No. _____

In The

Supreme Court of the United States

JEFFREY R. GILLIAM,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an individual inside a parked vehicle is seized within the meaning of the Fourth Amendment to the United States Constitution when a police officer activates a cruiser's emergency lights while positioned directly behind the parked vehicle, approaches the vehicle, knocks on the window of the vehicle, and directs the occupant to roll down the window.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Lancaster County District Court and the Nebraska Supreme Court were the State of Nebraska and petitioner, Jeffrey R. Gilliam. There were no parties to the proceeding other than those named in the caption of the case.

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The opinion of the Nebraska Supreme Court, reported as *State v. Gilliam*, 874 N.W.2d 48 (Neb. 2016), affirming petitioner's conviction and sentence was filed on February 12, 2016 and is reprinted in the Appendix (App.) at App. 1-19.

JURISDICTION

The decision of the Nebraska Supreme Court sought to be reviewed was filed on February 12, 2016. This petition is filed within 90 days of that date pursuant to the Rules of the United States Supreme Court, Rule 13.1. This Court has jurisdiction to review under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to 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.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

On October 9, 2013, an Information was filed in the Lancaster County District Court in Lancaster County, Nebraska, charging petitioner with driving under the influence, third offense. Petitioner filed a motion to suppress on March 14, 2014, asserting that his interaction with the police officer was a seizure unsupported by reasonable suspicion, and therefore, in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. App. 36-38. The trial court issued a written order overruling the motion to suppress. App. 20-35. Petitioner motioned the trial court to reconsider its ruling. The trial court overruled the motion to reconsider.

The case proceeded to jury trial during which petitioner renewed his objection to the trial court's order overruling the motion to suppress. The trial court allowed petitioner to have a continuing objection and ultimately overruled the objection. A jury found petitioner guilty of driving under the influence, third offense.

Petitioner appealed his conviction and sentence to the Nebraska Court of Appeals. The Nebraska Supreme Court moved the case to its own docket and oral arguments were heard on January 5, 2016. The Nebraska Supreme Court filed its decision on February 12, 2016, affirming the trial court's decision to overrule petitioner's motion to suppress.

SUMMARY OF FACTS

At approximately 5:39 a.m. on May 26, 2013, Lincoln Police Officer, Brock Wagner, was on duty. He was wearing a uniform and badge, and driving a marked cruiser when he was dispatched to the area of 9th and A streets on a report that a white Dodge Ram with Nebraska license plate number SYD417 was parked partially in the street and partially on the curb. Officer Wagner testified that he had limited information regarding the caller who originally reported the manner in which the Dodge Ram was parked. Officer Wagner claimed to know the reporting party's first name and phone number from reading it on the computer screen of his patrol car, but he never had any face-to-face interaction with the reporting party. His efforts to contact the reporting party after the incident were unsuccessful. Officer Wagner conceded that he had no basis to assess the reporting party's reliability.

After receiving the report, Officer Wagner drove to the area of 9th and A streets. Upon arrival, he did not see the described Dodge Ram vehicle in the area. After failing to locate the suspect vehicle, Officer Wagner was later driving in the area of 13th and Washington streets. While there, he observed a white Dodge Ram with Nebraska license plate SYD417. The vehicle was legally parked near the south curb of Washington Street between 13th and 14th streets. Officer Wagner then "initiated a traffic stop of the vehicle" by turning on his cruiser's overhead emergency lights and parking directly behind the vehicle. Officer Wagner approached the driver's side door and observed the

occupant to be awake and on his cell phone. The occupant of the vehicle was identified as petitioner.

Upon contact, Officer Wagner knocked on the driver's side window and directed petitioner to roll down the driver's side window. Petitioner complied with Officer Wagner's directive. When the window was rolled down, Officer Wagner detected an odor of alcohol, observed petitioner's eyes to be bloodshot and watery, and noticed his speech was slurred. Officer Wagner then conducted a DUI investigation which resulted in petitioner's arrest.

REASONS FOR GRANTING THE PETITION

This case presents the opportunity for this Court to clarify an important Fourth Amendment issue regarding what constitutes a seizure. The facts of petitioner's case represent a common scenario in police-citizen interactions which will undoubtedly reoccur in every jurisdiction. In affirming the trial court's order, the Nebraska Supreme Court held that no seizure occurs when an officer activates overhead emergency lights behind a parked car, approaches the vehicle, knocks on the window, and directs the occupant to roll the window down. This holding decides an important Fourth Amendment question and conflicts with the decisions of several state courts of last resort.

A seizure in the Fourth Amendment context occurs if, in view of all the circumstances surrounding the incident, a reasonable person would have believed

that he or she was not free to leave. *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382 (1991). In *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975 (1988), this Court noted some of the situations which would constitute a "show of authority," including activation of sirens or flashers.

Most state supreme courts considering the issue, under facts similar to those presented in petitioner's case, agree that a person in a parked vehicle is seized at the moment the officer activates the cruiser's emergency lights. *See, e.g., Hammons v. State*, 940 S.W.2d 424, 428 (Ark. 1997) (holding that defendant sitting in parked automobile was seized when police activated blue emergency light because the light was a display of authority that would indicate to a reasonable person he was not free to leave); *State v. Donahue*, 742 A.2d 775, 780 (Conn. 1999) (holding defendant was seized at moment officers pulled up behind parked vehicle and switched on flashing lights); *People v. Laake*, 809 N.E.2d 769, 772 (Ill. 2004) (holding that police officer's use of emergency lights, directed at occupant of parked car, is reasonably interpreted as a command not to leave); *State v. Morris*, 72 P.3d 570, 577 (Kan. 2003) (holding that defendant was seized at moment when officers pulled up behind his parked car and activated their emergency lights); *State v. Burgess*, 657 A.2d 202, 203 (Vt. 1995) (holding that even if officer subjectively intends to activate blue lights for safety reasons, the use of the lights on the defendant's parked vehicle served as a restraint to prevent his departure from the pull-off area of the road); *State v. Willoughby*, 211 P.3d

