IN THE SUPREME COURT OF THE STATE OF NEVADA

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SARAH ELIZABETH GRAVELLE,

Appellant, No. 83781

vs.

THE STATE OF NEVADA,

Respondent.
_____/

Appeal from a Judgment of Conviction
Fourth Judicial District Court, Elko
The Honorable ALVIN R. KACIN, District Judge

APPELLANT'S FAST TRACK STATEMENT

MATTHEW PENNELL, ESQ.
ELKO COUNTY PUBLIC DEFENDER
569 Court Street
Elko, Nevada 89801
Nevada Bar Number 13298

By: ROGER H. STEWART
CHIEF CRIMINAL DEPUTY
569 Court Street
Elko, Nevada 89801
Nevada Bar Number 3823

Attorneys for Appellant

AARON D. FORD
ATTORNEY GENERAL
100 N Carson Street
Carson City, Nevada 89701

TYLER J. INGRAM, ELKO
ELKO COUNTY DISTRICT
ATTORNEY
540 Court Street
Elko, Nevada 89801
Nevada Bar Number 11819

Attorneys for Respondent

FAST TRACK STATEMENT

1. NAME OF PARTY: SARAH ELIZABETH GRAVELLE

2. PARTY'S ATTORNEYS:
By: ROGER H. STEWART
CHIEF CRIMINAL DEPUTY ELKO COUNTY PUBLIC DEFENDER

Attorney for Appellant
775-738-2521

3. CHANGE OF COUNSEL: AT TRIAL LEVEL, PHILLIP LEAMON, DEPUTY PUBLIC DEFENDER

4. DISTRICT, COUNTY, AND CASE NUMBER: FOURTH JUDICIAL DISTRICT, ELKO COUNTY, CASE NO. CR-FP-18-7207

5. JUDGES: THE HONORABLE ALVIN R. KACIN, THE HONORABLE NANCY PORTER

6. TRIAL LENGTH AND TYPE: JURY TRIAL, TWO DAYS

7. APPEAL FROM: POSSESSION OF A CONTROLLED SUBSTANCE

8. SENTENCE: NINETEEN TO FORTY EIGHT MONTHS, CONCURRENT WITH SAME AMOUNTS IN CASE DC-CR-20-42

9. SENTENCE ANNOUNCED: October 11, 2021

10. ENTRY OF SENTENCE: October 15, 2021

11. HABEAS CORPUS INFORMATION: NONE

12. POST-JUDGMENT MOTION INFORMATION: NONE

13. NOTICE OF APPEAL: November 12, 2021

14. RULE GOVERNING TIME LIMITS: NRAP 4(b)

15. JURISDICTION UNDER: NRS 177.815

16. NATURE OF DISPOSITION: APPEAL FOLLOWING SENTENCING AFTER JURY TRIAL

17. RELATED PROCEEDINGS IN THIS COURT: NONE

18. RELATED PROCEEDINGS IN OTHER COURTS: CONCURRENT SENTENCE IN DC-CR-20-42

19. PROCEEDINGS RAISING THE SAME ISSUE: JUST THE VARIOUS PRETRIAL AND POST TRIAL MOTIONS IN THIS CASE

20. PROCEDURAL HISTORY: The case was initiated by Criminal Complaint in the Elko Justice Court. After a Preliminary Hearing, Appellant was bound over to the District Court. She moved to dismiss the case and suppress evidence. These motions were denied. At trial she was convicted by a jury. After this two motions for a mistrial were denied. This appeal follows her sentencing.

21. FACTUAL STATEMENT:

On August 22, 2018, Officer Joshua Taylor initiated a traffic stop on a vehicle that did not have a functioning license plate light. Record on Appeal [ROA] at 16-17. After he initiated the stop, Officer Taylor testified at the preliminary hearing that he could see the passenger, later identified as Nicholas Done, move his left hand down by his seat. ROA at 18. Officer Taylor testified that he was concerned because Mr. Done was a known drug user. Id. After seeing

Mr. Done, Officer Taylor waited on backup to arrive. ROA at 19. Officer Taylor initiated contact with Ms. Gravelle, who was the driver of the vehicle. ROA at 17. Officer Taylor further testified that he could not remember whether or not he took Ms. Gravelle's license, registration, or insurance information during the stop. ROA at 33. Officer Taylor did not do any work in regards to issuing a citation regarding the license plate light being out. Id.

