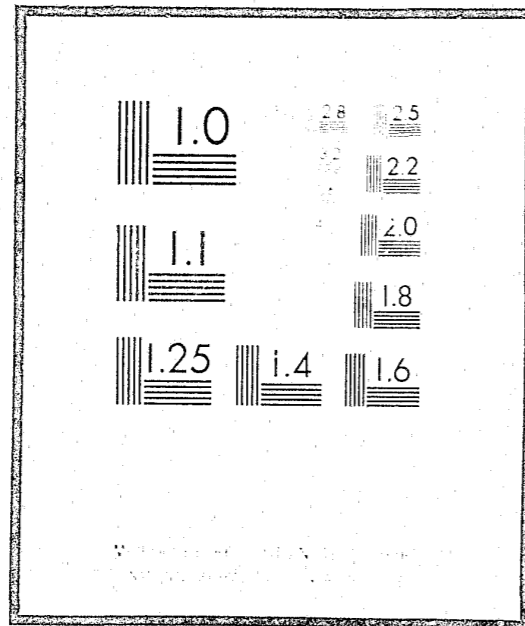


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A REFERENCE TO RELEASABLE CLIC MEMORANDA

34660
Final Report



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A REFERENCE TO RELEASABLE CLIC MEMORANDA

December 1975

FOREWORD

The Creighton Legal Information Center is a criminal justice research assistance project established at the Creighton Law School designed to aid Nebraska judges, county and city prosecutors, public defenders and appointed defense counsel and command police officials.

The project is financed by a grant from the Law Enforcement Assistance Administration. LEAA selected Nebraska as a site to study problems unique to rural criminal justice systems and to test the need for research assistance services.

CLIC case assistance service is available without charge to eligible attorneys in all Nebraska counties, except Douglas and Lancaster, and consists of assistance in researching and writing briefs, memoranda, jury instructions and other legal documents in criminal cases. A toll-free, state-wide, WATS line (800-642-8446) has been provided for the use of interested attorneys. A supervised law student will do the research and either phone or write a memorandum to the attorney within the time requested.

In addition, CLIC provides copies of memoranda prepared by the CLIC staff which are available for public release. As memoranda are completed, the topics are listed in the CLIC newsletters and users from all Nebraska counties can request copies. Periodically, a complete bibliography of available memoranda will be published.

CLIC has also published one special project report, The Nebraska Judges Deskbook, an analysis of sentencing and sentencing alternatives in Nebraska.

This project was supported by Grant Number 76 DF-99-0003, awarded by the Law Enforcement Assistance Administration, United States Department of Justice. Points of view or opinions stated in this publication are those of the Creighton Legal Information Center and do not necessarily represent the official position of the United States Department of Justice or the Creighton University.

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ACCESSORY AFTER THE FACT

- 247 DOES KNOWINGLY RECEIVING A PORTION OF THE MONEY TAKEN IN A ROBBERY CONSTITUTE CONCEALING A ROBBER UNDER NEB. REV. STAT. §28-508 (1964)?

It is arguable that receiving such stolen money amounts to the crime of concealing a robber as defined by statute.

- 247 DOES REMOVAL OR DESTRUCTION OF GUNS AND CLOTHING USED IN A ROBBERY AMOUNT TO CONCEALING A ROBBER AS DEFINED IN §28-508?

It is probable that this action does amount to concealing a robber.

ACCOMPLICES

- 001 CAN CO-DEFENDANTS LEGALLY BE COMPELLED TO TESTIFY AGAINST ONE ANOTHER?

No, however, the present state of the law in this area is not resting on solid ground.

- 016 CAN A STATE AGENT ACTING AS A PROVOCATEUR IN A DRUG PURCHASE CASE LEGALLY BE VIEWED AS AN ACCOMPLICE?

Nebraska does not have a case on point, but some jurisdictions consider this a question of fact for the jury.

- 512 CAN AN UNARMED ACCOMPLICE BE CHARGED WITH AIDING AND ABETTING THE USE OF A FIREARM IN THE COMMISSION OF A FELONY?

Yes, if the accomplice consciously shared in the criminal act.

ADMISSIONS

- 218 MAY AN EXTRAJUDICIAL ADMISSION BE INTRODUCED INTO EVIDENCE IF THE DEFENDANT/CONFESSOR DOES NOT TESTIFY AT TRIAL?

Yes. It appears that once an admission is deemed voluntary, the statement is admissible into evidence.

512 IS A VOLUNTARY, EXTRAJUDICIAL ADMISSION OF GUILT ADMISSIBLE INTO EVIDENCE?

If the admission or confession is voluntary it can be competent evidence in Nebraska.

AFFIDAVITS

027 CAN A TRIAL JUDGE DISCHARGE A DEFENDANT WITH PREJUDICE TO THE STATE IF A COUNTY ATTORNEY REFUSES TO FILE WITH THE COMPLAINT THE AFFIDAVIT REQUIRED BY NEB. REV. STAT. §43-202.01 (SUPP. 1975)?

Yes.

ALCOHOL

578 MAY A CONVICTION OF A MINOR FOR POSSESSION OF INTOXICATING LIQUOR BE BASED SOLELY UPON CIRCUMSTANTIAL EVIDENCE?

Yes, the Nebraska Supreme Court has upheld such convictions.

APPEALS

120 MAY A CITY ATTORNEY APPEAL TO THE DISTRICT COURT A CASE INVOLVING THE VIOLATION OF A MUNICIPAL ORDINANCE WHICH WAS DISMISSED BY THE COUNTY COURT?

No. However, various Nebraska Supreme Court decisions provide a basis for the argument that such an appeal should be permitted.

300 IF THERE IS NO RECORD OF DISTRICT COURT PROCEEDING IN WHICH GUILTY PLEA WAS ENTERED, IS THIS AN APPEALABLE ERROR?

Yes, however the pleas will not necessarily be set aside for this reason alone. The state must make an affirmative showing that the plea was intelligent and voluntary. The appellate court may remand for an evidentiary hearing, or allow the state to establish by other evidence a reasonably accurate account of what took place.

300 CAN DEFENDANT CHANGE HIS PLEA FROM GUILTY TO NOT GUILTY AT APPELLATE LEVEL?

Yes. The appellate court will vacate the plea if defendant proves that his plea was not voluntarily and intelligently made. Such a plea is a violation of due process and is therefore void.

300 CAN DEFENDANT RAISE THE ISSUE ON APPEAL THAT HIS SENTENCE DOES NOT REFLECT PLEA BARGAIN MADE AT DISTRICT COURT LEVEL?

Yes. In *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the United States Supreme Court held that if a guilty plea is based to any significant degree upon a promise of the prosecutor, the promise must be kept. If it is not, the conviction cannot stand even if the breach of the agreement is unintentional.

692 MAY A DEFENDANT WHO IS IN CUSTODY AFTER A PLEA OF GUILTY AND WHO ALLEGES VIOLATION OF HIS CONSTITUTIONAL RIGHTS BE GRANTED POST CONVICTION RELIEF UNDER NEB. REV. STAT. §29-3001 (SUPP. 1974) WITHOUT FIRST APPEALING THE JUDGMENT?

Probably. The purpose and function of the Post Conviction Act would seem to allow relief without a prior appeal when the issues involved could not be effectively addressed on appeal.

ARREST

007 IS A JUDGE REQUIRED TO SIGN A WARRANT FOR AN ARREST ON THE BASIS THAT THE COUNTY ATTORNEY HAS FILED A FORMAL COMPLAINT, OR MUST THE JUDGE FIRST DETERMINE JUST CAUSE ON THE BASIS OF A PROBABLE CAUSE AFFIDAVIT?

A probable cause affidavit is required by statute.

073 IS AN ARREST FOR A FELONY INVALID BECAUSE THE ARRESTING OFFICERS FAILED TO OBTAIN AN ARREST WARRANT WHERE AMPLE TIME WAS AVAILABLE TO SECURE ONE?

No, courts have generally not imposed this requirement.

073 DOES AN UNANNOUNCED ENTRY INTO A DEFENDANT'S PREMISES VITIATE AN OTHERWISE VALID ARREST?

Yes, unless justified under the facts as an exigent circumstance.

181 SHOULD BLOOD ALCOHOL TEST RESULTS BE SUPPRESSED IF THE OFFICER DID NOT INFORM THE DEFENDANT OF THE FACT THAT HE WAS UNDER ARREST BEFORE TAKING A SAMPLE, WHEN DEFENDANT WAS UNCONSCIOUS, DELIRIOUS OR OTHERWISE INCAPABLE OF COMPREHENDING THE FACT THAT HE WAS UNDER ARREST?

Results should be suppressed if defendant was not actually under arrest or in custody of the police officer at the time the tests were administered.

278 IS IT UNCONSTITUTIONAL FOR A NEBRASKA PEACE OFFICER TO ARREST A PERSON ON A FOREIGN BAD CHECK CHARGE IN RESPONSE TO A REQUEST FROM A PEACE OFFICER OF THE FOREIGN JURISDICTION THAT THE PERSON BE ARRESTED AND HELD FOR EXTRADITION UNLESS HE PAID THE AMOUNT OF THE BAD CHECK?

Yes, this amounts to an imprisonment for debt and as such violates the Nebraska Constitution.

- 331 DEFENDANT WAS ARRESTED AT HIS PROBATION OFFICER'S OFFICE FOR A CAUSE UNRELATED TO HIS PROBATION. THE ARREST WAS WITHOUT WARRANT. WAS THE ARREST LAWFUL?

The burden is on the state to show that the arresting officer had probable cause to make the arrest. If probable cause is not shown to the satisfaction of the court, then the arrest was unlawful.

- 345 MAY A NEBRASKA POLICE OFFICER ARREST A PERSON WITHOUT A WARRANT UPON RECEIVING A TELETYPE FROM ANOTHER JURISDICTION IN NEBRASKA REPORTING THAT THERE IS A WARRANT OUTSTANDING?

Yes, this satisfies the requirement of probable cause.

- 356 MAY A JUDGE ISSUE A WARRANT BY A DETERMINATION OF PROBABLE CAUSE MADE FROM A TAPE RECORDED CONVERSATION WITH THE COMPLAINANT (E.G. SHERIFF)?

Neb. Rev. Stat. §29-404 (Supp. 1974) requires the complaint to be in writing. It is unlikely that a tape recorded conversation would be valid in the absence of a statute.

- 356 IS A DETERMINATION OF PROBABLE CAUSE NECESSARY FOR THE ISSUANCE OF AN ARREST WARRANT IN A MISDEMEANOR CASE?

Yes. The Fourth Amendment requirement that "no warrants shall issue, but upon probable cause" applies to misdemeanors.

- 356 WHAT DETERMINATION IS NECESSARY FOR THE ISSUANCE OF A BENCH WARRANT?

The requirements of a bench warrant are the same as those for any arrest warrant. However, once a determination of probable cause has been made, it need not be remade to secure the presence of the defendant.

- 381 MAY AN OFFICER CONDUCT A SEARCH "INCIDENT TO ARREST" BEFORE ARRESTING DEFENDANT?

The better view is "yes," although there is some authority contra.

- 519 DO CITY POLICE IN NEBRASKA HAVE ARREST POWERS OUTSIDE THE TERRITORIAL LIMITS OF THE CITY, BUT WITHIN THE COUNTY WHICH IS THE LOCUS OF THE CITY?

The general rule is that police have no arrest powers outside of their jurisdictions without express statutory authority. However, in Nebraska, while there is no express statutory authority granting extra-territorial arrest powers to police officers, an argument can be made that certain statutes can be construed together to give them that power.

589 DOES A SHERIFF'S DEPUTY HAVE PROBABLE CAUSE TO ARREST, WHEN HE RELIES UPON FAULTY INFORMATION FROM A POLICE DEPARTMENT THAT AN ARREST WARRANT EXISTS FOR THE INDIVIDUAL?

No, without a warrant in existence, there is no probable cause for the arrest.

589 MAY EVIDENCE WHICH WAS ACQUIRED INCIDENT TO AN UNLAWFUL ARREST BE USED IN COURT?

No, the exclusionary rule would bar from court all evidence obtained incident to an improper arrest.

705 MAY DOUBLE HEARSAY BE USED TO ESTABLISH PROBABLE CAUSE FOR AN ARREST AND SUBSEQUENT SEARCH AND SEIZURE?

Double hearsay may be used to establish probable cause if the information given can reasonably be said to be reliable in light of the totality of circumstances.

ARSON

257 WHERE OWNER OF MOBILE HOME PROPOSED TO TENANT THAT TENANT BURN MOBILE HOME SO THAT THEY COULD COLLECT FIRE INSURANCE CLAIM AND OWNER PRESENTED PLAN TO ACCOMPLISH BURNING BY MEANS OF A PROPANE STOVE, CAN OWNER BE SUCCESSFULLY PROSECUTED UNDER NEB. REV. STAT. §28-504.04 (1943)?

Probably. There are no cases on point, but both Neb. Rev. Stat. §28-504.04 and §28-504.05 in our opinion could be read to include the common law crime of solicitation to commit a felony, and in effect, equate the crime of solicitation to commit arson with that of attempted arson by providing the same penalty for both crimes.

ATTORNEYS (see also COUNSEL)

003 IS THERE A CONSTITUTIONAL MANDATE TO APPOINT COUNSEL IN INDIGENT MISDEMEANOR CASES?

Yes.

003 DOES NEBRASKA HAVE A STATUTE OR COURT RULE TO AUTHORIZE COMPENSATION IN INDIGENT MISDEMEANOR CASES?

There is a statutory procedure available making counties liable to pay for such attorney services.