91 (Idaho 2009) (holding that "officers' use of overhead emergency lights in close proximity to a parked vehicle" produced a seizure, given the state's failure to include in the record other circumstances); *Commonwealth v. Smigliano*, 694 N.E.2d 341 (Mass. 1998) (holding that where defendant stopped his automobile and then "the officer pulled up behind it, activated his blue lights, and got out of his cruiser to approach the car," this was a seizure, as "a reasonable person, on the activation of a police car's blue lights, would believe that he or she is not free to leave"); *State v. Icard*, 677 S.E.2d 822 (N.C. 2009) (holding that a seizure occurred when one officer illuminated parked truck with his blue lights and backup officer illuminated defendant-passenger's side of vehicle with take-down lights); *State v. Thompson*, 793 N.W.2d 185 (N.D. 2011) (holding where defendant pulled into space in parking lot and police officer pulled in behind him and turned on emergency lights, defendant had been seized); *State v. Moats*, 403 S.W.3d 170 (Tenn. 2013) (holding where officer parked immediately behind parked truck, which was the only vehicle in the lot, and activated blue lights where "no objective indication" that lights were necessary to protect defendant or other motorists, this constituted a seizure); *State v. Greever*, 183 P.3d 788 (Kan. 2008) (holding that when officer pulled up behind defendant's parked car, "activated the emergency lights on the patrol car," and then approached the car and "tapped on the window" on driver's side, there was a seizure); *State v. Graham*, 175 P.3d 885 (Mont. 2007) (holding there was a seizure when officer parked car behind defendant's car and "activated her emergency lights");

State v. Williams, 185 S.W.3d 311 (Tenn. 2006) (holding "that a person in a parked vehicle is seized at the moment when the officer activates the emergency lights" even if "the officer may have subjectively intended to activate his blue lights solely for his safety and the safety of others on the road").

In support of its decision, the Nebraska Supreme Court only cited to one case, *U.S. v. Clements*, 522 F.3d 790 (7th Cir. 2008). The Seventh Circuit is the only federal circuit court to specifically address whether an individual is seized at the moment an officer activates emergency lights behind a parked car. While the court in *Clements* stated it would not find a seizure occurred under these circumstances, it is important to note that this was dicta. It was unnecessary for the court to determine whether a seizure occurred in *Clements* because it held that the defendant had waived the issue by failing to file a motion to suppress. *Id*. at 793-94.

At least one other state and the District of Columbia Court of Appeals have also relied on the decision in *Clements*. *See State v. Steeves*, 972 A.2d 1033 (N.H. 2009) (holding there was no seizure when officer pulled up behind a parked motorcycle and activated the spotlight, "takedown" lights, and rear blue lights); *Jacobs v. U.S.*, 981 A.2d 579 (D.C. 2009) (holding there was no seizure when officers pulled behind a parked car, activated the emergency lights, approached the vehicle, and requested that the driver roll down the window). In holding that petitioner was not seized when the officer activated his emergency lights behind petitioner's

parked vehicle, the Nebraska Supreme Court contradicted the overwhelming weight of state supreme court authority. Such a conflict undermines the uniformity of application of the Fourth Amendment. Absent a decision by this Court, the discord between states will continue, as rulings by the court of last resort in a state is definitive, and change to that ruling unlikely. Additionally, a decision by this Court would assist law enforcement in conforming their actions with Fourth Amendment requirements, reducing the risk of a violation. Finally, a decision by this Court would control the final outcome of petitioner's case.

CONCLUSION

Petitioner respectfully requests that this Court grant the petition.

Respectfully submitted,

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OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

STATE OF NEBRASKA, APPELLEE,
V.
JEFFREY GILLIAM, APPELLANT.

Case Caption

STATE V. GILLIAM

Filed February 12, 2016. No. S-15-373.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Affirmed.

Mark E. Rappl, Lincoln, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

I. INTRODUCTION

In this direct appeal, Jeffrey Gilliam challenges the district court's denial of his pretrial motion to suppress evidence and the court's use of a conviction from a Missouri court to enhance his sentence for driving under the influence of alcohol (DUI). We reject Gilliam's first argument, because his initial encounter with police fell outside the realm of the Fourth Amendment. And his argument regarding enhancement fails, because a suspended imposition of sentence in the

prior Missouri case qualifies as a "prior conviction" under the pertinent statute. We affirm his conviction and sentence.

II. BACKGROUND

Gilliam was arrested for DUI after an encounter with a police officer. An information filed in the district court for Lancaster County charged Gilliam with DUI and alleged that Gilliam had two prior convictions.

1. Motion to Suppress

Gilliam filed a pretrial motion to suppress all evidence gathered as a result of his encounter with the police officer. He argued that he was seized and that his seizure was unsupported by reasonable suspicion.

(a) Hearing

Officer Brock Wagner of the Lincoln Police Department testified at the suppression hearing. Wagner testified that on May 26, 2013, at approximately 5:39 a.m., he received a report from police dispatch that a white Dodge Ram, license plate No. SYD 417, was parked partially on the curb and partially on the street in the area of Ninth and A Streets. Wagner drove to the area in his marked patrol unit to investigate, but he did not see the reported Dodge Ram when he arrived. He turned onto a different street, where he saw the reported Dodge Ram parked legally on the side of the street. It was running, and its lights were on.

Wagner pulled behind the Dodge Ram and activated his patrol unit's overhead lights. He exited his patrol unit, knocked on the window, and directed Gilliam, who was in the driver's seat, to roll down the window, and Gilliam complied. Wagner observed that Gilliam had a strong odor of alcohol on his breath; watery, bloodshot eyes; and slurred speech. Wagner asked to see Gilliam's driver's license, and Gilliam produced it. Wagner then conducted a DUI investigation and arrested Gilliam for DUI. Wagner testified that he was dressed in his uniform, wearing his badge, and carrying a gun when his encounter with Gilliam occurred.

(b) Order

At the end of the suppression hearing, the district court took the matter under advisement. It later issued a written order overruling Gilliam's motion to suppress. It concluded that Gilliam's encounter with Wagner did not begin as a seizure; rather, it began as a consensual or "first-tier" encounter that did not implicate Fourth Amendment protections. The district court further concluded that Wagner had reasonable suspicion to expand his initial contact with Gilliam into a DUI investigation.

The district court rejected Gilliam's argument that "'a person in a parked vehicle is seized at the moment when the officer activates the emergency lights.'" It explained that "there are a myriad of circumstances under which police are authorized to use overhead lights – many of which have nothing whatsoever to do

with a seizure." And it observed that adopting Gilliam's approach "would have the practical effect of making every police-citizen contact a seizure once overhead lights are activated, regardless of the other circumstances surrounding the contact."

Finally, the district court concluded that Wagner obtained reasonable suspicion to extend the encounter into a DUI investigation when Gilliam rolled down his window. At that point, Wagner observed the strong odor of alcohol and Gilliam's bloodshot eyes and slurred speech, which provided reasonable suspicion of criminal activity.