Officer Taylor testified that after other officers arrived he pulled Mr. Done out of the vehicle began to question Ms. Gravelle. ROA at 19. No weapons or drugs were found on Mr. Done. ROA at 34. After his safety concerns regarding Mr. Done were put at rest, Officer Taylor then had Ms. Gravelle to exit the vehicle. Id. Ms. Gravelle initially consented to a search of the vehicle but then changed her mind and denied Officer Taylor consent to search the vehicle. ROA at 36. Officer Taylor then deployed his canine Kyng who alerted to the presence of narcotics in the vehicle. ROA Id. at 36-37. Officer Taylor could not remember the exact amount of time Ms. Gravelle was detained prior to Kyng being deployed. ROA 41

Officers Taylor and Pinkham subsequently conducted a search of the vehicle. ROA at 24. Officer Pinkham testified that he found a blue backpack located on the floorboard in the rear passenger section of the vehicle. ROA at 49. Inside the blue backpack, near the top of the main compartment Officer Pinkham

found an eyeglasses case. ROA at 50. Inside the case was among other items methamphetamine. Id.

The Opposition to the motion to suppress noted that the officer testified at the preliminary hearing that the dog was run about ten minutes into the stop. ROA at 161.

The District Court denied the motion to suppress based on these facts, finding that the circumstances of the stop developed reasonable suspicion of criminal activity to justify further detention including concerns for officer safety. ROA at 172-73. The court noted further reasonable suspicion was developed by the following: "Regarding the conversations between the officer and Defendant, the officer testified that after the passenger was secured by an assisting officer, he contacted the Defendant at the driver's side window. During that contact, the officer inquired as to Defendant's association with the passenger, a known methamphetamine user, and Defendant admitted to using methamphetamine recently. Additionally, the officer testified that Defendant volunteered information that she had just cleaned her car because she 'didn't want to get in trouble for anything in [the car].' The officer understood Defendant to be referencing contraband items that may have caused her 'trouble' with law enforcement. The officer's testimony reflects that he then became suspicious that there may be drugs inside the car. The officer requested consent to search the vehicle and Defendant

became visibly nervous. At this point the officer decided to deploy his police service dog 'Kyng,' for a drug sniff around the exterior of the vehicle." ROA at 174 (preliminary hearing citations omitted).

Based on the above, the District Court found that Taylor had reasonable suspicion to prolong the stop and run the dog. The court noted that this was bolstered by a finding of a hypodermic needle in her pocket and her suspicious response when questioned about this. ROA at 175. These bolstering indicators occurred after Taylor, having decided to run the dog, patted her down beforehand. ROA at 37.

A motion to dismiss based on essentially the same facts, see ROA at 109-14, alleged that since the officers were required to wear portable event recording devices [body cams] since July 1, 2018 and were not doing so on August 22, 2018, the case should be dismissed. ROA at 140-41. It alleged bad faith since in fact the city of Elko had not provided funds to do so until October 23 or 24, 2018. ROA at 140.

The District Court found that even if the evidence of body cams would have been material, it would not grant the dismissal because "(1) the officers did not act in bad faith; and (2) this Court does not have the authority to declare a remedy for a violation of the statute when the legislature does not provide one." ROA at 168. It noted that because "the police officers who arrested Defendant were not yet

equipped with body-worn cameras. The officers did not fail to activate their cameras, or in any way choose to violate NRS 289.830. Portable event recording devices were not procured or issued by the Elko Police Department until, at least, two months after Defendant's arrest. Thus, there was no bad faith misconduct on behalf of the officers who arrested Defendant." Id.

Alternatively, the District Court found that since the legislature had attached no remedy to the body cam statute district courts "are without authority to provide a remedy for violation of the statute." ROA at 169.

On February 20, 2019, the State and Defense both closed their respective cases at which time the jury began deliberations. ROA at 296-300. After the jury had deliberated for approximately an hour, the Jury submitted a question. ROA at 300. The question involved whether the jury could be allowed to see an exhibit that was not entered into evidence, which was photographs of evidence containing inadmissible propensity evidence. At that point the Court realized that an exhibit list containing all proposed exhibits was sent back with the Jury for deliberations. This list included several items that were never admitted into trial, including reference to a purple container, references to photographs that contained inadmissible evidence, and most importantly references to Judgments of Convictions. See ROA at 300-01.