023 WHAT ARE THE STANDARDS USED TO DETERMINE "INDIGENCY" FOR THE PURPOSE OF APPOINTING COUNSEL?

No set standards can be established to be uniformly applied. Indigence is a relative term and must be considered individually in each case.

205 WHO DETERMINES WHAT IS A REASONABLE FEE FOR COURT APPOINTED COUNSEL?

Under Nebraska statute and case law from other jurisdictions, the trial judge has almost complete discretion in setting the attorney fee.

AUTOMOBILES

033 WHAT MUST THE STATE PROVE BEYOND A REASONABLE DOUBT TO OBTAIN A CONVICTION OF MOTOR VEHICLE HOMICIDE UNDER NEBRASKA REVISED STATUTE §28-403.01?

Elements necessary to be proved in a charge of motor vehicle homicide are: (1) the death of a person, (2) without malice, (3) while engaged in the unlawful operation of a motor vehicle.

034 IS A WARRANTLESS AUTOMOBILE SEARCH FOR ALCOHOLIC BEVERAGES JUSTIFIED IF THE DEFENDANT DRIVER WAS SPEEDING, HIS BREATH SMELLED OF ALCOHOL AND A BROWN PAPER BAG COULD BE SEEN FROM THE OUTSIDE OF THE CAR ON THE FRONT FLOORBOARD?

Yes. The warrantless search can be justified under the automobile exception rule of Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925). It also might be allowable under the plain view rule, Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971), or an expanded interpretation of the recent Supreme Court case on search incident to arrest, United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

034 WAS THERE PROBABLE CAUSE FOR MAKING A DRUG SEARCH AS A RESULT OF SEEING TWO HAND-ROLLED CIGARETTES IN THE FRONT ASHTRAY?

This is a hard question, probably answered in the affirmative.

126 IS A WARRANTLESS SEARCH OF AN AUTOMOBILE AT THE SCENE OF THE ARREST VALID?

Yes. If probable cause exists, there is no requirement that the officer must first obtain a search warrant.

126 IS THE WARRANTLESS SEARCH OF AN AUTOMOBILE AFTER ITS REMOVAL TO THE POLICE STATION AND SUBSEQUENT TO THE ARREST OF DEFENDANT'S A VALID SEARCH?

Yes, it may be justified as an inventory search (if this is police custom) or simply under the rule of Chamber v. Moroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 419 (1970).

308 IS EVIDENCE FOUND DURING AN INVENTORY SEARCH OF AN IMPOUNDED VEHICLE ADMISSIBLE IN COURT?

The cases indicate that such evidence is admissible provided that three criteria are met. First, there must be a lawful arrest of the defendant. Second, there must be reasonable

justification for impounding the vehicle. Third, the inventory search must not go to unreasonable lengths.

- 353 CAN AUTO STOP BY POLICE OFFICER BE JUSTIFIED WHEN GROUNDS FOR "REASONABLE SUSPICION" UNDER NEB. REV. STAT. §29-829 (SUPP. 1974) ARE BASED SOLELY ON ANONYMOUS TELEPHONE TIP?

Probably not. Some "indicia of reliability" is needed to substantiate an anonymous tip, since reasonable suspicion must be based on objective facts.

- 515 IS THERE REASONABLE SUSPICION FOR A POLICE OFFICER TO STOP AN AUTOMOBILE WHEN IT MAY CONTAIN A PERSON WHO IS SUSPECTED OF HAVING NARCOTICS PARAPHERNALIA IN HIS POSSESSION?

Under the facts peculiar to this case, the stop may be questionable.

- 681 DOES A POLICE OFFICER WHO STOPS A DEFENDANT FOR SPEEDING HAVE PROBABLE CAUSE TO CONDUCT A WARRANTLESS SEARCH OF THE DEFENDANT'S AUTOMOBILE FOR CONTRABAND WHERE THE DEFENDANT APPEARS TO BE NERVOUS AND IS DRIVING AN AUTOMOBILE WITH OUT-OF-STATE LICENSE PLATES WHEN PERSONS FROM SAME STATE HAD RECENTLY BEEN ARRESTED FOR POSSESSION OF MARIJUANA?

Probably not, although warrantless searches of automobiles are usually permissible where there are attendant exigent circumstances, there must first exist probable cause for the officer to conduct a search. The probable cause requirement demands that there be some objective facts from which the officer can make a reasoned conclusion that a crime is being committed. Mere suspicion of a crime does not suffice.

BAIL

- 304 MAY A COUNTY JUDGE, WHO ADMITTED A DEFENDANT TO BAIL, CITE FOR CRIMINAL CONTEMPT A SHERIFF WHO REARRESTED THE DEFENDANT WITH FULL KNOWLEDGE THAT SUCH DEFENDANT HAD BEEN ADMITTED TO BAIL?

Yes, if the county judge had the power (jurisdiction) to admit the defendant to bail.

BILL OF PARTICULARS

CAN THE STATE VARY ITS EVIDENCE AS TO THE DATE ON WHICH AN OFFENSE WAS ALLEGED TO HAVE BEEN COMMITTED IN A BILL OF PARTICULARS?

The state can present evidence of similar offenses for limited purposes, but conviction can only be had upon the offense charged.

BLOOD ALCOHOL TESTS

181 SHOULD BLOOD ALCOHOL TEST RESULTS BE SUPPRESSED IF THE OFFICER DID NOT INFORM THE DEFENDANT OF THE FACT THAT HE WAS UNDER ARREST BEFORE TAKING A SAMPLE, WHEN DEFENDANT WAS UNCONSCIOUS, DELERIOUS OR OTHERWISE INCAPABLE OF COMPREHENDING THE FACT THAT HE WAS UNDER ARREST?

Results should be suppressed if defendant was not actually under arrest or in custody of the police officer at the time the tests were administered.

260 IN A PROSECUTION FOR DRUNKEN DRIVING UNDER NEB. REV. STAT. §39-669.07 (1973), IS A VALID TEST REVEALING .10% OR MORE ALCOHOL IN THE ACCUSED'S BLOOD CONCLUSIVE EVIDENCE OF A CRIME OR DOES SUCH A VALID TEST MERELY ESTABLISH A REBUTTABLE PRESUMPTION AGAINST THE ACCUSED?

A validly administered test is conclusive evidence of a crime.

428 CAN THE STATE REQUIRE THE DEFENDANT IN A DRIVING WHILE INTOXICATED CASE, A MISDEMEANOR, TO PRODUCE HIS PRIVATE BLOOD ALCOHOL TEST?

Probably not, the Legislature specifically excluded misdemeanors from the criminal discovery statutes, Neb. Rev. Stat. §29-1912 et seq. However, if discovery is allowed the defendant in misdemeanor cases, it should, arguably, be granted to the state also.

662 DO MIRANDA WARNINGS HAVE TO BE GIVEN TO AN INDIVIDUAL ARRESTED FOR DRUNKEN DRIVING BEFORE THE CHEMICAL TEST TO DETERMINE THE ALCOHOLIC CONTENT OF HIS BLOOD, URINE, OR BREATH IS ADMINISTERED?

Miranda warnings are not required to be given an individual who is properly requested to submit to a chemical test of his alcoholic content, but failure to give warnings may render inadmissible testimonial evidence obtained from the individual subsequent to his arrest.

BONDS

241 WHEN APPELLANT HAS DEPOSITED CASH IN LIEU OF A WRITTEN UNDERTAKING, AS PROVIDED IN R.R.S. §29-611, AND HAS FAILED TO EITHER SIGN THE BOND OR TO INCLUDE IN IT THE NECESSARY CONDITIONS OF SUCH A WRITTEN UNDERTAKING, IS THE BOND DEFECTIVE?

No, in accordance with Neb. Rev. Stat. §29-611, a cash bond is given in "lieu of" such an undertaking and need not meet the formal written requirements necessary to it.

BURGLARY

198 IF A DEFENDANT SECRETS HIMSELF IN A STORE DURING BUSINESS HOURS AND STEALS GOODS AFTER CLOSING, MAY HE BE CHARGED WITH BURGLARY UNDER NEB. REV. STAT. §28-532 (1964)?

The statute requires both a breaking and an entry to sustain a conviction of burglary, and the facts are not sufficient to constitute either actual or constructive breaking.

CARELESS DRIVING

053 IS SOMNAMBULISM OR SOMNOLENTIA A VALID DEFENSE TO CARELESS DRIVING?

No, although somnambulism or somnolentia, commonly known as sleepwalking, is a defense akin to insanity, it is not a valid defense when voluntarily induced through intoxication or when the crime involves strict liability.

079 IS NEB. REV. STAT. §39-669 (1973) UNCONSTITUTIONAL ON THE GROUND THAT IT FAILS TO PRESCRIBE AN ASCERTAINABLE STANDARD OF GUILT?

A definite answer cannot be given, but the case in point suggests that it is unconstitutional.

CHAIN OF CUSTODY

140 IS THE CHAIN OF EVIDENCE BROKEN BECAUSE AT THE PRELIMINARY HEARING THE ARRESTING OFFICER TOOK THE PILLS OUT OF THE EVIDENCE LOCKER WITHOUT TALKING TO REPORTER?

No, presumption of regularity supports the official acts of public officers.

CHECKS

- 237 WHERE DOES VENUE LIE IN PROSECUTION OF A NO ACCOUNT OR INSUFFICIENT FUND CHECK WHERE THE DRAWER RESIDES OUTSIDE THE COUNTY OR THE STATE?

Venue lies in the county wherein the check was uttered or delivered, assuming that the payee resides within the county of prosecution.

- 237 WILL RESTITUTION OF AN INSUFFICIENT FUND OR NO-FUND CHECK NEGATE PROSECUTION UNDER NEB. REV. STAT. §28-1212 AND §28-1213?

No, since the offense is complete when the insufficient fund or no-fund check is uttered or delivered, subsequent restitution by the defendant has no effect, as of right, on prosecution.

- 237 WHEN DOES AN INSUFFICIENT FUND OR NO FUND CHECK BECOME STALE TO PROSECUTION?

If the offense is a felony, in three years. If a misdemeanor, in one year and six months.

- 237 CAN THE COUNTY ATTORNEY INCUR LIABILITY IF HE MAKES AVAILABLE TO LOCAL MERCHANTS A LIST OF "BAD CHECK" VIOLATORS?

No, assuming that the list contains only names taken from judicial records and no excessive editorial comment is added to the list.

- 278 IS IT UNCONSTITUTIONAL FOR A NEBRASKA PEACE OFFICER TO ARREST A PERSON ON A FOREIGN BAD CHECK CHARGE IN RESPONSE TO A REQUEST FROM A PEACE OFFICER OF THE FOREIGN JURISDICTION THAT THE PERSON BE ARRESTED AND HELD FOR EXTRADITION UNLESS HE PAID THE AMOUNT OF THE BAD CHECK?

Yes, this amounts to an imprisonment for debt and as such violates the Nebraska Constitution.

- 648 DOES THE PROSECUTOR HAVE DISCRETION UNDER NEB. REV. STAT. §28-1214 (SUPP. 1974), DEALING WITH INSUFFICIENT FUND CHECKS, TO DETERMINE WHETHER TO SEND A NOTICE TO THE MAKER THAT HIS CHECK HAS BEEN RETURNED TO THE DEPOSITOR, AND WHETHER TO PROCEED WITH PROSECUTION IF PAYMENT HAS NOT BEEN MADE WITHIN TEN DAYS AFTER THE SENDING OF SUCH NOTICE?

It appears that the prosecutor should retain discretion not to file a complaint against the maker, or send notice to the maker that his check has been returned, when the prosecutor has information negating the requisite intent to defraud.

CITIES, FIRST CLASS

144 MAY A CITY OF THE FIRST CLASS OUTLAW POSSESSION OF MARIJUANA BY WAY OF ORDINANCE?

Existing statutory and case law would authorize a city of the first class to outlaw possession, however, any such ordinance would not be built on solid ground.

488 IS THERE ANY LIMIT ON THE SHERIFF'S AUTHORITY IN INCORPORATED AREAS OF THE COUNTY?

No, the sheriff's authority is county-wide and concurrent with the police force of any incorporated area within the county.

562 WHAT ARE THE FACTORS WHICH WOULD MAKE THE CITY NUISANCE ORDINANCE UNCONSTITUTIONAL BECAUSE OF VAGUENESS OR OVERBREATH?

To be constitutional the ordinance must: (1) contain terms meaningful in light of common experience and usage; and (2) be a bona fide exercise of the police power.

CITIES, SECOND CLASS

488 IS THERE ANY LIMIT ON THE SHERIFF'S AUTHORITY IN INCORPORATED AREAS OF THE COUNTY?

No, the sheriff's authority is county-wide and concurrent with the police force of any incorporated area within the county.

562 WHAT ARE THE FACTORS WHICH WOULD MAKE THE CITY NUISANCE ORDINANCE UNCONSTITUTIONAL BECAUSE OF VAGUENESS OR OVERBREATH?

To be constitutional the ordinance must: (1) contain terms meaningful in light of common experience and usage; and (2) be a bona fide exercise of the police power.

CIVIL LIABILITY

232 CAN A JUDGE, ACTING WITHIN THE LIMITS OF HIS JURISDICTION, BE HELD CIVILLY LIABLE FOR AN ACT OF HIS WHICH RESULTED IN THE IMPROPER JAILING OF THE PERSON BRINGING SUIT?

No, a judicial officer acting in his official capacity is generally not liable for a false imprisonment resulting from an erroneous exercise of jurisdiction unless there is a clear absence of jurisdiction.