2. ENHANCEMENT

Gilliam proceeded to trial and was convicted by a jury of DUI. An enhancement hearing was held, and the State offered two exhibits: a certified copy of a prior DUI conviction from Nebraska and a certified copy of a document from Missouri titled "JUDGMENT OF COURT UPON PLEA OF GUILTY" (Missouri judgment). The Missouri judgment indicated that in 2004, Gilliam appeared with an attorney and pled guilty to driving while intoxicated (DWI) in a Missouri court. It showed that the judge found a factual basis for Gilliam's plea of guilty, approved it, and accepted it. But it also showed that the imposition of his sentence was suspended and that he was placed on probation for 2 years.

Gilliam did not object to the receipt of the Missouri judgment, but argued that because the suspended imposition of a sentence is not considered a final judgment[1] or a conviction[2] in Missouri, it cannot be considered a prior conviction for the purposes of sentence enhancement under Nebraska law. He asked the court to take judicial notice of the Missouri sentencing statute that authorizes courts to suspend the imposition of a sentence,[3] but he otherwise presented no evidence at the hearing.

The district court concluded that the State had met its initial burden of proving Gilliam's prior Missouri DWI conviction by a preponderance of the evidence. It determined that the Missouri judgment "reflects, with requisite trustworthiness, the Missouri court's acceptance of [Gilliam's] guilty plea to the charge of DWI and the court's act of rendering judgment and disposition thereon." It also found that the Missouri conviction was counseled and that the offense would have been a violation of Nebraska's DUI laws.

The district court noted that once the State had met its burden, the burden shifted to Gilliam to introduce evidence "rebutting the statutory presumption that the Missouri [judgment] is valid for purposes of enhancement." Gilliam presented no evidence. Accordingly, the district court found that Gilliam was convicted of DUI or the equivalent offense on two prior

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[1] *See Yale v. City of Independence*, 846 S.W.2d 193 (Mo. 1993).

[2] *Id.*

[3] Mo. Rev. Stat. § 557.011 (West Cum. Supp. 2016).

occasions. And it concluded that the prior convictions were valid for the purposes of enhancement. The district court sentenced Gilliam to probation for a period of 36 months. The terms of the probation included a 60-day jail sentence, a fine, and other restrictions.

Gilliam filed a timely appeal, which we moved to our docket in order to resolve the enhancement issue, which is an issue of first impression.[4]

III. ASSIGNMENTS OF ERROR

Gilliam assigns that the district court erred in (1) overruling his motion to suppress and (2) concluding that his DWI conviction from the State of Missouri was a valid prior conviction for enhancement purposes.

IV. STANDARD OF REVIEW

In reviewing a trial court's ruling on a motion to suppress evidence based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review.[5] Regarding historical facts, we review the trial court's findings for clear error.[6] But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[7]

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[4] *See* Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[5] *State v. Modlin*, 291 Neb. 660, 867 N.W.2d 609 (2015).

[6] *Id.*

[7] *Id.*

Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[8]

On a claim of insufficiency of the evidence, an appellate court, viewing and construing the evidence most favorably to the State, will not set aside a finding of a previous conviction for the purposes of sentence enhancement supported by relevant evidence.[9]

V. ANALYSIS

1. SEIZURE

Gilliam claims that the district court erred when it overruled his motion to suppress the evidence obtained as a result of his encounter with Wagner. He argues that Wagner's activation of his patrol unit's overhead lights was a show of authority that transformed the initial encounter into a seizure for Fourth Amendment purposes. We disagree.

The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.[10] Evidence obtained as the fruit of an illegal search or

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[8] *State v. Taylor*, 286 Neb. 966, 840 N.W.2d 526 (2013).

[9] *Id.*

[10] *State v. Modlin*, *supra* note 5.

seizure is inadmissible in a state prosecution and must be excluded.[11]

To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment to the U.S. Constitution, an appellate court employs the analysis set forth in *State v. Van Ackeren*.[12] *Van Ackeren* describes three levels, or tiers, of police-citizen encounters.[13]

The first tier does not implicate the Fourth Amendment. A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen.[14] Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection.[15]

However, second or third tier encounters require constitutional analysis. A tier-two police-citizen encounter constitutes an investigatory stop as defined by *Terry v. Ohio*.[16] Such an encounter involves a brief, nonintrusive detention during a frisk for weapons or

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[11] *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

[12] *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[13] *See State v. Wells*, *supra* note 11.

[14] *Id.*

[15] *See State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[16] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *See State v. Wells*, *supra* note 11.

preliminary questioning.[17] A tier-three police-citizen encounter constitutes an arrest.[18] An arrest involves a highly intrusive or lengthy search or detention.[19] Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.[20]

A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.[21] In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.[22] We have concluded that a police officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the

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[17] *State v. Wells*, *supra* note 11.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *State v. Hedgcock*, *supra* note 15.

[22] *Id. See United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

questioning is carried on without interrupting or restraining the person's movement.[23]

The circumstances of the instant case reveal that Wagner was merely questioning Gilliam in a public place. Wagner contacted Gilliam while he was voluntarily parked in a public place in the early morning hours. He approached Gilliam's vehicle alone and on foot. He knocked on the window and asked to see Gilliam's identification. There is no evidence that Wagner displayed his weapon, used a forceful tone of voice, touched Gilliam, or otherwise told Gilliam that he was not free to leave.

Gilliam points to Wagner's activation of his patrol unit's overhead lights as evidence that he was not free to leave. But as the district court observed, there are a variety of reasons that officers may activate their overhead lights. And as the U.S. Court of Appeals for the Seventh Circuit observed in a case with circumstances similar to this one, one reason officers activate their overhead lights before approaching a parked vehicle is "to alert the car's occupants that they [are] going to approach the vehicle."[24] In that similar case, the Seventh Circuit court concluded that where a vehicle was parked and running at night, overhead lights alone were not sufficient to create a seizure. It reasoned that "[w]ithout identifying themselves appropriately to the

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[23] *Id. See State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

[24] *U.S. v. Clements*, 522 F.3d 790, 794 (7th Cir. 2008).

car's occupants, the officers would have put themselves at risk in approaching a parked car late at night."[25]

Under the circumstances of the instant case, the overhead lights, standing alone, would not have caused a reasonable person to believe that he was not free to leave. A reasonable person, parked on the side of the street at night or in the early morning hours, would understand that there are a variety of reasons an officer may activate his overhead lights before approaching him, including officer safety. Because none of the other circumstances would have made a reasonable person believe that he was not free to leave, we conclude that Gilliam's encounter with Wagner began as a tier-one encounter. Thus, he was not seized when Wagner approached him, and the Fourth Amendment was not implicated.

