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STATE OF NEBRASKA, APPELLEE, V. JAMES A. NELSON, APPELLANT.

807 N.W.2d 769

Filed December 2, 2011. No. S-11-003.

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. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
3. **Constitutional Law: Motor Vehicles: Search and Seizure: Appeal and Error.** To determine whether an unauthorized driver has a privacy interest in a rental vehicle, an appellate court must consider whether the person who claims the protection of the Fourth Amendment and Neb. Const. art. I, § 7, has a legitimate expectation of privacy in the invaded place.
4. **Constitutional Law: Search and Seizure.** To determine if an individual may make a challenge under the Fourth Amendment and Neb. Const. art. I, § 7, one must determine whether an individual has a legitimate or justifiable expectation of privacy. Ordinarily, two inquiries are required. First, an individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.
5. **Constitutional Law: Motor Vehicles: Search and Seizure.** Regarding a detention during a traffic stop, such action constitutes a seizure of the person and the individual traveling in an automobile does not lose all reasonable expectation of privacy.
6. **Constitutional Law: Search and Seizure: Standing.** A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment.
7. **Standing: Motor Vehicles: Search and Seizure: Contracts.** A driver of a rental vehicle may have standing to challenge a detention or search if he or she has demonstrated that he or she has received permission to drive the vehicle from the individual authorized on the rental agreement.
8. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
9. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the

driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are any outstanding warrants for any of its occupants.

10. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the motorist for the time necessary to deploy a drug detection dog, an officer must have a reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the stop.
11. **Probable Cause: Words and Phrases.** 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.
12. **Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.
13. **Probable Cause.** Reasonable suspicion exists on a case-by-case basis.
14. ____. Factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively.
15. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial because of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.
16. **Constitutional Law: Due Process.** The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.
17. **Constitutional Law: Due Process: Evidence.** Under certain circumstances, the Due Process Clause of the 14th Amendment to the U.S. Constitution may require that the State preserve potentially exculpatory evidence on behalf of a defendant.
18. **Due Process: Evidence: Police Officers and Sheriffs.** Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.
19. **Judgments: Due Process: Evidence: Appeal and Error.** A trial court's conclusion that the government did not act in bad faith in destroying potentially useful evidence, so as to deny the defendant due process, is reviewed for clear error.
20. **Evidence: Proof.** Because of its obvious importance, where "material exculpatory" evidence is destroyed, a showing of bad faith is not necessary.
21. ____: ____. Where evidence that is destroyed is only "potentially useful," a showing of bad faith under *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), is required.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

A rental vehicle driven by James A. Nelson, appellant, was stopped for speeding by a Nebraska State Patrol trooper. After a conversation and further observations, consent to search was denied. Nelson was detained, and a drug detection canine called to the scene alerted. A search disclosed a package of cocaine. Nelson was charged with possession of cocaine with intent to deliver or distribute and another count which was later dismissed.

A first motion to suppress challenging the detention was initially granted by the district court for Cheyenne County, but it was reversed by a single judge of the Nebraska Court of Appeals under the procedure set forth in Neb. Rev. Stat. § 29-824 (Reissue 2008). See *State v. Nelson*, No. A-09-082, 2009 WL 2342734 (Neb. App. July 28, 2009) (selected for posting to court Web site). The propriety of the detention is before us as an issue on appeal. Upon remand, a second motion to suppress—addressed to the execution of the search, the reliability of the canine, and the existence of probable cause to search—was overruled, and this ruling is not at issue on appeal.

At a jury trial, Nelson was found guilty of possession of cocaine with intent to deliver or distribute. Nelson's motion for new trial, asserting newly discovered evidence and other bases, was denied. Nelson was sentenced to imprisonment for a term of 20 to 21 years. Nelson appeals. Although Nelson was not the driver authorized on the rental agreement, he had permission from the authorized driver, and we conclude he had standing to challenge the search and seizure. Because we conclude that there was reasonable, articulable suspicion to detain Nelson, the denial of his first motion to suppress was not error. Further, the district court did not err when it denied the motion for new trial. We affirm.