CLOSING STATEMENTS

502 WHAT MAY THE PROSECUTOR AND DEFENSE COUNSEL SAY IN THE OPENING AND CLOSING STATEMENTS TO THE JURY?

In general, the trial court has wide discretion in determining the latitude permitted in the argument of counsel, provided the remarks do not mislead or unduly influence the jury and thereby prejudice the rights of a defendant.

COMPENSATION

205 WHO DETERMINES WHAT IS A REASONABLE FEE FOR COURT APPOINTED COUNSEL?

Under Nebraska statute and case law from other jurisdictions, the trial judge has almost complete discretion in setting the attorney fee.

COMPETENCY TO STAND TRIAL

205 CAN AN INDIGENT DEFENDANT OBTAIN A COURT ORDERED PSYCHIATRIC OR PSYCHOLOGICAL EXAM TO TEST COMPETENCY, AT THE EXPENSE OF THE STATE, WITHOUT HAVING TO SHOW THE RESULTS TO EITHER THE COURT OR THE COUNTY ATTORNEY?

Probably not.

COMPLAINT

518 DOES THE FAILURE TO SPECIFY THE EXACT DATE AND TIME ON A MISDEMEANOR COMPLAINT REQUIRE DISMISSAL OF THE COMPLAINT?

Probably not, the Eighth Circuit and the Nebraska Supreme Court have ruled that the date and time are not substantive elements, which are required to be alleged on an indictment or information.

CONCEALED WEAPONS

138 WHAT MUST BE SHOWN TO CONVICT A DEFENDANT OF CARRYING A CONCEALED WEAPON UNDER NEB. REV. STAT. §28-1001 (1943), WHERE THE KNIFE WAS FOUND NEAR THE DEFENDANT?

There must be evidence connecting the defendant to the weapon showing that he had carried it and it was concealed.

CONCEALING A ROBBER

- 247 DOES KNOWINGLY RECEIVING A PORTION OF THE MONEY TAKEN IN A ROBBERY CONSTITUTE CONCEALING A ROBBER UNDER NEB. REV. STAT. §28-508 (1964)?

It is arguable that receiving such stolen money amounts to the crime of concealing a robber as defined by statute.

- 247 DOES REMOVAL OR DESTRUCTION OF GUNS AND CLOTHING USED IN A ROBBERY AMOUNT TO CONCEALING A ROBBER AS DEFINED IN §28-508?

It is probable that this action does amount to concealing a robber.

CONDEMNATION

- 192 DOES NEB. REV. STAT. §28-4,135 (R.R.S. 1971), WHICH PROVIDES FOR CONDEMNATION OF PROPERTY USED OR INTENDED FOR USE IN TRANSPORTING A CONTROLLED SUBSTANCE, INCLUDE A MOTORCYCLE FOUND IN THE BACK OF A PANEL TRUCK?

Applying the guidelines governing forfeitures, probably not.

CONFESSIONS

- 116 MAY A RESPONSE BY A WITNESS IN A CRIMINAL PROCEEDING BE USED AGAINST THAT WITNESS IN SUBSEQUENT PROCEEDINGS AGAINST HER?

Yes. The witness' privilege is one to decline to respond, not a prohibition against inquiries designed to elicit incriminating responses.

- 200 MAY A YOUTH VOLUNTARILY WAIVE HIS MIRANDA RIGHTS?

Yes. Lack of age alone is usually insufficient to warrant a finding of involuntariness.

- 209 IN A CRIMINAL PROSECUTION INVOLVING A MISDEMEANOR WHERE THERE IS A WRITTEN CONFESSION MADE BY THE DEFENDANT, IS THE PRODUCTION OF THIS CONFESSION TO THE DEFENDANT MANDATORY?

No, under Neb. Rev. Stat. §29-1912 through 29-1924 (1972) production of confessions is discretionary in felony cases only. No mention is made of misdemeanors. However, a strong argument may be made that application of such discovery statute in felony cases alone may be violative of the due process and equal protection clause.

- 209 IN A CRIMINAL PROSECUTION INVOLVING A MISDEMEANOR WHERE THERE IS A WRITTEN CONFESSION MADE BY THE DEFENDANT, IS THE PRODUCTION OF THE CONFESSION TO THE DEFENDANT AT THE DISCRETION OF THE TRIAL COURT JUDGE?

Perhaps. According to Neb. Rev. Stat. §29-1912 through 29-1924, production is discretionary in felony cases, but no mention is made of misdemeanors. Since state law prior to the enactment of the 1969 statutes held that discovery was at the discretion of the trial court judge and since the statutes make no mention of misdemeanors, it is arguable that no change in common law has been made by the 1969 statutes.

280 CAN A "COERCIVE" STATEMENT IN THE FORM OF A PROMISE NOT TO PROSECUTE MADE BY A PRIVATE CITIZEN TO A SUSPECT VITIATE THE VOLUNTARINESS OF A CONFESSION?

Yes. Depending on the relationship of the declarant with the suspect and other circumstances affecting the suspect's perception of his situation.

344 DOES THE STATEMENT BY A LAW OFFICER THAT "IF YOU TELL THE TRUTH IT WILL GO EASIER ON YOU" CONSTITUTE A PROMISE OR A THREAT VITIATING THE VOLUNTARINESS OF A CONFESSION?

Probably not, although the statement borders on impermissible conduct, it does not meet all of the requisites shown in case law to render the confession involuntary.

344 DOES AN ACCUSED'S INITIAL REFUSAL TO WAIVE THE RIGHTS TO SILENCE AND TO COUNSEL CONSTITUTE A DEMAND THAT INTERROGATION CEASE UNDER MIRANDA V. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)?

No, most jurisdictions require a more specific statement demanding a cessation of interrogation.

426 IF A CONFESSION HAS BEEN ELICITED BY THREATS WITHOUT THE GIVING OF MIRANDA WARNINGS, CAN IT BE SUPPRESSED EVEN THOUGH THE PERSON WHO ELICITED IT WAS A PRIVATE INVESTIGATOR AND NOT A POLICE OFFICER?

No, private individuals are not bound by Miranda, however any confession must be shown to have been voluntarily obtained and courts have achieved much the same result as Miranda by applying a strict voluntariness standard.

512 IS A VOLUNTARY, EXTRAJUDICIAL ADMISSION OF GUILT ADMISSIBLE INTO EVIDENCE?

If the admission or confession is voluntary it can be competent evidence in Nebraska.

CONSPIRACY

458 CAN A DEFENDANT BE CONVICTED OF CONSPIRING WITH A POLICE OFFICER TO DELIVER A CONTROLLED SUBSTANCE UNDER NEB. REV. STAT. §28-4,129 (SUPP. 1974)?

No, conspiracy, under Neb. Rev. Stat. §28-4,129 (Supp. 1974), is governed by the general conspiracy statute, Neb. Rev. Stat. §28-301 (1964), which requires that at least two persons have an intent to commit the act charged.

596 DOES THE PROVIDING OF PERTINENT INFORMATION AND DETAILS CONCERNING A VICTIM BY THE ACCUSED SATISFY THE OVERT ACT REQUIREMENT FOR CONSPIRACY PROSECUTIONS IN NEBRASKA?

Nebraska has never considered this question, but other jurisdictions have held these acts or less significant acts to be adequate.

CONSTRUCTIVE POSSESSION

361 DOES NEB. REV. STAT. §28-4,127(g) (SUPP. 1974) VIOLATE THE CONSTITUTIONAL PROVISION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIEW OF THE PENALTY PROVIDED FOR POSSESSION IN NEB. REV. STAT. §28-4,125 (SUPP. 1974).

Probably not, since the statutes deal with different crimes.

362 IF A DEFENDANT TESTIFIES IN HIS OWN DEFENSE ON A CHARGE OF CONSTRUCTIVE POSSESSION OF MARIJUANA, MAY HE BE CROSS-EXAMINED ABOUT HIS ADMISSIONS TO THE POLICE, SMOKING MARIJUANA NOT FROM THE PACKAGE CONFISCATED?

If the charge is based solely on constructive possession of the marijuana in the package, then the defendant should not be required to answer questions concerning his admitted smoking. If the charge includes the smoking of the cigarette, then the defendant could be cross-examined in regard to the smoking.

364 WILL DIRECT EVIDENCE THAT A PARCEL CONTAINING MARIJUANA WAS THROWN FROM PASSENGER WINDOW OF A VEHICLE COMBINED WITH SOME OTHER CIRCUMSTANTIAL EVIDENCE SUPPORT A CHARGE OF POSSESSION OF A CONTROLLED SUBSTANCE AGAINST BOTH DRIVER AND PASSENGER?

It is probable that the evidence would allow the case to get to a jury.

CONTINUANCE

052 WHAT REMEDY OR REMEDIES EXIST, FOR THE ACCUSED, WHEN THERE HAS BEEN A VIOLATION OF §29-502?

When the accused does not show that he was prejudiced by the delay, his only remedy is release from bail and custody. He is not entitled to a complete dismissal of the charges with prejudice to the state.

CONTRIBUTING TO DELINQUENCY

347 NEB. REV. STAT. §28-477 (SUPP. 1974) DEFINES THE CRIME OF CONTRIBUTING TO THE DELINQUENCY OF A MINOR AND REFERS TO THE DEFINITION OF DELINQUENT CHILD FORMERLY FOUND IN NEB. REV. STAT. §43-201 (1964). §43-201 WAS REVISED AND NO LONGER DEFINES DELINQUENT CHILD. THE DEFINITION IS NOW FOUND IN §43-202(3)(c) (SUPP. 1974) WHICH DOES NOT USE THE TERM "DELINQUENT CHILD." IS §28-477 STILL AN EFFECTIVE STATUTE SINCE THE STATUTE TO WHICH IT REFERS HAS BEEN REPEALED?

The general rule is that when a statute is adopted by reference, it is adopted as it existed at the time the adopting statute was passed and the subsequent repeal of the adopted statute has no effect on the adopting statute unless expressly provided.

CONTROLLED SUBSTANCES

515 WHAT IS THE AMOUNT OF A CONTROLLED SUBSTANCE REQUIRED TO SUPPORT A CONVICTION FOR POSSESSION IN NEBRASKA?

In the absence of a legislative declaration to the contrary, even the most minute traces of a controlled substance is sufficient.

CORPORATE OFFICERS - CRIMINAL RESPONSIBILITY

574 IS A CORPORATION'S KNOWLEDGE OF AN OFFICER WRITING SIZABLE CHECKS TO HIMSELF WITHOUT EXPRESS AUTHORITY A DEFENSE TO THE CRIME OF EMBEZZLEMENT IN NEBRASKA?

No, the corporation's knowledge of the officer's activities is not a defense to embezzlement.

COSTS

- 028 IF A COUNTY JUDGE HAS THE POWER TO AUTHORIZE A CONVICTED OFFENDER TO UNDERGO TREATMENT FOR ALCOHOLISM IN ANOTHER STATE, IS THE COUNTY LIABLE FOR THE COSTS OF TREATMENT?

While there are some constitutional issues involved, the court does have such power pursuant to statutory authority. The county is probably not liable for costs.

COUNSEL (see also ATTORNEYS)

- 310 WHAT ARE THE DUTIES OF A GUARDIAN AD LITEM IN A PROCEEDING TO REVIEW THE DISPOSITION OF A CHILD WHO HAS BEEN DETERMINED TO BE IN NEED OF SPECIAL SUPERVISION?

The Guardian Ad Litem should take an active part in the litigation and try to get the court to make that disposition of his ward, which, in his considered opinion, would be in the ward's best interest.

- 341 WAS DEFENDANT, ARRESTED PURSUANT TO NEB. REV. STAT. §39-669.08 (1974), ENTITLED TO HAVE AN ATTORNEY PRESENT BEFORE SUBMITTING TO A BLOOD ALCOHOL TEST?

Arguably not. I. The right to counsel does not attach until defendant has been formally charged. II. Deciding whether or not to undergo a blood test is arguably not a "critical stage" where absence of counsel may harm an accused's right to a fair trial. III. When the necessity of the prompt seizure and preservation of a blood specimen is balanced against the accused's desire to postpone the simple procedure until counsel is present and when delay could render the test meaningless, society's interests outweigh those of the accused.

- 433 COULD THE COURT WAIVE APPOINTMENT OF COUNSEL FOR A NINE YEAR OLD MINOR IN 1969?

No, the only valid waiver of the right to counsel is a waiver that is competently and intelligently made by the defendant or his parents or guardian when the interests of the parents or guardian are not adverse to the interests of the defendant.

- 503 IS IT PERMISSIBLE FOR THE POLICE TO INTERROGATE A JUVENILE WHO HAS WAIVED HIS RIGHTS IN HIS MOTHER'S PRESENCE WITHOUT FIRST CONTACTING THE ATTORNEY THE POLICE KNOW REPRESENTS THE JUVENILE ON ANOTHER MATTER?

Probably yes, the Nebraska Supreme Court has ruled such practice is not violative of an adult's rights under the sixth amendment.

696 MUST THE STATE OR COUNTY CONTINUE THE COURT APPOINTMENT OF COUNSEL FOR A FELONY DEFENDANT SO THAT THE DEFENSE COUNSEL MAY APPLY FOR A WRIT OF CERTIORARI OR A DIRECT APPEAL TO THE UNITED STATES SUPREME COURT?

No. There is no constitutional requirement of Nebraska statute which supports the proposition that a state or county must continue the appointment of defense counsel, so that he may apply for a direct appeal or writ of certiorari to the United States Supreme Court.

COUNSEL - COMPENSATION FOR COURT APPOINTED

003 DOES NEBRASKA HAVE A STATUTE OR COURT RULE TO AUTHORIZE COMPENSATION IN INDIGENT MISDEMEANOR CASES?

There is a statutory procedure available making the counties liable to pay for such attorney services.

