probable cause nor reasonable suspicion, it is relevant to look at the subjective intentions of the officers and the circumstances of the stop. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 45–46 (2000) (while "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis, programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken ... without individualized suspicion."). It is doubtful the Supreme Court thought to authorize a stop like the one in this case when it decided *Lidster*. As its reasoning for upholding information seeking stops, the *Lidster* Court stated:

> Information-seeking highway stops are less likely to provoke anxiety or to prove intrusive. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information. And citizens will often react positively when police simply ask for their help as 'responsible citizen[s]' to 'give whatever information they may have to aid in law enforcement.'

540 U.S. at 425.

This stop played out very differently from the stop contemplated by the *Lidster* decision. Sievers was pulled over by a marked patrol car using its emergency lights; he could not anticipate arrival at a checkpoint stop. Furthermore, Sievers was asked questions that

prompted him to incriminate himself (that he had recently smoked marijuana). (84:12-16). And this stop cannot be described as brief, especially considering the intent of the stop was to prevent Sievers from leaving the target residence with stolen property. (54:7-10). Furthermore, police testified that they were "extra assertive" during the stop because the pickup truck was believed to be connected to the burglary where guns were stolen and because Sievers made furtive movements when he was first pulled over. (14:5). Sievers was almost immediately ordered out of the truck and taken to the back of a patrol cruiser. (82:22-83:5). An officer told Sievers that he was "being detained due to an investigation that was being done at the address that he had just left from." (*Id.*). Furthermore, the officer "didn't ask him specific questions as it relates" to the burglary or drug use inside the residence. (84:17-85:1).

In a separate opinion in the *Lidster* case, Justice Stevens wrote "[t]here is a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier." 540 U.S. at 428. Even if police had not stopped Sievers to determine if he was committing the crime of possession of stolen property or methamphetamine, they certainly were not stopping him to see if he had any information *about an unknown person* who committed a crime. The suspect in this case was known to police by name. In fact, police were in the process of obtaining a search warrant to search the place Sievers had left. While the search warrant affidavit mentions the traffic stop of Sievers, no information Sievers provided is included in the search warrant affidavit.

(Ex. 1). The search clearly was set to occur regardless of what Sievers told the police.

The evidence suggests that police treated Sievers closer to a suspect than as a potential witness to criminal activity. Also, the actions of police tend to negate that Sievers' cooperation was "voluntary," which is how the Supreme Court characterized the questioning in *Lidster*. 540 U.S. at 426. Sievers was stopped by a marked patrol car using emergency lights and immediately ordered out of his vehicle and told that he was being "detained." This was a classic traffic stop, not a situation where police voluntarily sought the cooperation of a potential witness who happened to be in an automobile.

Allowing police to stop a person who leaves a suspected drug house under the justification of an "information seeking" stop gives police too much discretion and sets up the potential that police can stop any person who leaves a location the police have under surveillance.

The stop was not authorized to prevent the destruction of evidence

Sievers was not seized in the immediate vicinity of the place to be searched, therefore his seizure cannot be supported by *Illinois v. McArthur*. As the *Bailey* Court stated, "If officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion under *Terry* or an arrest based on probable cause." 568 U.S. at 202.

Conclusion

For the reasons noted above, the appellee submits that the proper analysis for this case is that of reasonable suspicion.

Therefore, the State stands upon its original argument that the stop was supported by reasonable suspicion, particularly because the search warrant affidavit evinces that police saw Sievers walking from the target residence to a camper on the property appearing to conceal items in his hands before he got into the pickup truck and drove away. (Ex. 1). Police had reasonable suspicion to believe Sievers was involved in drug activity and the stop was proper for that reason.

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