STATEMENT OF FACTS

On August 7, 2008, Nelson was driving a rental vehicle on Interstate 80 in Cheyenne County, Nebraska, when he was stopped for speeding. The facts surrounding that stop are derived primarily from the first of two hearings on Nelson's motions to suppress. During the hearing on Nelson's first motion to suppress, Trooper Ronald Kissler, who is trained in drug interdiction, testified. Kissler stated that he stopped the vehicle being driven by Nelson for speeding. At 12:58 p.m., Kissler approached Nelson's vehicle. Nelson provided Kissler with his driver's license and told Kissler that the vehicle was a rental vehicle. Nelson provided Kissler with the rental agreement, which listed Cornell Nelson as the lessee. Nelson told Kissler that Cornell is his uncle. Kissler asked Nelson to come back to his patrol car. Once in the patrol car, at approximately 12:59 p.m., Nelson commented to Kissler that Nelson had observed that Kissler had both a long rifle and a shotgun in his patrol car, which Kissler acknowledged. Upon questioning, Nelson told Kissler that he had flown to California to visit his grandmother. Nelson stated the trip was 3 days. He stated that because he does not like to fly, he was driving back home to Missouri instead of flying. At this point in the conversation, Nelson asked Kissler about the local geography, cities, and attractions.

At about 1:05 p.m., Kissler asked dispatch to run a license plate check on the vehicle, a check for prior arrests on Nelson, a check on Nelson and his uncle for involvement with drugs, and a check on the validity of Nelson's driver's license and whether there were any outstanding warrants on Nelson. While waiting for this information, Kissler began filling out the warning citation and advised Nelson that he intended to issue a written warning. Nelson then asked Kissler whether Kissler was wearing boots. At 1:09 p.m., dispatch advised Kissler that Nelson's license was valid and that there were no outstanding warrants for him. Kissler was also advised that there was a positive arrest check on Nelson, but the nature of the arrest was not initially given.

Kissler and Nelson discussed the rental agreement and the fact that Nelson was not an authorized driver on the rental agreement. Kissler then asked Nelson whether there were any

problems with his driving record, to which Nelson responded that he had had a traffic violation in 1991. At about 1:11 p.m., Kissler asked whether Nelson had had any arrests, to which Nelson responded "not that I remember." At approximately 1:20 p.m., Nelson asked about the location of the nearest town. He also asked whether he could place his feet outside of the cruiser or whether he could go get his shoes from his car, as his feet were cold. Kissler testified that at this point, Nelson had his car keys in his hand. Nelson also asked Kissler about the proximity of other troopers in the area and whether Kissler was working alone.

At approximately 1:24 p.m., Kissler advised Nelson that he was making Kissler a little nervous and that Nelson's actions and questions indicated that there may be a concern for Kissler's safety or an intention on the part of Nelson to "bolt." Kissler also advised Nelson that these actions, in addition to the issue of the rental agreement, created suspicion. Kissler also advised Nelson that he noticed that the duffelbag in the back of Nelson's vehicle did not have airline tags on it, to which Nelson responded that he had carried the bag onto the airplane.

At approximately 1:27 p.m., Kissler received a response from dispatch that Nelson had a previous drug-related arrest. At 1:28 p.m., Kissler gave Nelson a warning citation and returned his driver's license and the rental agreement. Kissler then asked Nelson whether there was anything in the vehicle that should not be there. Nelson responded in the negative to this question. Kissler then asked Nelson whether he had a problem with Kissler's searching the vehicle, and Nelson did not give his consent. Kissler testified that Nelson was "visibly shaking hard." Kissler requested the drug detection dog at 1:31 p.m., and another trooper arrived with the drug detection dog at 1:46 p.m. The dog ultimately alerted to the presence of drugs, and following the search, cocaine was found in the duffelbag on the back seat of the vehicle. Nelson was charged with possession of cocaine with intent to deliver or distribute and another count which was later dismissed.