After being informed of the mistake the Court contacted counsel for the parties in order to determine how to handle this issue and whether a curative instruction could cure the mistake. While the parties were deciding how to address the issue the Jury notified the Court they had come to a verdict. ROA at 301. The attorneys agreed to go ahead and here the verdict then consider their options afterward. Id. The Jury found Ms. Gravelle guilty of Count 1 of the Criminal Information, Possession of a Controlled Substance. Id.

Over four months later on June 27, 2019, the District Court held a hearing on Ms. Gravelle's first motion for mistrial. During the course of the hearing the Court asked prospective jurors several questions regarding the case, and whether the instant case was difficult to resolve. E.g., ROA at 327-28. The attorneys also asked the jurors follow up questions. E.g., ROA at 335-37. During the hearing juror number eight, Dora Torres, testified. During the questioning of Ms. Torres, it became apparent that she may not have had sufficient command of the English language necessary to serve on a jury. See ROA at 340-42. The Court asked Ms. Torres several questions about whether the case was difficult or tough. ROA at 337. Ms. Torres seemed to have difficulties understanding what the court meant and answering questions. See ROA at 336. Eventually, Ms. Torres seemed to explain to the Court that she meant that sitting in judgment of someone was difficult. However, Gravelle's counsel returned to this line of questioning and

asked about one of the defense theories presented at trial. When asked if the methamphetamine could have belonged to the passenger of the vehicle, Ms. Torres said, it is possible who knows. Id.; see also ROA 337 (similar responses to State counsel's questions along this line).

After the jurors testified the Court proceeded to hear argument on the motion. However, the Court was concerned about Ms. Torres's command of the English language and asked the parties to address that issue as well during argument. ROA at 336. Defense counsel argued that this issue could also warrant a mistrial as it appeared there could have been a language barrier, and because it appeared that Ms. Torres could have had doubts about whether Ms. Gravelle actually possessed the methamphetamine. ROA at 336-37.

In denying the first motion for a mistrial the District Court noted that once the jury submitted a question about the list improperly provided them, the list was immediately remove. ROA at 219. The court noted that Winarz v. State, 107 Nev. 812, 814, 820 P.2d 1317, 1318 (1991) factors to be considered in determining whether beyond a reasonable doubt no prejudice resulted were "'whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" ROA at 220.

Noting that the list provided the jurors did "not describe the collateral act items in any detail," the court nonetheless noted that "Of additional concern were

the State's proposed exhibits 13 and 14, which are listed respectively as, 'Certified JOC for case CR-FP-11-0469' and 'Certified JOC for case 3:15-CR-0005-MMD-VPC.' These proposed exhibits are copies of Defendant's prior [felony] convictions which would only have been admissible if Defendant had testified." ROA at 221.

The District Court described the hearing held in regard to these charges: "To determine whether Defendant's case was prejudiced by the list of proposed exhibits, the court held a hearing and asked eleven of the twelve jurors a set of pre-arranged questions. The questions the Court asked were drafted on the record in consultation with the parties. The questions were drafted with the intention of finding out what the jurors understood regarding the list of proposed exhibits and the associated abbreviations contained therein. None of the jurors knew what a 'JOC' is or what those letters stand for. Only one juror considered the case to be a close call. Four of the jurors either did not remember the list or they did not recall the nature of the discussion related to the list." ROA at 221-22.

Analyzing this evidence via Winiarz, the court found that "1. The issue of guilt or innocence was not close. Methamphetamine found by the police in a backpack behind the passenger's seat in a vehicle driven by Defendant. Although the defense theory was that the methamphetamine belonged to the passenger, evidence found in the backpack tied the controlled substance to Defendant. Based

on the evidence presented at trial, a reasonable jury could have found that the methamphetamine was possessed solely by Defendant, or jointly by Defendant and her passenger." ROA at 222 (emphasis added).

With regard to the quantity and character of the error the court found them "slight" believing that certified JOCs did not show a probable prior criminal history. ROA at 222.

With regard to the seriousness of the offense the court noted that the crime here was the lowest level of felony and thus not so serious as other cases examined by the Supreme court of Nevada. ROA at 222.