205 WHO DETERMINES WHAT IS A REASONABLE FEE FOR COURT APPOINTED COUNSEL?

Under Nebraska statute and case law from other jurisdictions, the trial judge has almost complete discretion in setting the attorney fee.

COURTS (JURISDICTION)

011 WHAT IS THE IMPACT OF LB 620, EFFECTIVE JULY 1974, ON THE POWER OF A DISTRICT COURT TO RETAIN JURISDICTION OVER AND PASS SENTENCE ON A MINOR CONVICTED OF COMMITTING A FELONY?

The District Court may still hear a felony trial and sentence the offender to the Nebraska Penal and Correctional Complex but the juvenile procedures of Chapter 43 of the Nebraska Revised Statutes may be invoked at several stages of the trial. The decision of which court to proceed in is no longer solely the responsibility of the county attorneys.

031 DOES A NEBRASKA COUNTY COURT HAVE JURISDICTION OVER THE PROSECUTION OF A JUVENILE WHEN A NEBRASKA DISTRICT COURT IN A DIVORCE PROCEEDING HAD PREVIOUSLY DECLARED THE CUSTODY OF THAT JUVENILE?

Yes, the County Court has jurisdiction of a criminal proceeding against such a juvenile, and also has jurisdiction to determine his custody.

350 MAY A COUNTY COURT COMMIT A CRIMINAL DEFENDANT TO THE DEPARTMENT OF CORRECTIONAL SERVICES FOR UP TO 90 DAYS FOR PRESENTENCE INVESTIGATION PURSUANT TO NEB. REV. STAT. §83-1,105(3) (SUPP. 1974) OR IS THIS AUTHORITY LIMITED TO THE DISTRICT COURTS?

§83-1,105(3) (Supp. 1974) is not applicable to county courts. The authority to commit is available only to the district courts.

546 DOES THE COUNTY COURT HAVE EQUITY JURISDICTION?

Generally, the county courts have equity powers only in areas where the court exercises exclusive original jurisdiction.

COURT RULES

083 IS A COURT RULE WHICH REQUIRES A WRITTEN DEMAND FOR TRIAL BY JURY IN A CRIMINAL CASE WITHIN A DEFINED PERIOD PRIOR TO TRIAL UNCONSTITUTIONAL BECAUSE FAILURE TO DEMAND IS DEEMED A WAIVER OF THE RIGHT?

Yes, in felony cases the court must be satisfied that the defendant made a knowing and intelligent waiver. In petty offenses the rule may be proper.

DEFENSES

010 WHAT CONSTITUTES THE DEFENSE OF ENTRAPMENT AND WHAT GENERAL PROBLEMS ARE ENCOUNTERED IN USING IT?

The defense has been severely limited by recent decisions and the election to employ this defense precludes the defendant from alleging many other available defenses.

053 IS SOMNAMBULISM OR SOMNOLENTIA A VALID DEFENSE TO CARELESS DRIVING?

No, although somnambulism or somnolentia, commonly known as sleepwalking, is a defense akin to insanity, it is not a valid defense when voluntarily induced through intoxication or when the crime involves strict liability.

581 IS IT REQUIRED THAT A DEFENSE ATTORNEY PLEAD THE AFFIRMATIVE DEFENSE OF ENTRAPMENT PRIOR TO TRIAL IN NEBRASKA?

No, Nebraska has no statutory requirement that the accused give notice of intention to rely on entrapment as a defense.

DEFRAUDING AN INSURANCE COMPANY

573 CAN A PERSON BE CONVICTED OF DEFRAUDING AN INSURANCE COMPANY, PURSUANT TO NEB. REV. STAT. §44-391 (1974), IF HE DID NOT HAVE ANY CONTRACTUAL RELATIONS WITH THAT COMPANY?

Though there are no Nebraska cases on point, of four cases from other jurisdictions dealing with this question under a similar statute, three have held that contractual relations are not necessary.

DEPUTIES

355 WHERE THE SHERIFF OBTAINED A SEARCH WARRANT DIRECTED TO HIM PERSONALLY AND THE SEARCH WAS CONDUCTED BY HIS DEPUTY AT HIS DIRECTION BUT NOT IN HIS PRESENCE, MAY BE EVIDENCE THUS OBTAINED BE SUPPRESSED?

No. The deputy was acting for the sheriff according to a Neb. Rev. Stat. §25-2219 and where the defendant was not substantially prejudiced by this substitution, suppression of seized evidence would be unwarranted.

DISCOVERY

209 IN A CRIMINAL PROSECUTION INVOLVING A MISDEMEANOR WHERE THERE IS A WRITTEN CONFESSION MADE BY THE DEFENDANT, IS THE PRODUCTION OF THIS CONFESSION TO THE DEFENDANT MANDATORY?

No, under Neb. Rev. Stat. §29-1912 through 29-1924 (1972) production of confessions is discretionary in felony cases only. No mention is made of misdemeanors. However, a strong argument may be made that application of such discovery statute in felony cases alone may be violative of the due process and equal protection clause.

428 CAN THE STATE REQUIRE THE DEFENDANT IN A DRIVING WHILE INTOXICATED CASE A MISDEMEANOR TO PRODUCE HIS PRIVATE BLOOD ALCOHOL TEST?

Probably not. The Legislature specifically excluded misdemeanors from the criminal discovery statutes, Neb. Rev. Stat. §29-1912 et seq. However, if discovery is allowed the defendant in misdemeanor cases, it should, arguably, be granted to the state also.

589 MAY THE DEFENSE ATTORNEY EXAMINE POLICE REPORTS THROUGH PRE-TRIAL DISCOVERY?

The trial court has discretion to determine whether the defense attorney shall be permitted to examine police reports prior to trial.

DISCRETION

- 648 DOES THE PROSECUTOR HAVE DISCRETION UNDER NEB. REV. STAT. §28-1214 (SUPP. 1974), DEALING WITH INSUFFICIENT FUND CHECKS, TO DETERMINE WHETHER TO SEND A NOTICE TO THE MAKER THAT HIS CHECK HAS BEEN RETURNED TO THE DEPOSITOR, AND WHETHER TO PROCEED WITH PROSECUTION IF PAYMENT HAS NOT BEEN MADE WITHIN TEN DAYS AFTER THE SENDING OF SUCH NOTICE?

It appears that the prosecutor should retain discretion not to file a complaint against the maker, or send notice to the maker that his check has been returned, when the prosecutor has information negating the requisite intent to defraud.

DRIVER'S LICENSES

- 022 DOES THE 1957 AMENDMENT TO NEBRASKA REVISED STATUTE §60-427 CHANGE THE 1955 NEBRASKA SUPREME COURT'S INTERPRETATION OF THAT STATUTE?

No, there is no indication in the committee hearing or the statement by the committee chairman that such a change was intended.

- 207 MAY AN ARRESTEE OBJECT TO THE SUBMISSION OF THE SWORN REPORT OF THE ARRESTING OFFICER IN THE PROCEEDING TO REVOKE HIS LICENSE ON THE GROUND THAT IT IS AN UNCONSTITUTIONAL DENIAL OF THE RIGHT TO CONFRONT WITNESSES?

No. The proceeding is civil in nature and not criminal. Therefore, no claim of unconstitutional denial of the right to confront witnesses should attach.

DRUNKEN DRIVING

- 150 WHAT IS THE DEFINITION OF "OPERATE OR BE IN THE ACTUAL PHYSICAL CONTROL" OF A MOTOR VEHICLE WITHIN THE MEANING OF NEB. REV. STAT. §39-669.07?

According to Waite v. State, 169 Neb. 113, 118, 98 N.W.2d 688, 691 (1959), "operating" relates to the actual physical handling of the controls of the vehicle by a person while under the influence of intoxicating liquor.

- 260 IN A PROSECUTION FOR DRUNKEN DRIVING UNDER NEB. REV. STAT. §39-669.07 (1973), IS A VALID TEST REVEALING .10% OR MORE ALCOHOL IN THE ACCUSED'S BLOOD CONCLUSIVE EVIDENCE OF A CRIME OR DOES SUCH A VALID TEST MERELY ESTABLISH A REBUTTABLE PRESUMPTION AGAINST THE ACCUSED?

A validly administered test is conclusive evidence of a crime.

EDUCATION, COMPULSORY

- 254 WHAT ELEMENTS AND/OR FACTS MUST BE SHOWN TO BRING A DEFENSE AGAINST THE CHARGES OF CAUSING CHILDREN TO BE ABSENT FROM SCHOOL UNDER NEB. REV. STAT. §79-211, 216 (1971) WITHIN THE PROTECTION OF WISCONSIN V. YODER, 406 U.S. 205, 92 S. Ct. 1526, 32 L. ED. 2d 15 (1972)?

The nature and history of the religious sect, their beliefs and conduct, the effect of compulsory attendance on the child and the community, and the type of education offered by the community are all relevant.

EMBEZZLEMENT

- 574 IS A CORPORATION'S KNOWLEDGE OF AN OFFICER WRITING SIZABLE CHECKS TO HIMSELF WITHOUT EXPRESS AUTHORITY A DEFENSE TO THE CRIME OF EMBEZZLEMENT IN NEBRASKA?

No, the corporation's knowledge of the officer's activities is not a defense to embezzlement.

ENTRAPMENT

- 010 WHAT CONSTITUTES THE DEFENSE OF ENTRAPMENT AND WHAT GENERAL PROBLEMS ARE ENCOUNTERED IN USING IT?

The defense has been severely limited by recent decisions and the election to employ this defense precludes defendant from alleging many other available defenses.

- 581 IS IT REQUIRED THAT A DEFENSE ATTORNEY PLEAD THE AFFIRMATIVE DEFENSE OF ENTRAPMENT PRIOR TO TRIAL IN NEBRASKA?

No, Nebraska has no statutory requirement that the accused give notice of intention to rely on entrapment as a defense.

EQUITY

- 546 DOES THE COUNTY COURT HAVE EQUITY JURISDICTION?

Generally, the county courts have equity powers only in areas where the court exercises exclusive original jurisdiction.

ESCAPE

- 278 DOES THE ESCAPE OF A PERSON UNDER ARREST BUT NOT INCARCERATED AMOUNT TO A VIOLATION OF THE NEBRASKA STATUTE PENALIZING ESCAPE FROM LEGAL CUSTODY IF SUCH ARREST WAS ILLEGAL?

No, a person may escape from an illegal arrest.

EVIDENCE (COMPELLED TESTIMONY)

001 CAN CO-DEFENDANTS LEGALLY BE COMPELLED TO TESTIFY AGAINST ONE ANOTHER?

No, however, the present state of the law in this area is not resting on solid ground.

218 MAY AN EXTRAJUDICIAL ADMISSION BE INTRODUCED INTO EVIDENCE IF THE DEFENDANT/CONFESSOR DOES NOT TESTIFY AT TRIAL?

Yes. It appears that once an admission is deemed voluntary, the statement is admissible into evidence.

EVIDENCE (CORROBORATIVE)

016 DOES THE INTRODUCTION OF THE DRUG INTO EVIDENCE CONSTITUTE CORROBORATIVE EVIDENCE IN A CRIMINAL TRIAL WHERE THE DEFENDANT IS CHARGED WITH DISTURBING THAT DRUG?

No, there must be some evidence linking the drug to the defendant other than that of the self-authenticating accomplice.

016 CAN A CONVICTION REST ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE?

Yes, unless the defense can establish that the accomplice is guilty of willful false swearing in relation to a material matter before the court.

033 CAN A STATEMENT GIVEN BY THE ACCUSED TO AN INVESTIGATOR, THE DAY FOLLOWING THE ACCIDENT WHILE THE ACCUSED WAS HOSPITALIZED, BE USED AT THE TRIAL TO SHOW THE HIGH RATE OF SPEED AT WHICH THE ACCUSED WAS DRIVING, THE TIME OF DAY THE ACCIDENT OCCURRED, AND THAT THE ACCUSED WAS THE DRIVER OF THE CAR?

Voluntary admissions by the accused, if corroborated, may be used to establish the corpus delicti of the crime or the accused's connection with the crime or to impeach the accused's testimony.

332 IS THE TESTIMONY OF THE ACCUSED'S GIRLFRIEND THAT THE ACCUSED ADMITTED DOING THE ACTS CONSTITUTING BURGLARY AND GRAND LARCENY SUFFICIENT TO CONVICT THE ACCUSED IN THE ABSENCE OF OTHER EVIDENCE?

No. According to the Nebraska Supreme Court, "[I]t is a fundamental in the law of this state that a defendant may not be properly convicted solely on an admission or confession made by him. Olney v. State, 169 Neb. 717, 723, 100 N.W.2d 838 (1960); Whomble v. State, 145 Neb. 667, 672, 10 N.W.2d 627 (1943).

607 DOES THE ADMISSION OF BUSINESS RECORDS IN A CRIMINAL ACTION CONSTITUTE A DENIAL OF THE RIGHT OF CONFRONTATION?

Only if the proffered evidence seeks to establish either an element of the offense or defendant's connection with the crime.

EVIDENCE (DEFENSES)

010 WHAT CONSTITUTES THE DEFENSE OF ENTRAPMENT AND WHAT GENERAL PROBLEMS ARE ENCOUNTERED IN USING IT?

The defense has been severely limited by recent decisions and the election to employ this defense precludes defendant from alleging many other available defenses.

016 CAN A STAGE AGENT ACTING AS A PROVOCATEUR IN A DRUG PURCHASE CASE LEGALLY BE VIEWED AS AN ACCOMPLICE?

Some states hold that this is a jury question, and dicta in Nebraska case law may uphold such an approach.