Nelson filed his first motion to suppress. The parties stipulated that the hearing would be limited to the propriety of the stop and continued detention and that, with the court's approval,

Nelson reserved the right to another hearing addressed to probable cause to search. A hearing was held. On January 16, 2009, the district court entered an order in which it found facts and sustained Nelson's first motion to suppress. The district court concluded that under the totality of the circumstances, there was insufficient articulable suspicion of criminal activity to justify Nelson's continued detention and therefore ordered that the evidence from the subsequent search be suppressed.

The State appealed the district court's suppression order pursuant to § 29-824. This statute generally provides that the State may appeal an order granting a motion to suppress to a single judge of the Court of Appeals, whose ruling is binding for trial purposes but may be challenged after conviction.

A single judge of the Court of Appeals determined that the district court did not err in implicitly concluding that, although he had not rented the vehicle, Nelson had standing to object to the detention and search. See *State v. Nelson*, No. A-09-082, 2009 WL 2342734 (Neb. App. July 28, 2009) (selected for posting to court Web site). The single judge generally accepted the facts as found by the district court. The single judge concluded, however, that the district court had erred when it concluded that Kissler did not have a reasonable, articulable suspicion that Nelson was involved in unlawful activity and that thus, the district court had erred when it concluded that the continued detention was improper. *Id*. The single judge reversed the district court's grant of Nelson's motion to suppress and remanded the cause for further proceedings. *Id*. In accordance with the mandate, Nelson's challenge to his detention was therefore rejected. The issue of Nelson's continued detention is the subject of Nelson's first assignment of error on appeal.

Upon remand, Nelson filed a second motion to suppress, asserting that the officers lacked probable cause to conduct a search of the rental vehicle. Specifically, Nelson argued that the officers lacked probable cause because they mishandled the drug detection dog deployed at the scene, that the drug detection dog was not properly trained or certified, and that the drug detection dog failed to alert the officers to any contraband which would give the officers probable cause to search

the vehicle. A hearing was held, including testimony regarding proper dog handling.

On August 26, 2010, the district court overruled Nelson's second motion to suppress. The district court determined that the State provided sufficient evidence to show that the drug detection dog and the officer were properly trained and certified at the time of the sniff and alert. The district court also found that the drug detection dog reliably indicated an alert and concluded that the alert and other facts provided the officers with probable cause for a warrantless search of the vehicle. The district court overruled Nelson's second motion to suppress. The substance of this ruling is not challenged on appeal.

A jury trial was held. At trial, the State played an audio and visual recording of Nelson's interview with a Nebraska State Patrol investigator at the State Patrol office in Sidney, Nebraska, where Nelson was transported after the cocaine had been discovered. The investigator testified that before the interview, he advised Nelson of his *Miranda* rights. During the interview, Nelson stated that he picked up two men at a truckstop in Nevada and gave them a ride until he left them in Utah at a fast-food restaurant. At trial, Nelson similarly testified that he picked up two men in Nevada and left them in Utah. Nelson testified he was unaware that the cocaine was in the car. On September 28, 2010, the jury found Nelson guilty of possession of cocaine with intent to deliver or distribute, a Class IB felony, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 2008).

On November 17, 2010, prior to sentencing, Nelson filed an amended motion for new trial, based on a claim of newly discovered evidence which Nelson asserted was material for his defense. Nelson also claimed an error of law had occurred at trial, based on a claim that the State had lost or destroyed evidence which would have aided his defense. Nelson stated that after the trial, he learned of two Styrofoam cups and cigarette butts that had been in the vehicle and were destroyed or lost by the officers. Nelson asserted that the Styrofoam cups and cigarette butts belonged to the two men to whom Nelson had given a ride during his trip. Nelson asserted that because

this potentially exculpatory evidence was not turned over to him and was destroyed before trial, he was not able to corroborate his theory of defense that the two men put cocaine in his duffelbag. He claimed he was denied a fair trial. The district court denied the motion for new trial by reference to *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

A presentence investigation report was prepared. At the sentencing hearing, Nelson sought a sentence of probation and the State brought to the district court's attention that Nelson had been previously convicted of a felony for attempted arson, second degree. The presentence investigation report shows a conviction for driving under the influence and several arrests, including a drug-related arrest, the disposition of which is not clear. On December 17, 2010, Nelson was sentenced to imprisonment for a term of 20 to 21 years. Nelson appeals his conviction.