Gilliam does not challenge the district court's determination that Wagner obtained reasonable suspicion to expand the initial encounter into a DUI investigation when Gilliam opened his window. Therefore, we conclude that the district court did not err in denying Gilliam's motion to suppress.

2. ENHANCEMENT

Gilliam claims that the district court erred in using his Missouri DWI conviction to enhance his sentence. He argues that the Missouri judgment does not

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[25] *Id*. at 794-95.

constitute evidence of a prior conviction for enhancement purposes, because the Missouri Supreme Court has declared that a suspended imposition of sentence does not constitute a "conviction" in Missouri.[26] He also argues that the State did not show that his Missouri DWI conviction was final.

Neb. Rev. Stat. § 60-6,197.03 (Cum. Supp. 2012) delineates the penalties for DUI convictions. Those penalties include enhanced sentences for offenders who have had prior convictions.

The term "prior conviction" is defined by statute.[27] It provides that when a sentence is being imposed for a violation of Nebraska's general prohibition against DUI,[28] prior conviction means "[a]ny conviction under a law of another state if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of" one of Nebraska's DUI statutes.[29] It does not define the word "conviction."

Before we can review the district court's finding that the State proved Gilliam's prior conviction in Missouri, we must first determine what the word "conviction" means within the phrase, "[a]ny conviction under a law of another state." Statutory language is to be given its plain and ordinary meaning, and this court

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[26] *See Yale v. City of Independence*, *supra* note 1.

[27] Neb. Rev. Stat. § 60-6,197.02 (Cum. Supp. 2014).

[28] Neb. Rev. Stat. § 60-6,196 (Reissue 2010).

[29] § 60-6,197.02(1)(a)(i)(C).

will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[30] It is not within the province of this court to read a meaning into a statute that is not warranted by the legislative language.[31]

We often turn to dictionaries to ascertain a word's plain and ordinary meaning.[32] Black's Law Dictionary defines "conviction" as "[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. . . ."[33] Webster's Third New International Dictionary defines "conviction" as "the act of proving, finding, or adjudging a person guilty of an offense or crime."[34] These definitions square with our understanding of "conviction" in prior cases. We have consistently stated that "[a] plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest order. The effect of it is to authorize the imposition of the sentence prescribed by law on a

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[30] *State v. Taylor*, *supra* note 8.

[31] *Id.*

[32] *See, e.g., Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015) (citing Black's Law Dictionary for plain meaning of "public place"); *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment*, 287 Neb. 779, 844 N.W.2d 755 (2014) (citing Webster's Dictionary for plain meaning of "discontinue"); *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004) (citing several dictionaries for plain meaning of "indigent"); *Payless Bldg. Ctr. v. Wilmoth*, 254 Neb. 998, 581 N.W.2d 420 (1998) (citing Webster's Third New International Dictionary for plain meaning of "individual").

[33] Black's Law Dictionary 408 (10th ed. 2014).

[34] Webster's Third New International Dictionary of the English Language, Unabridged 499 (1993).

verdict of guilty of the crime charged."[35] We have also stated that "a plea of no contest, when voluntarily entered and accepted by the court, is a conviction, empowering the court to impose the sentence authorized by statute."[36]

We apply the plain and ordinary meaning of the word "conviction" to the statute before us. For the purposes of § 60-6,197.02, the word "conviction" means a finding of guilt by a jury or a judge, or a judge's acceptance of a plea of guilty or no contest.

We now review the district court's finding that the State had met its burden of proving Gilliam's prior conviction. In order to prove a prior conviction for purposes of sentence enhancement, the State has the burden to prove the fact of prior convictions by the greater weight of the evidence, and the trial court determines the fact of prior convictions based upon the greater weight of the evidence standard.[37] The greater weight of the evidence requires proof which leads the trier of fact to find that the existence of the contested

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[35] *Stewart v. Ress*, 164 Neb. 876, 881, 83 N.W.2d 901, 904 (1957). *See, also, State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004); *State v. Ondrak*, 212 Neb. 840, 326 N.W.2d 188 (1982); *Taylor v. State*, 159 Neb. 210, 66 N.W.2d 514 (1954). Cf. *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

[36] *State v. McKain*, 230 Neb. 817, 818, 434 N.W.2d 10, 11 (1989).

[37] *See State v. Taylor*, *supra* note 8. *See, also, Flores v. Flores-Guerrero*, 290 Neb. 248, 253, 859 N.W.2d 578, 583 (2015) ("preponderance of the evidence" is equivalent of " ' "greater weight" ' of the evidence").

fact is more likely true than not true.[38] On an appeal of a sentence enhancement hearing, we view and construe the evidence most favorably to the State.[39]

Regarding the process by which the prior conviction must be proved, § 60-6,197.02 provides: "The prosecutor shall present as evidence for purposes of sentence enhancement a court-certified copy or an authenticated copy of a prior conviction in another state. The court-certified or authenticated copy shall be prima facie evidence of such prior conviction."[40] That section also directs that once the prosecutor has presented prima facie evidence, "[t]he convicted person shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions."[41]

We conclude that the district court's finding was supported by relevant evidence. The State introduced the Missouri judgment, which indicates that Gilliam pled "guilty as charged" to DWI in Missouri and that the judge accepted his plea. Therefore, the Missouri judgment constitutes a certified copy of a prior conviction in another state and is prima facie evidence of the prior conviction. And Gilliam does not claim that the Missouri conviction would not have been a violation of

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[38] *See State v. Taylor*, *supra* note 8.

[39] *Id*.

[40] § 60-6,197.02(2).

[41] § 60-6,197.02(3).

Nebraska's DUI laws. Thus, the State met its burden, and the district court did not err in enhancing Gilliam's sentence.

Gilliam's two arguments that we should reach a contrary conclusion are meritless. First, Gilliam argues that we must analyze Missouri law to determine whether the Missouri judgment constitutes a "conviction under a law of another state" under § 60-6,197.02. We disagree. The meaning of the phrase is plain – it requires a finding of guilt or an acceptance of a guilty or no contest plea under a law of another state. That is satisfied here. The plain terms of the statute do not require an analysis of Missouri law.