092 IS HEARSAY TESTIMONY ADMISSIBLE AT A PRELIMINARY HEARING?

Though there is no case directly on point, the answer is "yes."

343 IS EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH OR FIFTH AMENDMENT ADMISSIBLE FOR PURPOSES OF FINDING PROBABLE CAUSE IN A PRELIMINARY HEARING FOR A FELONY IN NEBRASKA?

Yes, the Nebraska Supreme Court has held that a preliminary hearing before a magistrate is not a criminal prosecution and in reception of evidence it is not strictly governed by technical rules applicable at the trial court level.

607 DOES THE HEARSAY RULE EXCLUDE FROM EVIDENCE BUSINESS RECORDS OF A TRANSACTION UPON WHICH THE ILLEGALITY OF A SUBSEQUENT ACT IS BASED?

Only if such records are within the regularly kept records exception and a sufficient foundation for their authenticity is established.

607 MAY RECORDS OF A TRANSACTION BE EXCLUDED ON THE GROUNDS THAT THE CHAIN OF CUSTODY BETWEEN THE TIME OF THE TRANSACTION AND THE DISCOVERY OF THE RECORDS CANNOT BE ESTABLISHED?

Only if such records are not readily identifiable or are susceptible to alteration or tampering.

607 WHERE THE COMPLETE RECORDS ARE NOT AVAILABLE, MAY THOSE RECORDS THAT ARE AVAILABLE BE EXCLUDED ON THE GROUNDS THAT THE UNAVAILABLE RECORDS CANNOT BE EXAMINED?

Only if the meaning of such records is unclear or their effect would not be limited to the purpose for which it is introduced.

626 UNDER WHAT CIRCUMSTANCES CAN LINE-UP IDENTIFICATIONS AND PHOTO-IDENTIFICATIONS BE EXCLUDED FROM EVIDENCE?

If the procedure was such as to be "impermissibly suggestive" the evidence may be excluded unless there is an independent basis for the identification.

EVIDENCE (OBJECTS)

013 MUST THE PROSECUTION PRODUCE IN EVIDENCE OBJECTS WHICH ARE ELEMENTS OF THE CRIME CHARGED (E.G. CAN THE STATE PROCEED ON A CHARGE OF POSSESSION OF NARCOTICS IF THE NARCOTICS ALLEGED TO HAVE BEEN POSSESSED CANNOT BE PRODUCED AT TRIAL)?

No, such evidence is not a condition precedent to suit; however, the prosecution's burdens may prove inseparable in its absence.

014 CAN THE PROSECUTION BASE A CHARGE ON EVIDENCE OF A CRIME DISCOVERED DURING A SEARCH AUTHORIZED BY WARRANT IF THE WARRANT WAS LIMITED TO SEARCHING FOR EVIDENCE OF A DIFFERENT CRIME?

Yes, so long as the police had original justification for being where they found such other evidence; and so long as their actions fell within one of the exceptions to the warrant rule, such evidence may be used to support an additional charge.

140 IS THE CHAIN OF EVIDENCE BROKEN BECAUSE AT THE PRELIMINARY HEARING THE ARRESTING OFFICER TOOK THE PILLS OUT OF THE EVIDENCE LOCKER WITHOUT TALKING TO REPORTER?

No, presumption of regularity supports the official acts of public officers.

589 DOES A SHERIFF'S DEPUTY HAVE PROBABLE CAUSE TO ARREST, WHEN HE RELIES UPON FAULTY INFORMATION FROM A POLICE DEPARTMENT THAT AN ARREST WARRANT EXISTS FOR THE INDIVIDUAL?

No, without a warrant in existence, there is no probable cause for the arrest.

EXTRADITION

278 IS IT UNCONSTITUTIONAL FOR A NEBRASKA PEACE OFFICER TO ARREST A PERSON ON A FOREIGN BAD CHECK CHARGE IN RESPONSE TO A REQUEST FROM A PEACE OFFICER OF THE FOREIGN JURISDICTION THAT THE PERSON BE ARRESTED AND HELD FOR EXTRADITION UNLESS HE PAID THE AMOUNT OF THE BAD CHECK?

Yes, this amounts to an imprisonment for debt and as such violates the Nebraska Constitution.

FELONY

- 351 CAN A COUNTY ATTORNEY BRING A PROCEEDING IN JUVENILE COURT AGAINST A CHILD WHO HAS ALLEGEDLY COMMITTED A FELONY IN THAT COUNTY, EVEN THOUGH THE JUVENILE RESIDES IN ANOTHER NEBRASKA COUNTY?

It appears that the petition may be filed in the juvenile court in the county where the felony was committed.

FILING

- 241 WHEN APPELLANT HAS DEPOSITED CASH IN LIEU OF A WRITTEN UNDERTAKING, AS PROVIDED IN R.R.S. 29-611, AND HAS FAILED TO EITHER SIGN THE BOND OR TO INCLUDE IN IT THE NECESSARY CONDITIONS OF SUCH A WRITTEN UNDERTAKING, IS THE BOND DEFECTIVE?

No, in accordance with Neb. Rev. Stat. §29-611, a cash bond is given in "lieu of" such an undertaking and need not meet the formal written requirements necessary to it.

FINES

- 398 MAY A JUDGE IMPOSE ONLY THE MINIMUM FINE ON A DEFENDANT WHO HAS BEEN CHARGED AND CONVICTED OF SEVERAL COUNTS OF VIOLATION OF A STATUTE?

No. If the defendant has been convicted of several counts, at least the minimum sentence must be imposed for each count.

- 439 CAN AN INDIGENT DEFENDANT BE IMPRISONED IMMEDIATELY FOR NONPAYMENT OF A FINE IMPOSED BY A COURT?

No, it is denial of equal protection for any defendant to be imprisoned solely because he cannot make immediate payment of a fine by reason of indigency.

- 650 DOES A CITY OF THE SECOND CLASS HAVE A RIGHT TO ANY PART OF FINES COLLECTED BY THE COUNTY COURT, AS A RESULT OF CITY POLICE ACTIVITIES?

The city treasurer is entitled to receive fines and penalties collected by the county court only if those fines and penalties are imposed pursuant to a violation of a municipal ordinance or by-law. If the fines and penalties are imposed pursuant to a violation of the statutes of the State of Nebraska, they are to be paid into the county treasury.

FINGERPRINTS

- 548 ONCE A JUVENILE (OVER 14 BUT LESS THAN 19 YEARS) HAS BEEN ARRESTED AND RELEASED, MAY HE BE REQUIRED TO RETURN FOR FINGERPRINTING AND PHOTOGRAPHING?

Yes, but a court order is required.

FIREARMS

164 IS INTENT AN ESSENTIAL ELEMENT IN CONVICTING UNDER NEB. REV. STAT. §28-1011.15, FOR POSSESSION OF A FIREARM BY A FELON?

Intent may be an essential element, but the intent considered is merely the intent to possess not the intent to violate the statute.

512 CAN AN UNARMED ACCOMPLICE BE CHARGED WITH AIDING AND ABETTING THE USE OF A FIREARM IN THE COMMISSION OF A FELONY?

Yes, if the accomplice consciously shared in the criminal act.

FORGERY

555 DOES THE INTENTION TO REPAY MONEY OBTAINED THROUGH FORGERY NEGATE INTENT TO DEFRAUD?

No, the jurisdictions that have considered the issue hold that the intention to repay is not a defense.

GUARDIAN-AD-LITEM

310 WHAT ARE THE DUTIES OF A GUARDIAN AD LITEM IN A PROCEEDING TO REVIEW THE DISPOSITION OF A CHILD WHO HAS BEEN DETERMINED TO BE IN NEED OF SPECIAL SUPERVISION?

The Guardian Ad Litem should take an active part in the litigation and try to get the court to make that disposition of his ward, which, in his considered opinion, would be in the ward's best interest.

HABEAS CORPUS

476 IS A HABEAS CORPUS PROCEEDING THE PROPER WAY TO ATTACK THE ARREST PRIOR TO TRIAL?

Yes, habeas corpus is the traditional remedy to test the legality of custody, though it may not be used to attack the sufficiency of evidence adduced at a preliminary hearing.

565 IS A PERSON OUT ON BOND "IN CUSTODY" WITHIN THE MEANING OF THE FEDERAL HABEAS CORPUS STATUTE?

Yes, the definition of in custody has been recently broadened to include persons out on bond.

696 WHAT ACTIONS MUST THE DEFENDANT TAKE TO EXHAUST STATE REMEDIES IN ORDER TO BE ELIGIBLE TO FILE FOR FEDERAL HABEAS CORPUS RELIEF?

State remedies are exhausted when the constitutional contention has once been presented to the state courts.

HEARSAY

607 DOES THE HEARSAY RULE EXCLUDE FROM EVIDENCE BUSINESS RECORDS OF A TRANSACTION UPON WHICH THE ILLEGALITY OF A SUBSEQUENT ACT IS BASED?

If such records are within the regularly kept records exception and a sufficient foundation for their authenticity is established, they are admissible.

705 MAY DOUBLE HEARSAY BE USED TO ESTABLISH PROBABLE CAUSE FOR AN ARREST AND SUBSEQUENT SEARCH AND SEIZURE?

Double hearsay may be used to establish probable cause if the information given can reasonably be said to be reliable in light of the totality of circumstances.

HOMICIDE

033 WHAT MUST THE STATE PROVE BEYOND A REASONABLE DOUBT TO OBTAIN A CONVICTION OF MOTOR VEHICLE HOMICIDE UNDER NEBRASKA REVISED STATUTE §28-403.01?

Elements necessary to be proved in a charge of motor vehicle homicide are: (1) the death of a person, (2) without malice, (3) while engaged in the unlawful operation of a motor vehicle.

068 DOES A CHARGE OF SECOND DEGREE MURDER NECESSITATE A FINDING OF INTENT TO KILL?

The Nebraska statute and interpretive cases dictate a necessity of proof of intent to kill in order to support a charge of second degree murder.

HUSBAND-WIFE PRIVILEGE

226 MAY ONE SPOUSE TESTIFY AGAINST THE OTHER IN A PROSECUTION FOR ARSON BASED UPON THE BURNING OF THEIR JOINTLY OWNED DWELLING?

Yes. Arson arguably is a crime against the spouse within the meaning of Neb. Rev. Stat. §25-1203 (1964).

IMMUNITY

597 IS "LIMITED" OR "USE" IMMUNITY AVAILABLE IN NEBRASKA?

This question has not been directly addressed by the court, however, Neb. Rev. Stat. §29-2011.01 (Supp. 1974) has generally been interpreted as granting transactional immunity.

IMPEACHMENT

- 140 IF THE DEFENSE IMPEACHES A PROSECUTION WITNESS BY EVIDENCE OF A PRIOR CONVICTION, WHAT IS THE PROPER SCOPE OF INQUIRY ON REDIRECT?

Redirect is normally limited to answering any new matter drawn out on cross-examination.

- 332 ARE JUVENILE COURT RECORDS OF ADJUDICATIONS OF THAT COURT AVAILABLE TO IMPEACH WITNESSES?

Most likely not. Although no Nebraska case law exists on this point, the majority of other jurisdictions examined bar such use of the adjudication records.

- 346 WHAT IS THE EXTENT TO WHICH THE DEFENSE MAY EXAMINE A STATE'S WITNESS REGARDING HIS RELEASE FROM THE STATE PENITENTIARY BY AGREEMENT TO ACT AS UNDERCOVER AGENT?

By virtue of Neb. Rev. Stat. §25-1214 (1964), a witness may be interrogated as to his previous conviction for a felony. Cross-examination into factual details relating to witness' credibility is also statutorily provided. Neb. Rev. Stat. §25-1211 (1964).

IMPLIED CONSENT

- 178 WHEN DOES A SUSPECT'S REFUSAL TO HAVE BLOOD, URINE OR BREATH TEST BRING INTO PLAY ADMINISTRATIVE SANCTIONS SET OUT IN §39-669.08? IF THE SUSPECT REFUSES AND CHANGES HIS MIND ONE HALF HOUR LATER, DOES §39-669.08(4) MEAN THAT HE WILL STILL BE SUBJECT TO ADMINISTRATIVE REVOCATION OF HIS OPERATOR'S PERMIT?

Yes. The Nebraska Supreme Court has held that a conditional or qualified refusal is a refusal to submit to the test. However, if the refusal was induced by confusion resulting from the commingling of the Miranda warnings with information concerning the demands of the implied consent statute, the suspect did not refuse for the purposes of administratively revoking the operator's permit.

- 222 DOES THE REVISION IN NEB. REV. STAT. §39-669.14 (LB 679, 1974) CHANGING THE REQUIREMENT OF A "REGISTERED LAB TECHNOLOGIST" TO A "QUALIFIED TECHNICIAN" AS A PERSON AUTHORIZED TO WITHDRAW BLOOD SAMPLES FOR DETERMINING ALCOHOL CONTENT MANIFEST A SUBSTANTIVE CHANGE IN PRESENT LAW?

No. The Nebraska Legislature has never required licensing of lab technologists, although efforts are being made currently to pass such a law. The courts must interpret "qualified technician" without any guidelines from the Legislature.

260 IN A PROSECUTION FOR DRUNKEN DRIVING UNDER NEB. REV. STAT. §39-669.07 (1973), IS A VALID TEST REVEALING .10% OR MORE ALCOHOL IN THE ACCUSED'S BLOOD CONCLUSIVE EVIDENCE OF A CRIME OR DOES SUCH A VALID TEST MERELY ESTABLISH A REBUTTABLE PRESUMPTION AGAINST THE ACCUSED?