Thus, the court found that the error was beyond a reasonable doubt harmless. ROA at 223.

The trial court seems to have found the case not close despite the State attorney's concession that "We have most of the evidence suggesting it's her narcotics and it's possible that they were his as well." ROA at 298. Similarly, there was evidence that part of the drugs were not tested, ROA at 299, and that the furtive action was be the known drug user passenger on the passenger side, id. Indeed when said passenger was searched he had nothing on him despite the furtive acts, suggesting he had successfully stashed the drugs. Id.

22. ISSUES RAISED

ISSUE ONE: Whether the District Court erred by finding that Officer Taylor had reasonable suspicion to prolong the stop and run the drug dog.

ISSUE TWO: Whether the District Court erred in finding that the case should not be dismissed because of a violation of NRS 289.830(1)(b).

ISSUE THREE: Whether the District Court erred by failing to declare a mistrial.

23. LEGAL ARGUMENT

ISSUE ONE: Whether the District Court erred by finding that Officer Taylor had reasonable suspicion to prolong the stop and run the drug dog.

When the District Court denied the motion to suppress finding that the circumstances of the stop developed reasonable suspicion of criminal activity to justify further detention including concerns for officer safety, it noted further reasonable suspicion was developed by the following: "Regarding the conversations between the officer and Defendant, the officer testified that after the passenger was secured by an assisting officer, he [Taylor] contacted the Defendant at the driver's side window. During that contact, the officer inquired as to

Defendant's association with the passenger, a known methamphetamine user, and Defendant admitted to using methamphetamine recently. Additionally, the officer testified that Defendant volunteered information that she had just cleaned her car because she 'didn't want to get in trouble for anything in [the car].' The officer understood Defendant to be referencing contraband items that may have caused her 'trouble' with law enforcement. The officer's testimony reflects that he then became suspicious that there may be drugs inside the car. The officer requested consent to search the vehicle and Defendant became visibly nervous. At this point the officer decided to deploy his police service dog 'Kyng,' for a drug sniff around the exterior of the vehicle." ROA 172-74 (preliminary hearing citations omitted).

Based on the above, the District Court found that Taylor had reasonable suspicion to prolong the stop and run the dog. The court noted that this was bolstered by a finding of a hypodermic needle in her pocket and her suspicious response when questioned about this. ROA at 175. These bolstering indicators occurred after Taylor, having decided to run the dog, patted her down beforehand. ROA 37.

Both the United States and Nevada Supreme Courts have weighed in on the issue of a stop being prolonged in order to deploy a drug detecting canine. The leading Nevada case in this area is State v. Beckman, 129 Nev. 481, 484-85, 488-91, 305 P.3d 912 (2013). In Beckman, a justification that defendant was overly nervous

and had fingerprints on the trunk of his car did not justify holding him sixteen minutes for a drug dog. The Beckman court found that a "prolonged stop may be reasonable in three limited circumstances: when the extension of the stop was consensual, the delay was *de minimis*, or the officer lawfully receives information during the traffic stop that creates a reasonable suspicion of criminal conduct." 129 Nev. at 488.

In Rodriquez v. United States, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015), the United States Supreme Court likewise found that law enforcement officers cannot prolong a stop in order to deploy a drug sniffing canine. The Court found that a seven or eight minute delay was not *de minimus*. Id. 135 S. Ct. at 1617. The Court further noted that

> "if an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." Caballes, 543 U. S., at 407, 125 S. Ct. 834, 160 L. Ed. 2d 842. As we said in Caballes and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." [**501] Ibid. The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, as Justice Alito supposes, post, at ___ - ___, 191 L. Ed. 2d, at 509, but whether conducting the sniff "prolongs"—i.e., adds time to—"the stop," supra, at ___, 191 L. Ed. 2d, at 499.

Rodriguez 135 S. Ct. at 1616.

Applying the above rationales to the instant case it is clear that the evidence should have been suppressed. Under the Beckman analysis this does not fit into

any of the three categories where a prolonged stop may be reasonable. First there is no denying that the detention was not consensual. A reasonable person would have not felt like they were free to go in this situation. Officer Taylor testified that he could not remember if he took her license but admitted she was being detained and was not free to leave the situation. ROA at 36. Furthermore, prior to the deploying Kyng, Officer Taylor had to order Ms. Gravelle out of her vehicle. ROA at 34. Accordingly, this was not a consensual encounter as described in Beckman.