And even if we were to examine Missouri law, we would reach the same conclusion. In a Missouri Supreme Court decision,[42] the court addressed the term "conviction" as used in a municipality's employee manual. It was in that context that the court concluded that a suspended imposition of sentence was not a conviction. But the court observed that the Missouri Legislature had provided otherwise in specific instances. And, particularly pertinent here, the court recognized that a specific Missouri statute[43] treated a plea of guilty, finding of guilt, or disposition of suspended imposition of sentence as a "conviction, or 'final disposition,' in alcohol or drug related driving offenses."[44]

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[42] *Yale v. City of Independence*, *supra* note 1.

[43] Mo. Rev. Stat. § 577.051.1 (1986).

[44] *Yale v. City of Independence*, *supra* note 1, 846 S.W.2d at 195.

A change in Missouri's statutory framework for enhancement of intoxication-related traffic offenses, enacted after the date of Gilliam's conviction, does not change the result. Although Missouri no longer looks to a "conviction" in intoxication-related traffic offenses for purposes of enhancement, it still treats a suspended imposition of sentence as an event qualifying as a necessary predicate for enhancement. The Missouri Legislature treated a suspended imposition of sentence in an intoxication-related traffic offense as a "conviction" sufficient to enhance an offender's sentence for a subsequent intoxication-related traffic offense until 2008. In 2008, it changed the terminology of its enhancement statute.[45] It removed the word "conviction" and substituted definitions employing the phrases "has pleaded guilty to or has been found guilty of" and "intoxication-related traffic offenses."[46] But despite the changes in nomenclature, the current Missouri statute states that a "suspended imposition of sentence" is to be treated as a "prior plea of guilty or finding of guilt."[47] Thus, the effect remains the same – Missouri considers a suspended imposition of sentence for an intoxication-related traffic offense sufficient to enhance a sentence for a subsequent intoxication-related traffic offense. And, ultimately, the question is not whether Missouri would characterize the 2004 event as a "conviction" under its current enhancement statute, but whether it qualifies as a prior conviction

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[45] *See* H.B. 1715, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008).

[46] Mo. Rev. Stat. § 577.023 (West 2011).

[47] § 577.023(16).

under the Nebraska statute. We have already explained why it does, and the change in Missouri's terminology does not affect our conclusion.

Second, Gilliam claims that the State was required to establish that the Missouri judgment was a final conviction. In this argument, he does not rely upon Missouri law, which, as we have noted, does not support his assertion. Rather, he recites that in Nebraska, a judgment is not final until a convicted person is sentenced.[48] And he argues that because the Missouri judgment indicates that his sentence was suspended, the State did not sufficiently prove a final conviction.

Gilliam relies on *State v. Estes*.[49] There, we cited *Nelson v. State*[50] for the following rule: "To constitute a basis for enhancement of punishment on a charge of a second or subsequent offense, the prior conviction relied upon for enhancement must be a final conviction."[51] In *Nelson*, we said: "[W]here the evidence of one of the former violations charged shows that proceedings in error are pending and undisposed of which might result in a reversal of such judgment, such

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[48] *See State v. Kaba*, 210 Neb. 503, 315 N.W.2d 456 (1982).

[49] *State v. Estes*, 238 Neb. 692, 472 N.W.2d 214 (1991).

[50] *Nelson v. State*, 116 Neb. 219, 216 N.W. 556 (1927).

[51] *State v. Estes*, *supra* note 49, 238 Neb. at 695, 472 N.W.2d at 216.

evidence is insufficient and incompetent to establish a former conviction."[52]

The rule pronounced in *Nelson* and repeated in *Estes* applies when the evidence presented by the State shows that a prior conviction is pending on appeal. The record in the instant case does not indicate that an appeal is pending, and Gilliam does not contend that he has appealed the Missouri conviction. Thus, *Nelson* and *Estes* are inapplicable. The terms of § 60-6,197.02 do not require the prosecution to prove that an appeal is not pending or that the conviction is otherwise final. We will not read into a statute requirements that are not there.

VI. CONCLUSION

We conclude that the district court did not err by overruling Gilliam's motion to suppress. Further, we conclude that the district court did not err in using Gilliam's Missouri conviction to enhance his sentence. Therefore, we affirm.

AFFIRMED.

STACY, J., not participating.

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[52] *Nelson v. State*, *supra* note 50, 116 Neb. at 221, 216 N.W. at 557.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	**CR13-1196**
Plaintiff,	)	**ORDER**
vs.	)	(Filed Dec. 1, 2014)
JEFFREY GILLIAM,	)	
Defendant.	)	

Defendant's Motion to Suppress evidence (filing #4) came on for hearing June 16, 2014. The State appeared by Deputy Lancaster County Attorney Nick Freeman, and the Defendant was present with his attorney Mark Rappl. Evidence was adduced, argument was heard, and briefing was waived by all parties. The motion was taken under advisement.

Thereafter, on August 29, 2014, the court requested briefing from the parties regarding the decision released by the Supreme Court in *State v. Rodriguez*, 288 Neb. 878 (August 18, 2014) and any impact that holding or analysis may have on the issues under advisement in the present case. On September 26, 2014 the Defendant submitted a letter brief, and the State submitted an e-mail summarizing its position but declining the opportunity to brief the issues.

Having now considered the evidence and the arguments of counsel, this court finds and orders as follows.

BACKGROUND

In a single-count Information, the Defendant is charged with DUI .15 or over (2 prior convictions), a class IIIA felony. Defendant's motion seeks suppression of all evidence gathered by law enforcement as a result of the contact on May 26, 2013, on grounds the contact amounted to a seizure that was unsupported by reasonable suspicion and violated the Defendant's right to be free from unreasonable searches and seizures as guaranteed by the State and United States Constitutions.

FACTUAL FINDINGS

Lincoln Police Officer Brock Wagner testified that in the early morning hours of May 26, 2013, he was on duty, in uniform, driving a marked police cruiser, when he was dispatched to the area of 9th and "A" streets on a report that a white Dodge Ram with the license plate SYD417 was parked partially in the street, and partially on the curb/grass. Wagner testified that in addition to the fact that parking is not permitted in that area of 9th Street, the report was concerning to him because: 1) it was dark outside and the Dodge Ram presented a traffic hazard for other vehicles traveling on the one-way street; and 2) the unusual manner in which the vehicle was parked and the timing of the report (overnight on a weekend) concerned the officer because, based on his training and experience, a higher number of individuals drink and drive during that

time frame and "that kind of parking cause[d] . . . concern about a DUI."