A validly administered test is conclusive evidence of a crime.

IMPOUND

308 IS EVIDENCE FOUND DURING AN INVENTORY SEARCH OF AN IMPOUNDED VEHICLE ADMISSIBLE IN COURT?

The cases indicate that such evidence is admissible provided that three criteria are met. First, there must be a lawful arrest of the defendant. Second, there must be reasonable justification for impounding the vehicle. Third, the inventory search must not go to unreasonable lengths.

INCONSISTENT VERDICTS

483 IS AN INCONSISTENT VERDICT GROUND FOR REVERSAL, WHERE THE JURY CONVICTS ON ONE CHARGE AND ACQUITS ON A SECOND IDENTICAL CHARGE AND THE STATE'S EVIDENCE ON EACH CHARGE IS BASED UPON THE SAME TESTIMONY BY AN INFORMER?

Probably not, as the Nebraska Supreme Court has consistently held, the credibility of a witness is for the jury and will not be disturbed on appeal if the evidence sustains some rational theory of guilt. However, an argument can be made that as the state's case rests upon the testimony of one informer, who presented identical testimony on both charges and who the jury believed on one charge and not on the other, the court on appeal should examine the evidence carefully to prevent a miscarriage of justice.

INCORPORATION DOCTRINE

347 NEB. REV. STAT. §28-477 (SUPP. 1974) DEFINES THE CRIME OF CONTRIBUTING TO THE DELINQUENCY OF A MINOR AND REFERS TO THE DEFINITION OF DELINQUENT CHILD FORMERLY FOUND IN NEB. REV. STAT. §43-201 (1964). §43-201 WAS REVISED AND NO LONGER DEFINES DELINQUENT CHILD. THE DEFINITION IS NOW FOUND IN §43-202(3) (c) (SUPP. 1974) WHICH DOES NOT USE THE TERM "DELINQUENT CHILD." IS §28-477 STILL AN EFFECTIVE STATUTE SINCE THE STATUTE TO WHICH IT REFERS HAS BEEN REPEALED?

The general rule is that when a statute is adopted by reference, it is adopted as it existed at the time the adopting statute was passed and the subsequent repeal of the adopted statute has no effect on the adopting statute unless expressly provided.

INDICTMENTS AND INFORMATIONS

123 CAN THE STATE VARY ITS EVIDENCE AS TO THE DATE ON WHICH AN OFFENSE WAS ALLEGED TO HAVE BEEN COMMITTED IN A BILL OF PARTICULARS?

The state can present evidence of similar offenses for limited purposes, but conviction can only be had upon the offense charged.

216 MAY A DEFENDANT BE CONVICTED OF SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE WHEN THE INFORMATION CHARGES THAT HE DID "SELL AND DISTRIBUTE" THE CONTROLLED SUBSTANCE?

It is arguable that possession is not included in the offense charged.

535 ARE JURY INSTRUCTIONS WHICH CONTAIN BOTH A) THE INFORMATION, ALLEGING THE MATERIAL ELEMENTS OF THE CRIME IN CONJUNCTIVE LANGUAGE, AND B) THE STATUTE, WHICH STATES THE ELEMENTS IN DISJUNCTIVE LANGUAGE, PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE ACCUSED?

Probably not, although an argument exists that such a practice is confusing as to what material elements must be proved to establish a violation of the statute.

607 DOES A DEFENDANT HAVE TO BE CHARGED WITH A VIOLATION OF THE MOST SPECIFIC STATUTE, IF MORE THAN ONE COVERS THE ACT?

No, generally the prosecutor has discretion concerning what statute the defendant will be charged with violating.

INDIGENTS

003 MUST AN ATTORNEY BE APPOINTED TO REPRESENT INDIGENT MISDEMEANTS IF THE JUDGE IS TO HAVE OPEN TO HIM THE OPTION OF SENDING SUCH AN OFFENDER TO JAIL?

Yes.

023 WHAT ARE THE STANDARDS USED TO DETERMINE "INDIGENCY" FOR THE PURPOSE OF APPOINTING COUNSEL?

No set standards can be established to be uniformly applied. Indigence is a relative term and must be considered individually in each case.

028 IF A COUNTY JUDGE HAS THE POWER TO AUTHORIZE A CONVICTED OFFENDER TO UNDERGO TREATMENT FOR ALCOHOLISM IN ANOTHER STATE, IS THE COUNTY LIABLE FOR THE COSTS OF TREATMENT?

While there are some constitutional issues involved, the court does have such power pursuant to statutory authority. The county is probably not liable for costs.

439 CAN AN INDIGENT DEFENDANT BE IMPRISONED IMMEDIATELY FOR NONPAYMENT OF A FINE IMPOSED BY A COURT?

No, it is denial of equal protection for any defendant to be imprisoned solely because he cannot make immediate payment of a fine by reason of indigency.

INFANTS

365 IN A PROSECUTION AGAINST A HUSBAND FOR A CRIME COMMITTED AGAINST HIS CHILD, MAY HIS WIFE TESTIFY AGAINST HIM?

Neb. Rev. Stat. §25-1203 (1964) specifically forbids one spouse from testifying against the other except in enumerated cases, one of which is not crimes against their children.

INFORMANTS

002 IF A DEFENDANT FAILS TO SHOW THAT THE DISCLOSURE OF AN INFORMANT'S IDENTITY IS MATERIAL TO HIS DEFENSE, DOES A JUDGE ACT PROPERLY IN REFUSING TO ORDER THAT SUCH IDENTITY BE DISCLOSED?

Yes, the defense must first establish materiality and relevancy.

016 CAN A STATE AGENT ACTING AS A PROVOCATEUR IN A DRUG PURCHASE CASE LEGALLY BE VIEWED AS AN ACCOMPLICE?

Nebraska does not have a case on point, but some jurisdictions consider this a question of fact for the jury.

272 WHEN AN INDIVIDUAL NOT PREVIOUSLY AN INFORMANT, INFORMS THE POLICE THAT DEFENDANT HAS THREATENED TO SHOOT HIM, THAT HE SAW THE WEAPON IN DEFENDANT'S CAR AND THAT THE DEFENDANT, THE WEAPON AND THE CAR HAVE RECENTLY BEEN IN THE AREA, MAY THE POLICEMAN STOP DEFENDANT'S CAR AND ASK FOR DEFENDANT'S DRIVER'S LICENSE, REGISTRATION AND THE WEAPON WITHOUT RUNNING AFOUL OF THE FOURTH AMENDMENT?

Yes, such a brief detention does not, under Nebraska law or recent Supreme Court interpretations, violate defendant's constitutional rights.

352 IS AN AFFIDAVIT FOR A SEARCH WARRANT INSUFFICIENT WHERE THE AFFIDAVIT STATES THAT AN INFORMANT WHO HAD "PROVIDED CREDIBLE INFORMATION TO THE AFFIANT ON AT LEAST THREE PREVIOUS OCCASIONS" TOLD THE AFFIANT THAT A NAMED DEFENDANT HAD "LEFT THE CITY ON FEBRUARY 1st TO PURCHASE DRUGS, WITH AN UNKNOWN INDIVIDUAL, AND WOULD RETURN TO A STATED ADDRESS ON THE EVENING OF FEBRUARY 2nd OR IN THE EARLY MORNING HOURS OF FEBRUARY 3rd WITH THE DRUGS?"

Yes, although a defendant's veracity may have been proven, the informant must still show the underlying circumstances on which he based his information in a fashion sufficient for the magistrate to credit the hearsay elements.

596 IS THE RECORDING BY AN ELECTRONIC DEVICE CONCEALED UPON AN INFORMANT ADMISSIBLE INTO EVIDENCE?

Yes, the courts have held such evidence to be admissible provided that proper foundation is established.

INFORMATION

313 DOES THE SIX MONTH PERIOD IN NEB. REV. STAT. §29-1207 (1972 SUPP.) BEGIN TO RUN FROM THE FILING OF A COMPLAINT?

Only in misdemeanor cases. State v. Born, 190 Neb. 767, 212 N.W.2d 581 (1973).

INTENT

164 IS INTENT AN ESSENTIAL ELEMENT IN CONVICTING UNDER NEB. REV. STAT. §28-1011.15, FOR POSSESSION OF A FIREARM BY A FELON?

Intent may be an essential element, but the intent considered is merely the intent to possess not the intent to violate the statute.

561 DO THE NEBRASKA CRIMINAL JURY INSTRUCTIONS CONTAIN A SPECIFIC INTENT INSTRUCTION?

No, but the District of Columbia specific intent instruction is attached.

INTERROGATION

503 IS IT PERMISSIBLE FOR THE POLICE TO INTERROGATE A JUVENILE WHO HAS WAIVED HIS RIGHTS IN HIS MOTHER'S PRESENCE WITHOUT FIRST CONTACTING THE ATTORNEY THE POLICE KNOW REPRESENTS THE JUVENILE ON ANOTHER MATTER?

Probably yes, the Nebraska Supreme Court has ruled such practice is not violative of an adult's rights under the sixth amendment.

INTOXICATION AND INTOXICATING LIQUORS

053 IS SOMNAMBULISM OR SOMNOLENTIA A VALID DEFENSE TO CARELESS DRIVING?

No, although somnambulism or somnolentia, commonly known as sleepwalking, is a defense akin to insanity, it is not a valid defense when voluntarily induced through intoxication or when the crime involves strict liability.

132 DOES NEB. REV. STAT. §53-180.02 (1974) PROHIBIT MINORS FROM POSSESSING OR CONTROLLING LIQUOR IN A PRIVATE PLACE OTHER THAN THEIR PERMANENT PLACE OF RESIDENCE?

This statute presents certain ambiguities which would require a court to interpret it in order to effect the intent of the Legislature and to avoid due process problems. The recommended construction would be that the statute prevents minors from possessing alcohol in any public place whatsoever, and in those private places when the circumstances were such that there was a reasonable likelihood of either a minor driving while under the influence of alcohol after a party, or there was a reasonable likelihood that the minors would cause injury to property or persons.

150 WHAT IS THE DEFINITION OF "OPERATE OR BE IN THE ACTUAL PHYSICAL CONTROL" OF A MOTOR VEHICLE WITHIN THE MEANING OF NEB. REV. STAT. §39-669.07?

According to *Waite v. State*, 169 Neb. 113, 118, 98 N.W.2d 688, 691 (1959), "Operating" relates to the actual physical handling of the controls of the vehicle by a person while under the influence of intoxicating liquor."

496 IS ONE URINE TEST A VALID INDICATOR OF THE BODY FLUID ALCOHOL FOR A DRIVING WHILE INTOXICATED CHARGE?

Probably not, because the process by which alcohol passes to the urine, the dilution which may occur in the bladder, and the length of time the urine has been retained render one test unreliable. The recommended method is for the subject to empty his or her bladder and half an hour later to obtain another specimen.

704 IN A PROSECUTION UNDER NEB. REV. STAT. §53-196 (1974) IS THE OFFENSE DEFINED THAT OF BEING IN A STATE OF INTOXICATION OR THAT OF BEING UNDER THE INFLUENCE OF ALCOHOLIC LIQUOR?

Under Nebraska law, the terms are probably synonymous.

JEOPARDY

001 HAS JEOPARDY ATTACHED IN A NON-JURY TRIAL WHERE THE JUDGE DIRECTS A VERDICT FOR THE DEFENDANT?

Yes.

JUDGES

232 CAN A JUDGE, ACTING WITHIN THE LIMITS OF HIS JURISDICTION, BE HELD CIVILLY LIABLE FOR AN ACT OF HIS WHICH RESULTED IN THE IMPROPER JAILING OF THE PERSON BRINGING SUIT?

No, a judicial officer acting in his official capacity is generally not liable for a false imprisonment resulting from an erroneous exercise of jurisdiction unless there is a clear absence of jurisdiction.

JURISDICTION

351 CAN A COUNTY ATTORNEY BRING A PROCEEDING IN JUVENILE COURT AGAINST A CHILD WHO HAS ALLEGEDLY COMMITTED A FELONY IN THAT COUNTY, EVEN THOUGH THE JUVENILE RESIDES IN ANOTHER NEBRASKA COUNTY?

It appears that the petition may be filed in the juvenile court in the county where the felony was committed.

493 MUST AN ALLEGED MISDEMEANANT WHO IS 15 YEARS OLD OR YOUNGER BE TRIED IN A JUVENILE PROCEEDING?

Yes, though the Nebraska Supreme Court has not decided this question, Neb. Rev. Stat. §43-202 *et seq* (Supp. 1974) provides that juvenile courts have exclusive original jurisdiction over misdemeanants who are under 16 years old.

516 IS THE JURISDICTION OF THE JUVENILE COURT TERMINATED BY THE MARRIAGE OF A CHILD OTHERWISE IN ITS JURISDICTION?

No, though Nebraska has never decided this question, courts of other jurisdictions have consistently held that marriage does not affect the jurisdiction of the juvenile court over delinquent or dependent children.

JURY INSTRUCTIONS

206 IF THE DEFENDANT CHOOSES TO PUT THE JURY TO A CHOICE OF CONVICTING HIM OF THE CRIME CHARGED OR OF ACQUITTING HIM, MUST THE JUDGE GIVE THE JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES IF THE PROSECUTOR SO REQUESTS?

In the absence of a request for instructions on lesser included offenses by the defendant, the decision is left largely to the discretion of the trial judge. However, in homicide cases, Nebraska case law and Neb. Rev. Stat. §29-2027 (1943) seem to require instructions on lesser offenses if they are indicated by the evidence and by the indictment.