The next exception involves cases where the delay was *de minimus*. Here the delay was not *de minimus*. Officer Taylor took little to no steps to effectuate the reason for the initial stop, which was due to Ms. Gravelle's license plate light being out. Officer Taylor testified that he could not recall whether or not he took Ms. Gravelle's driver's license, whether he took her registration and proof of insurance. This would all be standard procedure in a relatively minor traffic stop. Instead at the onset this turned into a full blown narcotics investigation. Officer Taylor initially delayed the stop because Mr. Done was a known drug user, and was afraid for his safety. However, when other officers arrived and Mr. Done was found not to be a threat there were not steps taken at that time to effectuate the traffic stop. At no point did Officer Taylor ever begin work on issuing a citation. Around ten minutes passed from the outset of the stop to Kyng being deployed, and at no time was any work done with regards to the initial stop. Accordingly,

this narcotics investigation, including deploying Kyng added time to the stop and was not *de minimus*.

Finally, Officer Taylor did not have reasonable suspicion to further detain Ms. Gravelle as a result of information learned after the initial stop. The totality of the circumstances here would not cause a prudent person to have an honest or strong suspicion that Ms. Gravelle had committed a crime. Beckman 129 Nev. at 489. "The 'reasonable, articulable suspicion' necessary for a Terry stop is more than an 'inchoate and unparticularized suspicion or 'hunch.' Rather, there must be some objective justification for detaining a person." Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 909, (1968). In support of his detention Officer Taylor initially justified it because the passenger of the vehicle was allegedly a known drug user, because Ms. Gravelle stated she had used methamphetamine five days before, and because she had cleaned her car after a trip to California. ROA at 22. On cross examination Officer Taylor admitted that it was not a crime to associate with a methamphetamine user or to travel to California. ROA at 35. Officer Taylor was asked about why he believed reasonable suspicion existed, to which he replied "other than he's (Mr. Done) a known narcotic user and the first time I ever met her, and I needed to speak with her again." ROA at 36. Officer Taylor also admitted that he did not see any indicia

that would suggest that Ms. Gravelle had recently used or was under the influence of a controlled substance. Id.

On redirect examination Officer Taylor was once again asked about his decision to employ Kyng. ROA at 43. Officer Taylor believed that Ms. Gravelle may have had illegal items in the car in the past. Id. Officer Taylor then for the first time indicated that Ms. Gravelle was also nervous throughout the stop. Id. However, this was Officer Taylor's first mention of this nervousness at any point throughout the preliminary hearing, despite being asked about his reason to deploy Kyng on numerous occasions. ROA at 15-43. Furthermore, none of Officer Taylor's documents relating to this incident, the Declaration of Probable Cause, Sniff Report, or Initial Report, state that Ms. Gravelle was nervous. See ROA 124-31. Officer Taylor also stated that one of the biggest reasons for deploying Kyng was that she had admitted to cleaning out her car to ensure there were no items that would get her in trouble. ROA at 33. However, in his initial report, Officer Taylor discusses finding the blue backpack at which point the report states that "[b]oth denied ownership of the backpack. I spoke to GRAVELLE about her vehicle and she stated no one was allowed to use her vehicle. She stated she "just" cleaned it out so she would not get 'in trouble.'" ROA at 130. This report seemed to contradict Officer Taylor's testimony at the preliminary hearing. If the report is

correct this statement could not have been a basis for determining he had reasonable suspicion to further detain Ms. Gravelle.

In any event, it was not until Ms. Gravelle asserted her constitutional right to not consent to a search that Officer Taylor decided to further detain Ms. Gravelle and deploy Kyng. A person's assertion of their rights can never constitute probable cause to believe a person has committed a criminal offense. See State v. Ballard, 617 N.W.2d 837, 842 (S.D. 2000)(refusing to consent to search does not provide further suspicion); see also United States v. Turner, 815 F. Supp. 1332, 1341 (N.D. Cal. 1993)("The protections of the Fourth Amendment would be wholly eviscerated if the courts were to hold that a citizen's refusal to consent to unlawful detention could serve as a sufficient basis for reasonable suspicion"); State v. Richmond 133 S.W.3d 576, 581 (Mo App 2004)(protective sweep not justified by refusal to consent).