ASSIGNMENTS OF ERROR

Nelson claims (1) that the officer lacked reasonable suspicion to detain him after the conclusion of the traffic stop and that his first motion to suppress should have been sustained; (2) that the district court erred when it denied his motion for new trial based on newly discovered evidence, including the fact that the State had destroyed exculpatory evidence; and (3) that the district court erred when it denied his motion for new trial, because the destruction of evidence deprived him of valuable corroboration of his testimony and violated his due process right to a complete defense.

STANDARDS OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). Regarding historical facts, we review the trial court's findings for clear error. *Id.* 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. *Id.*

[2] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

ANALYSIS

Nelson asserts that the evidence found as a result of the search of the vehicle should have been suppressed, because Kissler lacked reasonable suspicion to detain him while awaiting the arrival of the canine unit. Nelson additionally asserts that the district court erred when it denied his motion for new trial.

Nelson Has Standing.

We must initially determine whether Nelson has "standing" to file a motion to suppress challenging his detention and the search of the rental vehicle. Nelson was driving a rental vehicle, and his name was not on the rental agreement. The record shows that the deposition of Nelson's uncle was received in evidence and established that Nelson had permission from his uncle, whose name was on the rental agreement, to drive the vehicle. We have not had occasion to directly address the question of whether an individual who has permission to drive a rental vehicle but is not an authorized driver under the rental agreement has standing under the Fourth Amendment and Neb. Const. art. I, § 7 (collectively Fourth Amendment), to challenge a detention and search of the rental vehicle.

[3-5] To determine whether an unauthorized driver has a privacy interest in a rental vehicle, we must consider whether "the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). To determine if an individual may make a challenge under the Fourth Amendment, we must determine whether an individual has a legitimate or justifiable expectation of privacy. Ordinarily, two inquiries are required. First, an individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable. *State v. Smith*, 279 Neb.

918, 782 N.W.2d 913 (2010). Regarding a detention during a traffic stop, we have noted that such action constitutes a seizure of the person and that an individual traveling in an automobile does not lose all reasonable expectation of privacy. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[6] Although the right to challenge a search on Fourth Amendment grounds is generally referred to as "standing," the U.S. Supreme Court has clarified that the definition of that right "is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *Rakas*, 439 U.S. at 140. See *Minnesota v. Carter*, 525 U.S. 83, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998). We have stated: "A 'standing' analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment." *State v. Konfrst*, 251 Neb. 214, 224, 556 N.W.2d 250, 259 (1996). As the Court of Appeals for the Fifth Circuit has stated, and we tend to follow: "We [nevertheless] use the term 'standing' somewhat imprecisely to refer to this threshold substantive determination." *U.S. v. Sanchez*, 943 F.2d 110, 113 n.1 (1st Cir. 1991).

In *U.S. v. Thomas*, 447 F.3d 1191 (9th Cir. 2006), the Court of Appeals for the Ninth Circuit described three approaches courts have developed to determine when an unauthorized driver of a rental vehicle has standing to challenge a search. The first approach is seen in the opinions from the Third, Fourth, Fifth, and Tenth Circuits. See, *U.S. v. Kennedy*, 638 F.3d 159 (3d Cir. 2011); *U.S. v. Wellons*, 32 F.3d 117 (4th Cir. 1994); *U.S. v. Seeley*, 331 F.3d 471 (5th Cir. 2003); *U.S. v. Roper*, 918 F.2d 885 (10th Cir. 1990). The Ninth Circuit described the first approach by stating:

> These courts have all adopted a bright-line test: An individual not listed on the rental agreement lacks standing to object to a search. Their cases reason that because an unauthorized driver lacks a property or possessory interest in the car, the driver does not have an expectation of privacy in it.