When Officer Wagner received the dispatch he was at the police sub-station near 13th and "F" Streets, and it took him approximately two minutes to drive to the area of 9th and "A" Streets. When he arrived at 9th and "A" he did not see a Dodge Ram in the area, so he turned east onto Washington Street intending to return to the police sub-station. While stopped at the stop sign protecting the intersection of 13th and Washington Streets, Officer Wagner observed a white Dodge Ram with the license plate SYD417 parked on Washington Street between 13th and 14th Streets.[1]

Officer Wagner testified the Dodge Ram was parked alongside the curb with its headlights on and the motor running. Officer Wagner pulled in behind the Dodge Ram, activated the cruiser's overhead emergency lights, and walked up to the driver's side of the pickup. The officer made contact with the driver (and only occupant) of the Dodge Ram by knocking on the window, after which the driver rolled the window down. The officer asked the driver for his license, and the driver complied. The driver was identified by his Nebraska Driver's License as Jeffrey Gilliam. Officer Wagner noticed the driver had a strong odor of alcohol, blood shot watery eyes and slurred speech, after which

[1] Officer Wagner testified that street parking is permitted in the area of Washington Street where the pickup was parked, and further testified that this area is approximately 3 1/2 blocks from 9th and "A" (where the caller reported seeing the Dodge Ram parked partially on the curb/grass).

the officer conducted a DUI investigation. Eventually, Mr. Gilliam was arrested for DUI.

Officer Wagner testified he had limited information regarding the caller who originally reported a Dodge Ram illegally parked on 9th Street. The officer knew the reporting party's first name and a phone number from reading it on the computer screen in his patrol car, but he never spoke with the reporting party and his efforts to contact the reporting party after the incident were unsuccessful.[2] On cross-examination, Officer Wagner admitted that as a result of his inability to track down the caller, he had no basis to assess the caller's reliability. Officer Wagner also admitted he didn't know who was driving the Dodge Ram in the area of 9th and "A" Streets, nor did he know how long the Dodge Ram may have been parked on 9th Street.

ANALYSIS

The Fourth Amendment to the United States Constitution, and Article I, §7 of the Nebraska Constitution, protect against unreasonable searches and seizures. *State v. Rodriguez*, 288 Neb. 878, 884 (2014); *State v. Dalland*, 287 Neb. 231 (2014). The right to be free from unreasonable searches and seizures "requires that an arrest be based on probable cause and

[2] Officer Wagner testified that after arresting the Defendant for DUI, he called the number of the reporting party twice to get additional information to put into his report, but the calls went to voice mail. The officer testified he has not tried to contact the reporting party since that time.

limits investigatory stops to those made upon an articulable suspicion of criminal activity." *State v. Rodriguez*, 288 Neb. at 884 (citing *State v. Wollman*, 280 Neb. 43 (2010)).

To determine whether an encounter between a police officer and a citizen amounts to a seizure under the Fourth Amendment, Nebraska courts employ the three-tier analysis set forth in *State v. Van Ackeren*, 242 Neb. 479 (1993). A first-tier police/citizen encounter "involves no restraint on the liberty of the citizen involved, but rather the voluntary cooperation of the citizen is elicited through non-coercive questioning." *Id.* at 486. This type of contact does not rise to the level of a seizure and therefore is considered outside the realm of Fourth Amendment protection. *Id.* Only second- and third-tier encounters are considered seizures, sufficient to invoke the protection of the Fourth Amendment. A second-tier encounter is an "investigative stop" which is limited to a brief, non-intrusive detention during preliminary questioning or a frisk for weapons. *Id.* at 486. Second-tier encounters are less intrusive than an arrest, and require only that the officer have specific and articulable facts sufficient to give reasonable suspicion that a person has committed or is committing a crime. *Id.* A third-tier encounter is an arrest, and because of the intrusive and lengthy nature of an arrest, it must be supported by probable cause to believe the person has committed or is committing a crime. *Id.* at 479.

Was the initial contact a first-tier or second-tier encounter?

The Defendant argues Officer Wagner's initial contact with him on Washington Street was a second-tier contact, and further argues the seizure was not supported by reasonable suspicion because the reliability of the person who called to report the illegally-parked Dodge Ram was not determined. In response, the State argues the initial contact is more appropriately characterized as a first-tier contact which doesn't implicate the Fourth Amendment, because the Defendant's vehicle was already stopped and parked at the time the officer made contact.[3]

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[3] The court notes the State has changed its position somewhat regarding the threshold question of whether Officer Wagner's contact with the Defendant is properly characterized as a first-tier or a second-tier encounter. At the hearing on the motion to suppress, the State's argument initially focused on the fact that Mr. Gilliam's vehicle already was stopped and parked when Officer Wagner pulled up behind it and activated his lights, and in reliance on those facts the State argued there was no classic "traffic stop" and the contact began as a first-tier encounter which does not trigger Fourth Amendment protections. But after articulating this position the State's attorney then stated: "The State would concede that it would not be reasonable for that person to think that they could just drive off" after which the State focused its oral argument on second-tier encounters, stating:

> But, the State would argue that based on circumstances of this particular stop, his initial contact with Mr. Gilliam was not – was not much more than a *Terry* stop. Basically, he had suspicion that illegal activity was going on. He stopped him for a very brief period of time to dispel his suspicion. Instead of dispelling his suspicion it was enhanced and a DUI investigation did continue.

A seizure requiring Fourth Amendment protection occurs "only if, in view of all reasonable circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *State v. Anderson*, 258 Neb. 627 (2000). *See also*, *U.S. v. Mendenhall*, 446 U.S. 544, 553 (1980). A seizure "does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, provided the officer does not indicate that compliance with his or her request is required." *State v. Hedgcock*, 277 Neb. 805, 813-14 (2009).

Thereafter, in an e-mail to the court and opposing counsel summarizing the State's position on the Motion to Suppress, the State returned to its original position and argued:

> The State would argue that this was not a stop and started as a tier-one contact, as Mr. Gilliam had already stopped his vehicle and was parked. The fact that the officer activated his lights does not change that fact. There is no evidence that Mr. Gilliam even saw the lights or submitted to the authority of Officer Wagner as to constitute a seizure. Once the officer made contact with Mr. Gilliam, at the driver's side window, he noticed an odor of alcohol and then had reasonable suspicion to further investigate.