- 535 ARE JURY INSTRUCTIONS WHICH CONTAIN BOTH A) THE INFORMATION, ALLEGING THE MATERIAL ELEMENTS OF THE CRIME IN CONJUNCTIVE LANGUAGE, AND B) THE STATUTE, WHICH STATES THE ELEMENTS IN DISJUNCTIVE LANGUAGE, PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE ACCUSED?

Probably not, although an argument exists that such a practice is confusing as to what material elements must be proved to establish a violation of the statute.

- 561 DO THE NEBRASKA CRIMINAL JURY INSTRUCTIONS CONTAIN A SPECIFIC INTENT INSTRUCTION?

No, but the District of Columbia specific intent instruction is attached.

- 675 MUST A DEFENSE COUNSEL OBJECT TO A GIVEN JURY INSTRUCTION BEFORE THAT ISSUE WILL BE CONSIDERED ON APPEAL?

The general rule is yes, however, where the action of the trial court constituted "plain error," the absence of objection will not preclude error from being assigned.

JURY TRIAL

- 083 IS A COURT RULE WHICH REQUIRES A WRITTEN DEMAND FOR TRIAL BY JURY IN A CRIMINAL CASE WITHIN A DEFINED PERIOD PRIOR TO TRIAL UNCONSTITUTIONAL BECAUSE FAILURE TO DEMAND IS DEEMED A WAIVER OF THE RIGHT?

Yes, in felony cases the court must be satisfied that the defendant made a knowing and intelligent waiver. In petty offenses the rule may be proper.

- 483 IS AN INCONSISTENT VERDICT GROUND FOR REVERSAL, WHERE THE JURY CONVICTS ON ONE CHARGE AND ACQUITS ON A SECOND IDENTICAL CHARGE AND THE STATE'S EVIDENCE ON EACH CHARGE IS BASED UPON THE SAME TESTIMONY BY AN INFORMER?

Probably not, as the Nebraska Supreme Court has consistently held, the credibility of a witness is for the jury and will not be disturbed on appeal if the evidence sustains some rational theory of guilt. However, an argument can be made that as the state's case rests upon the testimony of one informer, who presented identical testimony on both charges and who the jury believed on one charge and not on the other, the court on appeal should examine the evidence carefully to prevent a miscarriage of justice.

502 WHAT MAY THE PROSECUTOR AND DEFENSE COUNSEL SAY IN THE OPENING AND CLOSING STATEMENTS TO THE JURY?

In general, the trial court has wide discretion in determining the latitude permitted in the argument of counsel, provided the remarks do not mislead or unduly influence the jury and thereby prejudice the rights of a defendant.

504 IS A DEFENDANT CHARGED WITH SPEEDING ENTITLED TO A JURY TRIAL?

No, under the present statutory scheme, there is no right to a jury trial in cases of traffic infractions.

JUVENILES

011 WHAT IS THE IMPACT OF LB 620, EFFECTIVE JULY 1974, ON THE POWER OF A DISTRICT COURT TO RETAIN JURISDICTION OVER AND PASS SENTENCE ON A MINOR CONVICTED OF COMMITTING A FELONY?

The District Court may still hear a felony trial and sentence the offender to the Nebraska Penal and Correctional Complex, but the juvenile procedures of Chapter 43 of the Nebraska Revised Statutes may be invoked at several stages of the trial. The decision of which court to proceed in is no longer solely the responsibility of the county attorneys.

015 MAY A JUVENILE JUDGE REFER A CHILD TO THE YOUTH DEVELOPMENT CENTERS IN KEARNEY OR GENEVA FOR A 30-90 DAY EVALUATION?

A State Attorney General's opinion says "yes."

114 CAN A MARRIED INDIVIDUAL UNDER THE AGE OF EIGHTEEN BE BROUGHT INTO JUVENILE COURT?

The weight of authority says "yes."

132 DOES NEB. REV. STAT. §53-180.02 (1947) PROHIBIT MINORS FROM POSSESSION OR CONTROLLING LIQUOR IN A PRIVATE PLACE OTHER THAN THEIR PERMANENT PLACE OF RESIDENCE?

This statute presents certain ambiguities which would require a court to interpret it in order to effect the intent of the Legislature and to avoid due process problems. The recommended construction would be that the statute prevents minors from possessing alcohol in any public place whatsoever, and in those private places when the circumstances were such that there was a reasonable likelihood of either a minor driving while under the influence of alcohol after a party, or there was a reasonable likelihood that the minors would cause injury to property or persons.

200 MAY A YOUTH VOLUNTARILY WAIVE HIS MIRANDA RIGHTS?

Yes. Lack of age alone is usually insufficient to warrant a finding of involuntariness.

285 DOES THE 48 HOUR RULE OF NEB. REV. STAT. §43-205.04 (1974) INCLUDE THE TIME THAT A JUVENILE MAY BE DETAINED BY THE POLICE PRIOR TO THE TRANSFER OF HIS CUSTODY TO THE JUVENILE COURT?

Yes. Neb. Rev. Stat. §43-205.02 (1974) requires a police officer to transfer custody of a detained juvenile "without unnecessary delay" to the probation officer or juvenile court. The 48 hour rule of §43-205.04 is the maximum time the juvenile may be detained in the absence of filing a juvenile petition or criminal complaint. However, in certain instances, a time of detention less than 48 hours by the police, prior to the transfer of custody, may also constitute "unnecessary delay." No cases have been found dealing with the provision.

332 ARE JUVENILE COURT RECORDS OF ADJUDICATIONS OF THAT COURT AVAILABLE TO IMPEACH WITNESSES?

Most likely not. Although no Nebraska case law exists on this point, the majority of other jurisdictions examined bar such use of the adjudication records.

351 CAN A COUNTY ATTORNEY BRING A PROCEEDING IN JUVENILE COURT AGAINST A CHILD WHO HAS ALLEGEDLY COMMITTED A FELONY IN THAT COUNTY, EVEN THOUGH THE JUVENILE RESIDES IN ANOTHER NEBRASKA COUNTY?

It appears that the petition may be filed in the juvenile court in the county where the felony was committed.

411 WHAT MUST A POLICE OFFICER DO TO COMPLY WITH NEB. REV. STAT. §29-401 (SUPP. 1974) WHEN HE WISHES TO DETAIN A JUVENILE?

As a general rule, the twenty-four hour requirement of §29-401 must be complied with. However, there appears to be a dichotomy in juvenile detention situations: on the one hand, if the detention is viewed as an arrest, the twenty-four hour rule must be complied with; on the other hand, should the detention be viewed as a "taking into custody" under Neb. Rev. Stat. §43-205.02 (1974), the twenty-four hour rule may not have to be complied with.

433 UNDER THE FACTS OF THE CASE (CHILD ADJUDGED GUILTY OF BREAKING AND ENTERING AND CAUSING \$600 WORTH OF PROPERTY DAMAGE) COULD THE COURT FIND THE JUVENILE A DELINQUENT RATHER THAN A CHILD IN NEED OF SPECIAL SUPERVISION IN 1969?

Yes; a minor who violated a law of the state or any city or village ordinance could be labeled and treated as a delinquent.

433 COULD THE COURT WAIVE APPOINTMENT OF COUNSEL FOR A NINE YEAR OLD MINOR IN 1969?

No, the only valid waiver of the right to counsel is a waiver that is competently and intelligently made by the defendant or his parents or guardian when the interests of the parents or guardian are not adverse to the interests of the defendant.

433 DOES THE COUNTY COURT HAVE JURISDICTION TO RULE ON THE TRANSFER OF A DELINQUENT FROM THE YOUTH DEVELOPMENT CENTER IN KEARNEY TO THE STATE REFORMATORY?

Yes, under Neb. Rev. Stat. §43-202(3)(b)(1974), the county has concurrent jurisdiction with the District Court over any child under the age of eighteen years at the time he has violated any law of the state constituting a felony. Under Neb. Rev. Stat. §83-176(2)(b)(1973) the transfer of a delinquent minor will be determined by the court of original disposition.

433 DOES THE MINOR HAVE THE RIGHT TO CONFRONT WITNESSES AT A HEARING TO EFFECT A TRANSFER OF THE MINOR FROM THE YOUTH DEVELOPMENT CENTER TO THE STATE REFORMATORY?

Not expressly. In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 527 (1967), established the right to confront witnesses only at the adjudicatory hearing. However, where the transfer can be characterized as one that would increase the amount of restriction on the minor's freedom, the constitutional safeguards mandated in Gault should be applicable.

433 CAN A JUDGE DENY A HABEAS CORPUS HEARING ON A PETITION STATING THAT AN ADDITIONAL ORDER OF COMMITMENT WAS NEEDED TO RETURN THE DELINQUENT MINOR TO THE YOUTH DEVELOPMENT CENTER IN KEARNEY?

Yes, there is no error in denying such a hearing if the original commitment was a valid commitment.

433 DOES A MINOR HAVE A RIGHT TO POST BOND DURING APPEAL?

No, a minor is allowed to post bond only at the discretion of the court.

433 DOES A JUVENILE HAVE A RIGHT TO A PROBATION REVOCATION HEARING?

Yes, under Neb. Rev. Stat. §29-2255 (1971) the probation revocation procedures of Neb. Rev. Stat. §29-2267 (1971) apply to juveniles. Those procedures include the right to a hearing.

493 MUST AN ALLEGED MISDEMEANANT WHO IS 15 YEARS OLD OR YOUNGER BE TRIED IN A JUVENILE PROCEEDING?

Yes, though the Nebraska Supreme Court has not decided this question, Neb. Rev. Stat. §43-202 et seq (Supp. 1974) provides that juvenile courts have exclusive original jurisdiction over misdemeanants who are under 16 years old.

503 IS IT PERMISSIBLE FOR THE POLICE TO INTERROGATE A JUVENILE WHO HAS WAIVED HIS RIGHTS IN HIS MOTHER'S PRESENCE WITHOUT FIRST CONTACTING THE ATTORNEY THE POLICE KNOW REPRESENTS THE JUVENILE ON ANOTHER MATTER?

Probably yes, the Nebraska Supreme Court has ruled such practice is not violative of an adult's rights under the sixth amendment.

516 IS THE JURISDICTION OF THE JUVENILE COURT TERMINATED BY THE MARRIAGE OF A CHILD OTHERWISE IN ITS JURISDICTION?

No, though Nebraska has never decided this question, courts of other jurisdictions have consistently held that marriage does not affect the jurisdiction of the juvenile court over delinquent or dependent children.

548 ONCE A JUVENILE (OVER 14 BUT LESS THAN 19 YEARS) HAS BEEN ARRESTED AND RELEASED, MAY HE BE REQUIRED TO RETURN FOR FINGERPRINTING AND PHOTOGRAPHING?

Yes, but a court order is required.

578 MAY A CONVICTION OF A MINOR FOR POSSESSION OF INTOXICATING LIQUOR BE BASED SOLELY UPON CIRCUMSTANTIAL EVIDENCE?

Yes, the Nebraska Supreme Court has upheld such convictions.

LESSER INCLUDED OFFENSE

216 MAY A DEFENDANT BE CONVICTED OF SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE WHEN THE INFORMATION CHARGES THAT HE DID "SELL AND DISTRIBUTE" THE CONTROLLED SUBSTANCE?

It is arguable that possession is not included in the offense charged.

LIE DETECTORS

205 SINCE THE STATE USED A LIE DETECTOR TEST ON THE ACCUSED AND HAD HIM SIGN A WAIVER FOR USE AGAINST HIM AT TRIAL, CAN COUNSEL OBTAIN A LIE DETECTOR TEST, USING HIS OWN EXPERT, AT THE EXPENSE OF THE STATE?

The persuasive powers of counsel will determine the outcome.

366 MAY THE RESULTS OF A POLYGRAPH TEST BE ADMITTED INTO EVIDENCE FOR ANY PURPOSE IN A CRIMINAL PROCEEDING IN NEBRASKA?

No, Nebraska has adhered to the majority view excluding polygraphic evidence as incompetent for any purpose in a criminal proceeding.

LINE UPS

626 UNDER WHAT CIRCUMSTANCES CAN LINE-UP IDENTIFICATIONS AND PHOTO-IDENTIFICATIONS BE EXCLUDED FROM EVIDENCE?

If the procedure was such as to be "impermissibly suggestive" the evidence may be excluded unless there is an independent basis for the identification.

LIQUORS

461 MAY A CITY AUTHORIZE CONSUMPTION OF ALCOHOLIC LIQUORS ON PUBLIC STREETS?

No, the first clause of Neb. Rev. Stat. §53-186 (1974) does not give a city that power. However, a city can authorize the consumption of alcoholic liquors on land or within structures upon land over which it has jurisdiction, provided the liquor commission issues it a liquor license.

LITTERING

116 WHAT MUST BE PROVED TO CONVICT A DEFENDANT OF LITTERING IN VIOLATION OF NEB. REV. STAT. §28-591 (1972)?

Violation of Neb. Rev. Stat. §28-591 requires a voluntary depositing of debris upon property not belonging to the litterer and without permission of the owner of the land.

LOITERING

511 IS A VILLAGE ORDINANCE MAKING IT ILLEGAL TO "LOITER," WITHOUT FURTHER DEFINITION, VOID FOR VAGUENESS?

It would appear that the ordinance on its face would be void for vagueness, however, it could be construed by the court in such a manner that the ordinance should be held valid.

LOTTERY

309 DOES NEB. REV. STAT. §28-964.04 AUTHORIZE AN. COUNTY, CITY OR VILLAGE TO CONDUCT A STATE-WIDE LOTTERY OR ARE LOTTERIES INTENDED TO BE LOCAL?