Thomas, 447 F.3d at 1196-97.

The second approach is followed by the Courts of Appeals for the Eighth and Ninth Circuits. See, *U.S. v. Best*, 135 F.3d 1223 (8th Cir. 1998); *Thomas, supra*. The *Thomas* court explained this approach by stating it is

> a modification of the majority bright-line approach, and generally disallows standing unless the unauthorized driver can show he or she had the permission of the authorized driver. . . . The Eighth Circuit reasoned that an unauthorized driver would have standing after a showing of "consensual possession" of the rental car. . . . In effect, this approach equates an unauthorized driver of a rental car with a non-owner driver of a privately owned car.

447 F.3d at 1197 (citations omitted).

The third approach is used by the Court of Appeals for the Sixth Circuit, and it examines the totality of the circumstances. *U.S. v. Smith*, 263 F.3d 571 (6th Cir. 2001). The *Thomas* court stated:

> In *Smith*, the Sixth Circuit noted a broad presumption against granting unauthorized drivers standing to challenge a search. However, the court [in *Smith*] stated that the "rigid [bright-line] test is inappropriate, given that we must determine whether [the defendant] had a legitimate expectation of privacy which was reasonable in light of all the surrounding circumstances." . . . Instead, the court opted to consider a range of factors, including: (1) whether the defendant had a driver's license; (2) the relationship between the unauthorized driver and the lessee; (3) the driver's ability to present rental documents; (4) whether the driver had the lessee's permission to use the car; and (5) the driver's relationship with the rental company, and held that the defendant [in *Smith*] had standing to challenge the search.

447 F.3d at 1197 (citations omitted).

Of these three approaches, we find the approach used by the Courts of Appeals for the Eighth and Ninth Circuits to be the most compelling. The Court of Appeals for the Ninth Circuit reached its conclusion and explained its rationale by stating that

> an unauthorized driver who received permission to use a rental car and has . . . authority over the car may challenge the search to the same extent as the authorized renter. This approach is in accord with precedent holding that indicia of ownership—including the right to exclude others—coupled with possession and the permission of the rightful owner, are sufficient grounds upon which to find standing.

U.S. v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006).

Our precedent in Nebraska supports the approach used in the Eighth and Ninth Circuits. We have stated that a defendant may demonstrate the infringement of his own legitimate expectation of privacy by showing that he owned the premises or that he occupied them and had dominion and control over them based on permission from the owner. *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). Thus, we have recognized standing of a guest as to certain areas of the home, *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000); an "occupant" in a vehicle belonging to another, *Stott, supra*; and the driver of a vehicle of which he was not the owner where a nonowner passenger gave consent to search, *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). Our cases show the importance of dominion and control and that standing is not limited to property rights or ownership.

[7] In accordance with the Eighth and Ninth Circuits, we hold that a driver of a rental vehicle may have standing to challenge a detention or search if he or she has demonstrated that he or she has received permission to drive the vehicle from the individual authorized on the rental agreement.

In this case, Nelson was not the authorized driver of the rental vehicle. However, he presented undisputed evidence that he had received permission from his uncle to use the vehicle, and the uncle was the authorized driver under the rental agreement. Accordingly, Nelson had standing to challenge his detention and the search of the rental vehicle on Fourth Amendment grounds.

The Initial Traffic Stop Was Proper.

[8] Nelson does not contest the propriety of the initial traffic stop. Nor could he reasonably do so, because the undisputed facts show that Nelson was stopped for speeding. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Howard, ante* p. 352, 803 N.W.2d 450 (2011). Therefore, Kissler had probable cause to stop Nelson's vehicle.

Nelson's Continued Detention Did Not Violate His Fourth Amendment or Nebraska Constitutional Rights.