The court recites this history not to be critical of the State's evolving position, but to make clear that it would be inaccurate to suggest the State has conceded the question of whether the encounter in this case began as a first-tier encounter. *Compare State v. Rodriguez*, 288 Neb. 878, 884 (2014) (noting the State conceded on appeal that the initial contact was a tier-two encounter, so the Court of Appeal analyzed it as such and neither party complained of that on further appeal so the Supreme Court "accepted that the contact was a traffic stop" despite fact that the defendant's vehicle was already stopped at the point when the officer pulled up behind it, activated his lights, and approached the vehicle).

Moreover, the Nebraska Supreme Court has made clear that:

> a police officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the persons's [sic] movement. In other words, a seizure does not occur simply by reason of the fact that a police officer approaches an individual, asks him or her for identification, and poses a few questions to that individual.

Hedgcock, 277 Neb. at 814 (citing *State v. Twohig*, 238 Neb. 92 (1991)).

To determine whether a particular encounter is properly characterized as a first-, second- or third-tier encounter, courts are to consider all of the circumstances surrounding the incident and determine whether a reasonable person under those circumstances would believe they were not free to leave. *State v. Hedgcock*, 277 Neb. at 814-15. In addition to situations where an officer directly tells a suspect they are not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, an officer displaying a weapon, an officer physically touching an individual, or an officer using language or a tone of voice to indicate compliance with the officer's request might be compelled. *U.S. v. Mendenhall*, 446 U.S. at 554 (*citing Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1980)). It is

clear from Fourth Amendment jurisprudence that officers can approach individuals in public and ask them questions without necessarily implicating the Fourth Amendment, and courts have applied the same totality-of-the-circumstances analysis whether the citizen is walking down the sidewalk, standing in a parking lot, or seated in their vehicle when contacted by police.

Applying the standards recited above, this court finds the following circumstances to be relevant: When Officer Wagner first encountered Mr. Gilliam he was sitting in his pickup, parked along-side the curb on a public street. The officer pulled in and parked behind the pickup (rather than next to or in front of the pickup). There is no evidence suggesting the position of the police cruiser or any other vehicles resulted in the pickup being blocked in or prevented from pulling away easily. The officer activated the cruiser's overhead emergency lights, but there is no evidence he used the siren or bullhorn at any point. There is no evidence as to how long the cruiser's overhead lights remained on, or whether Mr. Gilliam even noticed the lights. Officer Wagner got out of his police cruiser, approached the driver's side of Mr. Gilliam's pickup, and knocked on the driver's window, in response to which Mr. Gilliam rolled his window down and the two began talking. Officer Wagner asked the driver for his identification and Mr. Gilliam complied. Officer Wagner was in full uniform but there is no evidence he displayed or drew his service weapon or baton during the contact, nor is there any evidence the officer physically touched Mr. Gilliam at any point in the contact, used a threatening tone, or made any statement suggesting Mr.

Gilliam was not free to leave at that point. Officer Wagner asked for Mr. Gilliam's license and Mr. Gilliam provided it. The overarching question for purposes of the Fourth Amendment, is whether – given the circumstances just described – a reasonable person would believe they were not free to end the contact and leave.

The vast majority of the circumstances recited above militate against a conclusion that Mr. Gilliam had been seized. The officer approached a citizen who was stopped in a public place, asked for identification, and posed a few questions – all factors indicative of a classic first-tier encounter. There was no evidence Mr. Gilliam was trying to leave when the officer approached him, nor was there any evidence suggesting Officer Wagner interrupted or restrained Mr. Gilliam's movement in any respect to conduct the preliminary questioning. However, the Defendant argues there is one factor in particular which transforms this classic first-tier encounter into a second-tier encounter: the fact that Officer Wagner activated the overhead emergency lights on his police cruiser before he approached Mr. Gilliam's pickup. The Defendant argues that "a person in a parked vehicle is seized at the moment when the officer activates the emergency lights." (Defendant's Brief p.2) Basically, it is the Defendant's position that once an officer activates the overhead lights on their police cruiser, it is an *ipso facto* seizure.

The blanket rule suggested by the Defendant fails to consider all of the circumstances surrounding a particular encounter, and instead considers only one circumstance: the activation of overhead lights. One

problem with Defendant's approach is that the law recognizes (and common experience confirms) there are a myriad of circumstances under which police are authorized to use overhead lights – many of which have nothing whatsoever to do with a seizure. An officer may activate a cruiser's overhead lights while en route to a service call or an emergency, NEB. REV. STAT. § 60-6,233(1)(a) (Reissue 2010), to indicate to other drivers and pedestrians they should pull aside and allow the emergency vehicle to safely pass. NEB. REV. STAT. § 60-6,151(1)(a) and (b) (Reissue 2010). An officer who has stopped his or her cruiser alongside the road may activate the cruiser's overhead lights to indicate to other drivers they are to move over and proceed with due care unless otherwise directed by a peace officer. NEB. REV. STAT. § 60-6,378(1)(a) and (b) (Reissue 2010). There are a variety of reasons police might activate overhead emergency lights after stopping their cruiser, particularly at night. Flashing overhead lights on police cruisers are used to warn motorists of traffic hazards or accidents, to warn motorists that vehicles are stopped or disabled along the roadway, and to signal to the public that an officer is responding to an emergency, or a service call, or directing traffic, and they should proceed around the cruiser with care.[4]

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[4] It is important to note that this case does not involve a classic traffic-stop situation where flashing overhead lights and sirens were used by police to compel a moving vehicle to pull off the road and stop (as is common in a police pursuit or when an officer observes a moving traffic violation). Indeed, if the circumstances had been different and if Officer Wagner had observed Mr. Gilliam's pickup driving down the street, and then initiated a traditional traffic stop based only on the information provided by dispatch, then this

In the present case, there was no evidence adduced regarding why Officer Wagner activated the cruiser's overhead emergency lights after he pulled in and parked behind Mr. Gilliam's parked vehicle, but whether it was to announce his presence or to signal that he wanted to talk with the occupant of the pickup, the officer's subjective intent is not central to the Fourth Amendment analysis. The proper focus is on whether – given *all* of the circumstances surrounding the encounter – a reasonable person in Mr. Gilliam's position would have believed he was not free to end the encounter and leave.

