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Nebraska Supreme Court
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State of Nebraska, appellee, v.
Danny J. McGinn, appellant.
932 N.W.2d 83

Filed August 23, 2019. No. S-18-744.

SUPPLEMENTAL OPINION

Appeal from the District Court for Holt County, Mark D. Kozisek, Judge, on appeal thereto from the County Court for Holt County, Kale B. Burdick, Judge. Former opinion modified. Motion for rehearing overruled.

Forrest F. Peetz, of Peetz Law, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

This case is before us on a motion for rehearing filed by the appellee, State of Nebraska, concerning our opinion in *State v. McGinn*.[1] We overrule the motion, but we modify the opinion as follows:

In the analysis section, we withdraw the last paragraph[2] and substitute the following:

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[1] *State v. McGinn, ante* p. 224, 928 N.W.2d 391 (2019).

[2] *Id.* at 234, 928 N.W.2d at 398.

> In this matter, because we consider all evidence admitted by the trial court, erroneously or not, we consider the breath test in our double jeopardy analysis. Considering the breath test, the evidence was sufficient to sustain a guilty verdict for a violation of § 60-6,196(1)(c) as charged. As such, double jeopardy does not forbid a remand for a new trial. Therefore, in consideration of all of the above, we reverse the district court's decision affirming the county court's conviction and remand the cause to the district court with directions to remand the matter to the county court for a new trial.

In the sole paragraph of the conclusion section, we withdraw the last sentence[3] and substitute the following: "Accordingly, we reverse the district court's decision affirming the county court's conviction, but determine double jeopardy does not require dismissal of this action."

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motion for rehearing overruled.

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[3] *Id.*