For his first assignment of error, Nelson claims that the denial of his first motion to suppress challenging the propriety of his continued detention while he and Kissler awaited the drug detection dog was error. We find no merit to this assignment of error.

[9] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *Howard, supra*. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *Id.* Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are any outstanding warrants for any of its occupants. *Id.*

Nelson argues that after Kissler concluded these investigative procedures and issued a warning citation to him, Kissler lacked legal authority to detain the vehicle and Nelson pending the arrival of the canine unit. He claims that given the facts as found by the district court, his continued detention was improper, and that his first motion to suppress had merit. In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). Regarding historical facts, we review the trial court's findings for clear error. *Id.* 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. *Id.*

[10-13] In order to expand the scope of a traffic stop and continue to detain the motorist for the time necessary to deploy a drug detection dog, an officer must have a reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the stop. *Howard, supra.* 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. *Id.* Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. *Id.* Courts must determine whether reasonable suspicion exists on a case-by-case basis. *Id.*

[14] In determining whether reasonable suspicion exists, a court may consider, as part of the totality of the circumstances, the officer's knowledge of a person's drug-related criminal history. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). Moreover, factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively. *Id.* See *Howard, supra.* For example, evidence that a motorist is returning to his or her home state in a vehicle rented from another state is not inherently indicative of drug trafficking when the officer has no reason to believe the motorist's explanation is untrue. *Draganescu, supra.* But a court may nonetheless consider this factor when combined with other indicia that drug activity may be occurring, particularly the occupant's contradictory answers regarding his or her travel purpose and plans or an occupant's previous drug-related history. See *id.* A court may consider, along with other factors, evidence that the occupant exhibited nervousness. *Id.*

In this case, the district court considering Nelson's first motion to suppress made findings of fact with which the single judge of the Court of Appeals on the State's appeal under § 29-824 essentially agreed. Thus, we refer to the district court's findings. In its order, the district court found that Nelson had flown to Sacramento, California, and was driving a rental

vehicle home to Kansas City, Missouri; that Nelson's name was not listed as an authorized driver on the rental agreement; and that Nelson was nervous. The district court noted that Nelson's excursion was a 3-day trip. The district court found that many people, including drug traffickers, use I-80 to transport their goods; drug traffickers have been known to regularly use rental vehicles to transport illegal drugs in order to avoid the risk of forfeiture of their own vehicles; drug traffickers are known to fly from their base location to pick up their illegal drugs elsewhere; and drug traffickers sometimes rent a vehicle to return with the illegal drugs.

The district court also found that Nelson had made various statements while waiting in the patrol car, including asking why Kissler wore combat-type boots, asking whether he could open the car door and put his feet outside of the patrol car, asking if he could return to his vehicle to get his shoes, commenting on Kissler's weapons in the back of the patrol car, and noting the barren area and inquiring about the existence of backup officers for Kissler. The district court noted that Nelson did not mention his prior arson conviction when asked about his prior arrests and that Kissler knew that Nelson was a "positive Triple I," meaning that the driver had a prior arrest. Kissler testified that a "positive Triple I, 1040" means a criminal history with a drug-related arrest.

On appeal, we examine each of these findings in our independent review of the law. See *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). We are mindful of the rule that when a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *State v. Howard, ante* p. 352, 803 N.W.2d 450 (2011). We have considered the facts and the totality of these circumstances. Among other factors, we note the short duration of Nelson's trip; the fact that he flew out and drove back; the fact that his name was not on the rental agreement; the fact that he had a prior criminal history, including a drug-related arrest which he failed to acknowledge; and the fact that he was extremely nervous. We also note Kissler's testimony as a trained officer regarding

Nelson's conduct, the significance thereof, and questions which suggested a risk of flight. We have considered each factor and conclude that these facts collectively, when viewed from the standpoint of an objectively reasonable law enforcement officer, created a reasonable, articulable suspicion that Nelson was involved in unlawful activity justifying Nelson's continued detention to await the canine unit. We reject Nelson's first assignment of error claiming that his first motion to suppress challenging his detention was wrongly overruled.