Under the totality of the circumstances Officer Taylor did not have reasonable suspicion that Ms. Gravelle was involved in any drug activity. Thus, the third exception of Beckman, development of reasonable suspicion, would not apply to the instant case and the District Court erred by so finding and admitting the evidence subsequently found. Thus, the case should be reversed.

ISSUE TWO: Whether the District Court erred in finding that the case should not be dismissed because of a violation of NRS 289.830(1)(b).

The District Court held that even if the evidence of body cams would have been material, it would not grant the dismissal because "(1) the officers did not act in bad faith; and (2) this Court does not have the authority to declare a remedy for a violation of the statute when the legislature does not provide one." ROA at 168. It noted that because "the police officers who arrested Defendant were not yet equipped with body-worn cameras. The officers did not fail to activate their cameras, or in any way choose to violate NRS 289.830. Portable event recording devices were not procured or issued by the Elko Police Department until, at least, two months after Defendant's arrest. Thus, there was no bad faith misconduct on behalf of the officers who arrested Defendant." Id.

Alternatively, the District Court found that since the legislature had attached no remedy to the body cam statute district courts "are without authority to provide a remedy for violation of the statute." ROA at 169.

Both these holdings seem wrong.

The general parameters of the law here are that although police officers generally have no duty to collect all potential evidence, that rule is not absolute, Daniels v. State, 114 Nev. 261, 268, 956 P.2d 111 (1998), but in some cases a

failure to gather evidence may warrant sanctions against the State. Randolph v. State, 117 Nev. 970, 986, 36 P.3d 424 (2001). The flagrant violation of NRS 289.830(1)(b) makes this such violation.

The Nevada Supreme Court has fashioned a two part test in determining the remedy when the police have improperly failed to collect or gather the evidence: first, is the evidence material and second, if material, was the failure to gather negligence, gross negligence, or bad faith. Daniels, 114 Nev. at 267-68, e.g. Gordon v. State, 121 Nev 504, 509-10, 117 P. 3d 214, 218 (2005).

As noted above this instant case should have been be dismissed due to the flagrant violations of NRS 289.830(1)(b). NRS 289.830(1)(b) mandates that law enforcement officers wear a recording device and except when protecting a person's privacy and "prohibiting deactivation of a portable event recording device until the conclusion of a law enforcement or investigative encounter." Both Officers Taylor and Pinkham testified that they were not in compliance with the statute during this stop, as the officers were not wearing body cameras.

Applying the Daniels test to the matter at hand it is obvious that body cams required by law would be material to, inter alia, whether which party in the vehicle had dominion and control of the contraband (see ISSUE THREE), or to whether both did, plus whether reasonable suspicion was developed (see ISSUE ONE).

The District Court then erred when it held that the non-compliance with NRS 289.839(1)(b) did not amount to bad faith. NRS 289.830(1)(b), requires that the body camera be worn by officers and requires "activation of a portable event recording device whenever a peace officer is responding to a call for service or at the initiation of any other law enforcement or investigative encounter between a uniformed peace officer and a member of the public." Officers Taylor and Pinkham previously testified that they were in violation of the statute, and were not wearing body cameras while investigating the instant case. ROA at 39, 53. It seems ludicrous to suggest that an officer's willful violation of a statute can amount to anything other than bad faith. Thus, the District court erred in failing to dismiss under Daniels.

Likewise the District Court's ruling that it was "without authority to provide a remedy for violation of the statute" because the legislature had attached no remedy to the statute seems wrong. See Beavers v. DMV, 109 Nev. 435, 438-41, 851 P.2d 432 (1993). In Beavers, the Nevada Supreme Court found that under a procedure that apparently mandated rinsing after removing items from the mouth, the checklist itself noting that this was done properly sufficed to support the DMV's revocation of her driving privileges based on the Intoxilyzer reading. 109 Nev. at 440. Thus, the Nevada Supreme Court entertained the issue that the evidence should be inadmissible should the procedure be violated but found the test admissible

because the procedure was not violated. 109 Nev. at 440. This would seem clearly to indicate the remedy for violating the procedure could and should be available where, as here, the officers' own testimony indicates they did not follow the statute. Similarly, violations of implied consent statutes with apparently no attached remedy can lead to suppression of evidence. E.g., People v. Null, 233 P.3d 670, 678 (Colo. 2010); Riley v. People, 104 P.3d 218, 221 (Colo. 2005); Epps v. State, 680 S.E.2d 636 , 637-38 (Ga. App. 2009); Miller v. State, 516 S.E.2d 838, 838 (Ga. App. 1999); see, e.g., Nelson v. City of Irvine, 143 F.3d 1196, 1207-08 (9th Cir 1998)(civil rights); Watson v. County of Los Angeles, 244 Fed. Appx. 805, 807 (9th Cir. 2007)(same)