In this case the Defendant's pickup was parked along side the roadway, in the dark, with the engine running and the headlights on. A police car pulled up behind the pickup and parked in a fashion which did not prevent the pickup from leaving, and the officer approached the driver to ask some preliminary questions. There was no evidence Mr. Gilliam was trying to leave when the officer approached him, no evidence of a show of force or physical restraint, no evidence the officer used a threatening tone or made any statements to Mr. Gilliam suggesting he was not able to end the contact and leave. Under such circumstances, this court concludes the fact that the officer activated his overhead emergency lights after parking his cruiser did not – without more – automatically transform what otherwise was a classic first-tier encounter, into a second-tier encounter. To conclude otherwise would have the

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court's analysis of the Defendant's Motion to Suppress, and possibly the outcome, would be different.

practical effect of making every police-citizen contact a seizure once overhead lights are activated, regardless of the other circumstances surrounding the contact. In *Mendenhall*, the United State [sic] Supreme Court recognized the adverse impact of automatically labeling every police-citizen encounter a "seizure":

> [C]haracterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished.

Mendenhall, 446 U.S. at 554 (internal quotations omitted). The blanket rule proposed by the Defendant could have a chilling effect on law enforcement's use of overhead emergency lights, at the expense of public safety and officer safety. The better approach, and the one which this court concludes is consistent with established Fourth Amendment analysis, is to recognize that overhead emergency lights are merely one of many circumstances to be considered when determining whether a reasonable person would believe they were not free to leave. While there most certainly will

be situations where the activation of overhead emergency lights – when considered along with all the other circumstances of a police/citizen encounter – would cause a reasonable person to believe they were not free to leave, the facts and circumstances of the present case do not compel such a conclusion.

On the evidence presented and after considering all of the circumstances surrounding the encounter, this court concludes the initial contact between Officer Wagner and Mr. Gilliam is properly characterized as a first-tier encounter, and did not amount to a seizure for purposes of the Fourth Amendment.

There was reasonable suspicion to justify expanding the initial contact to a DUI investigation and Officer Wagner was justified in detaining the Defendant for that purpose.

To detain a driver for further investigation past the time reasonably necessary to conduct a routine investigation, an officer must have a reasonable, articulable suspicion that the motorist is involved in criminal activity. *State v. Draganescu*, 276 Neb. 448, 462 (2008); *State v. Voichahoske*, 271 Neb. 64, 72 (2006) (to "continue to detain a person for additional investigation, an officer must have reasonable, articulable suspicion that the person is involved in criminal activity beyond that which justified the initial interference.") Reasonable suspicion requires a "minimal level of objective justification for detention" based on the totality of circumstances. *Id.* The Nebraska Supreme Court has explained "reasonable suspicion" as follows:

> Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.

Voichahoske, 271 Neb. at 72. Applying this standard to the present case, the court concludes, based on the totality of the circumstances, that Officer Wagner had reasonable suspicion to expand the initial encounter into a DUI investigation, and a second-tier encounter.

The evidence shows that as soon as Mr. Gilliam rolled down the window of his pickup (which was parked and running with the lights on), the officer noticed the strong odor of alcohol, and observed Mr. Gilliam had bloodshot watery eyes and slurred speech. At that point the officer had reasonable suspicion that Mr. Gilliam was operating a motor vehicle under the influence of alcohol, and the officer was justified in expanding the contact into a DUI investigation.[5]

CONCLUSION

For the reasons stated above, the court concludes the initial encounter between Officer Wagner and Mr. Gilliam was a first-tier police-citizen encounter which did not implicate the Fourth Amendment, and further

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[5] The Defendant has not challenged the scope or duration of the DUI investigation or his eventual arrest.

concludes that almost immediately upon contacting Mr. Gilliam, the officer noticed the strong smell of alcohol and observed that Mr. Gilliam had bloodshot watery eyes and slurred speech, which provided reasonable suspicion to expand the contact for purposes of conducting a DUI investigation. The Defendant's Motion to Suppress should be denied and overruled.

IT THEREFORE HEREBY IS ORDERED:

1. For the reasons set forth above, Defendant's Motion to Suppress is denied and overruled;

2. The Defendant is ordered to appear at the court's next jury docket call on January 15, 2015 at 2:30 p.m. in Courtroom #35.

Dated this 1st day of December, 2014.

BY THE COURT: /s/ Stephanie F. Stacy

A copy of this Order is provided via e-mail to:

Nick Freeman, *Attorney for the Plaintiff*

Mark Rappl, *Attorney for the Defendant*

IN THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. JEFFREY R. GILLIAM, Defendant.	))))))	CR13-1196 **MOTION TO SUPPRESS AND NOTICE OF HEARING**

COMES NOW defendant, Jeffrey R. Giilliam [sic], by and through his attorney of record, Mark E. Rappl, and pursuant to the provisions of Neb. Rev. Stat. § 29-822 (Reissue 2008) moves this Court for an order suppressing as evidence at the trial of this matter any evidence gathered by law enforcement officers as a result of the seizure of defendant and his motor vehicle on May 26, 2013, in Lincoln, Nebraska. In support of said motion defendant shows to the Court as follows:

1. That on May 26, 2013, defendant and his motor vehicle were contacted by Officer Wagner of the Lincoln Police Department.

2. That the facts and circumstances surrounding said law enforcement contact resulted in defendant being "seized" under the law.

3. That subsequent to the seizure of defendant, and based upon information and observations derived as a result of said seizure, defendant was arrested for the offense of driving while intoxicated.

4. That the seizure of defendant and his motor vehicle was unsupported by a reasonable suspicion, based upon articulable facts, that said motor vehicle was being operated in violation of the law.

5. That for the foregoing reason, the seizure said [sic] motor vehicle violated the defendant's rights to be free from unreasonable searches and seizures as guaranteed to him by Article I, Section 7 of the Nebraska Constitution and by the Fourth and Fourteenth Amendments to the Constitution of the United States of America.

JEFFREY R. GILLIAM, Defendant

s/Mark E. Rappl, #21999
Attorney for Defendant
1111 Lincoln Mall, Suite 300
Lincoln, NE 68508
(402) 474-5529

NOTICE OF HEARING

TO: NICK FREEMAN, DEPUTY LANCASTER COUNTY ATTORNEY:

Please be advised that the foregoing will be heard before the Honorable Stephanie Stacy, District Judge, on June 16, 2014, at 2:00 p.m. in courtroom 35. Please govern yourself accordingly.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon Nick Freeman, Deputy Lancaster County Attorney, 575 S. 10th Street, Lincoln, NE 68508 via electronic service this 14th day of March, 2014.

s/Mark E. Rappl, #21999