The District Court Did Not Err When It Denied Nelson's Motion for New Trial.

For his second and third assignments of error, Nelson claims that the district court erred when it denied his motion for new trial, because there was newly discovered evidence; that the State destroyed evidence material for his defense before trial and that thus, he was deprived of corroboration of his testimony; and that the foregoing violated his due process rights to a complete defense and a fair trial. As we read Nelson's argument, he asserts that after the trial, he learned of two Styrofoam cups and cigarette butts that had been in the vehicle and were destroyed or lost by the officers. Evidently, Nelson believes that these items would bear the fingerprints of the two men to whom he gave a ride during his trip and that these items were exculpatory in nature. Essentially, the district court concluded by reference to *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. E. 2d 281 (1988), that Nelson had not demonstrated that the officers acted in bad faith when the material was destroyed or went missing, that Nelson had not shown that the material would have been exculpatory, and that there was not sufficient evidence presented to find that Nelson was unable to obtain comparable evidence by other reasonably available means. Accordingly, the district court denied Nelson's motion for new trial.

[15] A new trial can be granted on grounds materially affecting the substantial rights of the defendant, including "newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial." See Neb. Rev. Stat. § 29-2101(5) (Reissue

2008). A criminal defendant who seeks a new trial because of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result. *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005). We review the ruling denying a motion for new trial in a criminal case for an abuse of discretion. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011). We determine that the district court did not abuse its discretion when it denied Nelson's motion for new trial and therefore reject Nelson's second and third assignments of error.

The essence of Nelson's motion for new trial and his second and third assignments of error is (1) that the existence of the Styrofoam cups and cigarette butts and their loss was not discovered until after trial, and these items form newly discovered evidence, and (2) that the unavailability of these items deprived him of valuable corroborative evidence and denied him a fair trial. We recently considered the merits of a similar challenge to the denial of a new trial based on newly discovered evidence and concluded that the evidence was not newly discovered within the meaning of § 29-2101(5) and that even if the evidence were newly discovered, it was not exculpatory. *Collins, supra*. The same analysis applies in this case.

The record shows that a photograph, exhibit 83, was received in evidence during the State's case. The two Styrofoam cups, one with cigarette butts, are pictured in exhibit 83. The sergeant who inventoried the vehicle testified about exhibit 83, and he acknowledged the existence of these items shown in the photograph. Upon cross-examination by Nelson's counsel, he stated that the practice normally was to retain items of monetary value, but not trash; that these items would be considered trash; and that he did not know what had happened to these items.

During his testimony, Nelson was shown a photograph, exhibit 86, which displays numerous items inventoried and retained by the authorities. Nelson testified that the "Kool" brand cigarettes pictured in exhibit 86 belonged to him, but that a package of "Grand" brand cigarettes, a cardboard pack of matches, and a package of crackers did not belong to him. Nelson did not attempt to obtain fingerprints or otherwise test

the "Grand" brand cigarette package, the matches, or the package of crackers. Nelson testified that he had given a ride to two men whom he picked up in Nevada and left in Utah. The theory of the defense was that these men placed the cocaine in Nelson's duffelbag before they departed in Utah and that Nelson was unaware of the cocaine. Although the closing arguments are not in the record, the district court's order which denied Nelson's motion for new trial notes that Nelson's counsel "based a fair amount of his closing argument on the loss of this evidence," which we understand to mean the loss of the two Styrofoam cups and cigarette butts.

The two Styrofoam cups and cigarette butts are not newly discovered evidence under § 29-2101(5). The existence of the two Styrofoam cups and cigarette butts could have been discovered before trial, and in any event, their existence was, in fact, produced at trial and shown to the jury. They are pictured in exhibit 83. The record shows that Nelson conducted pretrial discovery. Further, Nelson testified that numerous items in exhibit 86 did not belong to him and that this information, if believed, was therefore graphic corroboration of Nelson's claim that two men rode with him for a distance.