Thus, no remedy need be attached to the statute for violations as egregious as this to be remedied.

ISSUE THREE: Whether the District Court erred by failing to declare a mistrial.

In denying the first motion for a mistrial the District Court noted that once the jury submitted a question about the list improperly provided them, the list was immediately remove. ROA 219. The court noted that Winiarz v. State, 107 Nev. 812, 814, 820 P.2d 1317 (1991) factors to be considered in determining whether beyond a reasonable doubt no prejudice resulted were "'whether the issue of

innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" ROA at 220.

Noting that the list provided the jurors did "not describe the collateral act items in any detail," the court nonetheless noted that "Of additional concern were the State's proposed exhibits 13 and 14, which are listed respectively as, 'Certified JOC for case CR-FP-11-0469' and 'Certified JOC for case 3:15-CR-0005-MMD-VPC.' These proposed exhibits are copies of Defendant's prior [felony] convictions which would only have been admissible if Defendant had testified." ROA at 221.

The District Court described the hearing held in regard to these charges: "To determine whether Defendant's case was prejudiced by the list of proposed exhibits, the court held a hearing and asked eleven of the twelve jurors a set of pre-arranged questions. The questions the Court asked were drafted on the record in consultation with the parties. The questions were drafted with the intention of finding out what the jurors understood regarding the list of proposed exhibits and the associated abbreviations contained therein. None of the jurors knew what a 'JOC' is or what those letters stand for. Only one juror considered the case to be a close call. Four of the jurors either did not remember the list or they did not recall the nature of the discussion related to the list." ROA at 221-2.

Analyzing this evidence via Winiarz, the District Court found that "1. The issue of guilt or innocence was not close. Methamphetamine found by the police in a backpack behind the passenger's seat in a vehicle driven by Defendant. Although the defense theory was that the methamphetamine belonged to the passenger, evidence found in the backpack tied the controlled substance to Defendant. Based on the evidence presented at trial, a reasonable jury could have found that the methamphetamine was possessed solely by Defendant, or jointly by Defendant and her passenger." ROA at 222 (emphasis added).

With regard to the quantity and character of the error the court found them "slight" believing that certified JOCs did not show a probable prior criminal history. ROA at 222.

With regard to the seriousness of the offense the court noted that the crime here was the lowest level of felony and thus not so serious as other cases examined by the Supreme Court of Nevada." ROA at 222.

Thus, the court found that the error was beyond a reasonable doubt harmless. ROA at 223.

The trial court's analysis on all three Winiarz factors seems suspect.

The trial court seems to have found the case not close despite the State attorney's concession that "We have most of the evidence suggesting it's her narcotics and it's possible that they were his as well." ROA at 298. Similarly,

there was evidence that part of the drugs were not tested, id., and that the furtive action was be the known drug user passenger on the passenger side, id. Indeed, when said passenger was searched he had nothing on him despite the furtive acts, suggesting he had successfully stashed the drugs. Id. Moreover, the damage in the instant case appears compounded because the court never had an opportunity to issue a curative instruction before the Jury reached its verdict.

Although the jury found Ms. Gravelle guilty it was by no means a case where overwhelming evidence was presented against Ms. Gravelle. This was a constructive possession case where another known methamphetamine user was making furtive movements in the area where the methamphetamine was found. See ROA 297-98 (State summation). Moreover, there was no DNA or fingerprint evidence showing that Ms. Gravelle had handled the methamphetamine. ROA 298 (Gravelle summation). Accordingly, this weighed in favor of a mistrial being declared.

Indeed, the trial court seems to have found the case not close despite the State attorney's concession that "We have most of the evidence suggesting it's her narcotics and it's possible that they were his as well." ROA at 297. Similarly, there was evidence that part of the drugs were not tested, ROA at 298, and that the furtive action was be the known drug user passenger on the passenger side, ROA at

298. Indeed, when the passenger was searched he had nothing on him despite the furtive acts, suggesting it was he who had successfully stashed the drugs. Id.

As for the quantity and character of the error, much like the error in Winiarz, the error in the instant case appeared to be the result of an accident made by court staff. The evidence list made it appear as though there was much more evidence against Ms. Gravelle than was presented at trial. Much of the evidence admitted directly undercuts Ms. Gravelle's trial strategy. For example, the Court sustained an objection as to the weight of the methamphetamine. ROA 287. The weight was listed on the exhibit list. See ROA 280. Furthermore, the jury potentially had knowledge of Ms. Gravelle's prior convictions and choice not to testify. See ROA 340. While Ms. Gravelle's name is not attached to this information the exhibit list noted that there was a CR-F number attached to the JOC's. It would not be a stretch of the imagination to find that the Jury could have come to the conclusion that these were documents related to a criminal case despite testimony to the contrary.

Moreover, what distinguishes this case from many other similar cases where a mistrial was not granted is that the Court never had an opportunity to issue a curative instruction. Because the verdict came back while the parties were determining how to proceed the Jury was never told that they could not rely on any of the inadmissible evidence when arriving at their verdict. This fact weighs

heavily in the favor of a mistrial being granted. See Koenig v. State, 99 Nev. 780, 784, 672 P.2d 37 (1983).

Finally, the gravity of the instant offense leaned towards a mistrial being granted. While this only a Category E Felony, it is still a felony offense. Furthermore, a conviction on this offense could potentially be used against Ms. Gravelle in future proceedings, most notably to potentially be considered if a habitual criminal claim were ever filed against Ms. Gravelle.

Thus, in a felony case described as close by a juror the District Court should have declared a mistrial.

24. PRESERVATION OF THE ISSUES: The issues were litigated via a suppression motion, a motion to dismiss, and a motion to declare a mistrial.

25. FIRST IMPRESSION OR PUBLIC INTEREST

26. RETENTION OF THE CASE: The case should be retained by the Supreme Court under Rule 17(a) because of the first impression issue regarding NRS 289.830(1)(b), a statute of considerable public interest because of the need for monitoring law enforcement use of video cams.

DATED this 25 day of January, 2022.

MATTHEW PENNELL, Esq.,
ELKO COUNTY PUBLIC DEFENDER
Elko, NV 89801

By: RHS
ROGER H. STEWART
Chief Criminal Deputy

VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track statement has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman in font 14.

2. I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 6567 words; or

[ ] Monospaced, has 10/5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

[ ] Does not exceed 15 pages.

3. Finally, I recognize that pursuant to NRAP 3C, I am responsible for filing

a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal.

I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 25 day of January, 2022.

MATTHEW PENNELL.
ELKO COUNTY PUBLIC DEFENDER
569 Court St.
Elko NV 89801

By: RHS
ROGER H. STEWART
Chief Criminal Deputy
Nevada Bar # 3823

CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify, pursuant to the provisions of NRAP 25, that I am an employee of the Elko County Public Defender's Office, and that on the 25 day of January, 2022 I electronically filed a copy of the foregoing, Appellant's Fast Track Statement, and the following parties have consented to receive electronic filings in this matter:

CLERK OF THE SUPREME COURT
Supreme Court Building
201 S Carson Street
Carson City, NV 89701-4702

OFFICE OF THE ATTORNEY GENERAL
100 N. Carson Street
Carson City, NV 89701-4717

TYLER J. INGRAM
Elko County District Attorney

Deputy Elko County District Attorney
WALTER F. FICK
ELKO COUNTY DISTRICT ATTORNEY'S OFFICE
540 Court Street
Elko NV 89801

CERTIFICATE OF MAILING

I hereby certify, pursuant to the provisions of NRAP 25, that I am an employee of the Elko County Public Defender's Office, and that on the 25 day of January, 2022, I mailed, postage prepaid, a copy of the foregoing Appellant's Fast Track Statement to the following:

MS. SARAH ELIZABETH GRAVELLE #1250080
Florence McClure Correctional Center
4370 Smiley Road
Las Vegas, NV 89115-1808