Even if the existence of this evidence was "newly discovered," the fact of its loss is not newly discovered, the evidence is not exculpatory, and its loss or destruction did not deprive Nelson of due process or a fair trial. The existence of the two travelers and their potential for detritus was made well known to the jury, inter alia, through the testimony of the State Patrol investigator and Nelson himself.

[16-19] We have previously considered a claim that the State's failure to preserve evidence denied a defendant of due process. In *State v. Davlin*, 263 Neb. 283, 299-300, 639 N.W.2d 631, 647 (2002), we stated:

> [The defendant] argues that the charges against him should have been dismissed because his right to due process under the state and federal Constitutions was violated by the State's failure to preserve relevant evidence. Because the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution, we apply the same analysis to [the defendant's] state and federal

constitutional claims. See, *State v. Hookstra*, [263 Neb.] 116, 638 N.W.2d 829 (2002); *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001).

Under certain circumstances, the Due Process Clause of the 14th Amendment may require that the State preserve potentially exculpatory evidence on behalf of a defendant. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999), citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). It is uncontroverted, however, that "'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" *Castor*, 257 Neb. at 590, 599 N.W.2d at 214, quoting *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). See, also, *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989). A trial court's conclusion that the government did not act in bad faith in destroying potentially useful evidence, so as to deny the defendant due process, is reviewed for clear error. See, *U.S. v. Gomez*, 191 F.3d 1214 (10th Cir. 1999); *U.S. v. Weise*, 89 F.3d 502 (8th Cir. 1996).

[20,21] Since our opinion in *Davlin*, the U.S. Supreme Court has made clear that because of its obvious importance, where "'material exculpatory'" evidence is destroyed, bad faith is not necessary. See *Illinois v. Fisher*, 540 U.S. 544, 549, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004). However, in the present case, where the evidence is only "'potentially useful,'" a showing of bad faith under *Youngblood* is required. See *Fisher*, 540 U.S. at 549. Furthermore, in the present case, it cannot be said that the Styrofoam cups and cigarette butts are irreplaceable under *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984), because the potential for fingerprints showing the presence of two other persons was possible had the "Grand" brand cigarettes, matches, and crackers—which were retained—been tested.

In analyzing the motion for new trial based on the failure of the State to preserve evidence, the district court considered three factors using the standard set forth in *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281

(1988): (1) Did the State act in bad faith in failing to preserve the evidence, (2) was the exculpatory value of the evidence apparent prior to its destruction, and (3) was the nature of the evidence such that the defendant would be unable to obtain comparable evidence by other reasonably available means. The district court essentially found that there was no bad faith, that the items were not exculpatory, and that Nelson could obtain comparable evidence. These findings were not clearly erroneous.

The record shows that the missing evidence consisting of trash was not preserved or retained as a matter of routine procedure. While the procedure may be unwise, nothing in the record shows bad faith by the State. The Styrofoam cups and cigarette butts are commonplace, Nelson was a smoker, and the exculpatory nature of these items was not apparent. An interview of Nelson was played at the trial, and Nelson again stated that during his trip, he gave a ride to two men from Nevada to Utah. This evidence is comparable to the evidence that may have been obtained if the Styrofoam cups and cigarette butts were not lost or destroyed; that is, the lost evidence might have shown evidence that another individual or individuals handled these materials which were found in the rental vehicle. The district court's findings were not clearly erroneous, and it did not err when it denied Nelson's motion for new trial. We reject Nelson's second and third assignments of error.

CONCLUSION

Because Nelson had permission from the driver who was authorized under the rental agreement, Nelson had standing to assert his Fourth Amendment claims. The detention of Nelson and the rental vehicle after the traffic stop was not unreasonable. The denial of Nelson's first motion to suppress was not error. The district court did not err when it denied Nelson's motion for new trial. We affirm.

AFFIRMED.

WRIGHT, J., not participating in the decision.