The statute as it is worded does not limit the lottery to a city's locale, however, based on legislative intent and statutory interpretation, it appears that the lotteries conducted by a county, city or village are intended to be only local.

CONTINUED

1 OF 2

MARIJUANA

045 IS THE WARRANTLESS SEARCH OF AN AUTOMOBILE STOPPED FOR A MINOR TRAFFIC OFFENSE JUSTIFIED IF THE POLICE OFFICER CLAIMS TO HAVE SMELLED MARIJUANA EMINATING FROM THE VAN?

Yes. The warrantless search can be justified under the rule of Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

144 MAY A CITY OF THE FIRST CLASS OUTLAW POSSESSION OF MARIJUANA BY WAY OF ORDINANCE?

Existing statutory and case law would authorize a city of the first class to outlaw possession, however, any such ordinance would not be built on solid ground.

153 CAN A DEFENDANT BE CORRECTLY CHARGED AND CONVICTED OF SECOND OFFENSE POSSESSION OF MARIJUANA IF HE PLED GUILTY, WAS FINED \$200, AND SUCCESSFULLY COMPLETED A FIVE MONTH PERIOD OF PROBATION FOR A PREVIOUS CHARGE?

In general, judgments which are rendered upon pleas of guilty are treated the same as a judgment rendered upon the verdict of a jury.

202 WHERE MARIJUANA AND ALCOHOLIC BEVERAGES ARE FOUND DURING THE SEARCH OF THE HOUSE, ARE THE OCCUPANTS ENTITLED TO THE MIRANDA WARNINGS PRIOR TO INVESTIGATION?

There is no doubt that the warnings are required in felony cases. However, the applicability of Miranda warnings to misdemeanors has not been resolved.

361 DOES NEB. REV. STAT. §28-4,127(g) (SUPP. 1974) VIOLATE THE CONSTITUTIONAL PROVISION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIEW OF THE PENALTY PROVIDED FOR POSSESSION IN NEB. REV. STAT. §28-4,125 (SUPP. 1974).

Probably not, since the statutes deal with different crimes.

362 IF A DEFENDANT TESTIFIES IN HIS OWN DEFENSE ON A CHARGE OF CONSTRUCTIVE POSSESSION OF MARIJUANA, MAY HE BE CROSS-EXAMINED ABOUT HIS ADMISSIONS TO THE POLICE, SMOKING MARIJUANA NOT FROM THE PACKAGE CONFISCATED?

If the charge is based solely on constructive possession of the marijuana in the package then the defendant should not be required to answer questions concerning his admitted smoking. If the charge includes the smoking of the cigarette, then the defendant could be cross-examined in regard to the smoking.

364 WILL DIRECT EVIDENCE THAT A PARCEL CONTAINING MARIJUANA WAS THROWN FROM PASSENGER WINDOW OF A VEHICLE COMBINED WITH SOME OTHER CIRCUMSTANTIAL EVIDENCE SUPPORT A CHARGE OF POSSESSION OF A CONTROLLED SUBSTANCE AGAINST BOTH DRIVER AND PASSENGER?

It is probable that the evidence would allow the case to get to a jury.

700 IS THE PRESENCE OF A SEED OR SEEDS WHICH RESEMBLE MARIJUANA SEEDS BUT ALSO COULD REASONABLY BE ANOTHER KIND OF A SEED, ON THE SEAT OF A VEHICLE, SUFFICIENT TO GIVE POLICE CAUSE TO SEARCH THE ENTIRE VEHICLE?

Maybe not. While there is no definitive case law or guidelines on what constitutes probable cause for a search, in these circumstances, reliance on the presence of two seeds could be challenged as inadequate to "warrant the person of reasonable caution that the search was appropriate."

MARRIAGE

516 IS THE JURISDICTION OF THE JUVENILE COURT TERMINATED BY THE MARRIAGE OF A CHILD OTHERWISE IN ITS JURISDICTION?

No, though Nebraska has never decided this question, courts of other jurisdictions have consistently held that marriage does not affect the jurisdiction of the juvenile court over delinquent or dependent children.

MENTAL RETARDATION

427 WHAT CONSTITUTES ABUSE OR NEGLECT OF A MENTALLY RETARDED INDIVIDUAL?

Abusive treatment as defined by statute is knowingly, intentionally, or negligently placing a mental retardate in a situation which may endanger his or her life, depriving him or her of the necessary food, clothing, care or shelter, and torturing, cruelly confining or cruelly punishing him or her. Neb. Rev. Stat. §28-1501 (Supp. 1974). This definition has been applied to neglect in LB 20 (1975).

MIRANDA

004 DOES MIRANDA HAVE ANY LEGAL EFFECT ON THE RIGHTS OF MISDEMEANANTS AT THE TIME OF THEIR ARRESTS?

Most cases have held that Miranda safeguards are not necessary in misdemeanor arrests. However, the law in this area is in a state of flux.

126 MUST THE STATEMENTS OF DEFENDANTS THAT THE PIPE WAS IN THE AUTOMOBILE ON THE FLOOR BEHIND THE DRIVER'S SEAT BE DISREGARDED IN ESTABLISHING PROBABLE CAUSE TO SEARCH?

Possibly, as Miranda warnings are often required when the defendant reasonably believes he is physically deprived of his freedom of action.

155 MAY INTERROGATION TAKE PLACE BY A SECOND OFFICER AFTER GIVING MIRANDA WARNINGS, WHEN IN RESPONSE TO A PRIOR WARNING BY FIRST OFFICER THE DEFENDANT REQUESTED COUNSEL?

Probably, where the subsequent interrogation is not part of a series of repeated questioning and harassment.

202 WHERE MARIJUANA AND ALCOHOLIC BEVERAGES ARE FOUND DURING THE SEARCH OF THE HOUSE, ARE THE OCCUPANTS ENTITLED TO THE MIRANDA WARNINGS PRIOR TO INVESTIGATION?

There is no doubt that the warnings are required in felony cases. However, the applicability of Miranda warnings to misdemeanors has not been resolved.

662 DO MIRANDA WARNINGS HAVE TO BE GIVEN TO AN INDIVIDUAL ARRESTED FOR DRUNKEN DRIVING BEFORE THE CHEMICAL TEST TO DETERMINE THE ALCOHOLIC CONTENT OF HIS BLOOD, URINE, OR BREATH IS ADMINISTERED?

Miranda warnings are not required to be given an individual who is properly requested to submit to a chemical test of his alcoholic content, but failure to give warnings may render inadmissible testimonial evidence obtained from the individual subsequent to his arrest.

MISDEMEANORS

209 IN A CRIMINAL PROSECUTION INVOLVING A MISDEMEANOR WHERE THERE IS A WRITTEN CONFESSION MADE BY THE DEFENDANT, IS THE PRODUCTION OF THIS CONFESSION TO THE DEFENDANT MANDATORY?

No, under Neb. Rev. Stat. §29-1912 through 29-1924 (1972) production of confessions is discretionary in felony cases only. No mention is made of misdemeanors. However, a strong argument may be made that application of such discovery statute in felony cases alone may be violative of the due process and equal protection clause.

428 CAN THE STATE REQUIRE THE DEFENDANT IN A DRIVING WHILE INTOXICATED CASE, A MISDEMEANOR, TO PRODUCE HIS PRIVATE BLOOD ALCOHOL TEST?

Probably not, the Legislature specifically excluded misdemeanors from the criminal discovery statutes, Neb. Rev. Stat. §29-1912 et seq. However, if discovery is allowed the defendant in misdemeanor cases, it should, arguably, be granted to the state also.

492 IS A PRESENTENCING REPORT NECESSARY IN CASES OF MISDEMEANORS?

No. A presentencing report is necessary where practical, only in cases of felonies.

493 MUST AN ALLEGED MISDEMEANANT WHO IS 15 YEARS OLD OR YOUNGER BE TRIED IN A JUVENILE PROCEEDING?

Yes, though the Nebraska Supreme Court has not decided this question, Neb. Rev. Stat. §43-202 et seq. (Supp. 1974) provides that juvenile courts have exclusive original jurisdiction over misdemeanants who are under 16 years old.

MISPRISION

179 DOES NEBRASKA HAVE A MISPRISION STATUTE OR ANY OTHER PROVISION WHICH MIGHT COMPEL THE SCHOOL ADMINISTRATOR TO REPORT A STUDENT'S DRUG USE?

Nebraska does not have an applicable misprision statute, but there may be a possibility that the accessory after the fact statute, Neb. Rev. Stat. §28-202 (Reissue of 1964) could be applied.

MONEY

003 IS COURT APPOINTED COUNSEL IN MISDEMEANOR CASE TO BE REIMBURSED; IF SO, BY WHOM, AND UNDER WHAT AUTHORITY?

There is a statutory procedure available making counties liable to pay for such attorney services.

015 IS THE COUNTY LIABLE TO PAY THE COSTS FOR AN EVALUATION AT THE YOUTH DEVELOPMENT CENTERS IN KEARNEY OR GENEVA WHICH HAS BEEN REFERRED BY A JUDGE?

Yes, however, the parents of the juvenile may be ordered to pay if they are able to do so.

028 IF A COUNTY JUDGE HAS THE POWER TO AUTHORIZE A CONVICTED OFFENDER TO UNDERGO TREATMENT FOR ALCOHOLISM IN ANOTHER STATE, IS THE COUNTY LIABLE FOR THE COSTS OF TREATMENT?

While there are some constitutional issues involved, the court does have such power pursuant to statutory authority. The county is probably not liable for costs.

MOTIONS -- PRETRIAL

471A DOES THE ACCUSED HAVE A RIGHT TO BE PRESENT DURING THE HEARING ON A MOTION TO SUPPRESS OR A MOTION TO QUASH?

No, although the accused has a right to be present during trial, preliminary motions are not part of the trial in the constitutional sense, therefore, the accused has no right to be present at the motion to quash. Similarly, the accused probably does not have the right for a motion to suppress.

MOTOR VEHICLES

308 IS EVIDENCE FOUND DURING AN INVENTORY SEARCH OF AN IMPOUNDED VEHICLE ADMISSIBLE IN COURT?

The cases indicate that such evidence is admissible provided that three criteria are met. First, there must be a lawful arrest of the defendant. Second, there must be reasonable justification for impounding the vehicle. Third, the inventory search must not go to unreasonable lengths.

335 DOES NEB. REV. STAT. §39-6,183 (1974) MAKE VIOLATION OF THE SPEED LIMITS BY THE OPERATOR OF A PASSENGER CAR A MISDEMEANOR INSTEAD OF A TRAFFIC INFRACTION?

It is arguable that this statute does not apply to the operator of a passenger car.

MOTOR VEHICLE DEPARTMENT

207 MAY AN ARRESTEE OBJECT TO THE SUBMISSION OF THE SWORN REPORT OF THE ARRESTING OFFICER IN THE PROCEEDING TO REVOKE HIS LICENSE ON THE GROUND THAT IT IS AN UNCONSTITUTIONAL DENIAL OF THE RIGHT TO CONFRONT WITNESSES?

No. The proceeding is civil in nature and not criminal. Therefore, no claim of unconstitutional denial of the right to confront witnesses should attach.

MUNICIPAL CORPORATIONS

078 IF CITY POLICE HAVE POWER TO STOP A SUSPECT OUTSIDE THE CITY LIMITS, IS A SUBSEQUENT SEIZURE OF EVIDENCE BY LATE-ARRIVING STATE TROOPERS JUSTIFIED UNDER THE "PLAIN VIEW" DOCTRINE?

Not only is the stop by city police questionable, so is the seizure of evidence under the circumstances of this case.

144 MAY A CITY OF THE FIRST CLASS OUTLAW POSSESSION OF MARIJUANA BY WAY OF ORDINANCE?

Existing statutory and case law would authorize a city of the first class to outlaw possession, however, any such ordinance would not be built on solid ground.

461 MAY A CITY AUTHORIZE CONSUMPTION OF ALCOHOLIC LIQUORS ON PUBLIC STREETS?

No, the first clause of Neb. Rev. Stat. §53-186 (1974) does not give a city that power. However, a city can authorize the consumption of alcoholic liquors on land or within structures upon land over which it has jurisdiction, provided the liquor commission issues it a liquor license.

488 IS THERE ANY LIMIT ON THE SHERIFF'S AUTHORITY IN INCORPORATED AREAS OF THE COUNTY?

No, the sheriff's authority is county-wide and concurrent with the police force of any incorporated area within the county.

651 WHAT FACTORS WOULD MAKE A MUNICIPAL INTOXICATION ORDINANCE, IN LANGUAGE IDENTICAL TO NEB. REV. STAT. §53-196 (1943), UNCONSTITUTIONAL BECAUSE OF OVERBREADTH?

To be constitutional, such an ordinance 1) must have a substantial relation to the health, safety, morals, and welfare of the community, and 2) would not require unwarranted invasions of the right of privacy to be enforced.

663 IN THE EVENT THAT THE CITY OR VILLAGE HAS EMPLOYED AN ATTORNEY OTHER THAN THE COUNTY ATTORNEY AS CITY PROSECUTOR, IS THE CITY PROSECUTOR OBLIGATED TO CLEAR ALL CRIMINAL COMPLAINTS, I.E., FELONY AND MISDEMEANOR COMPLAINTS, WITH THE COUNTY BEFORE FILING IN THE COUNTY COURT?

According to Neb. Rev. Stat. §29-404 (Supp. 1974) no complaint can be filed with a magistrate without the county attorney's approval or the submission of a surety bond to indemnify the person complained against for wrongful or malicious prosecution, with the exception that first class city, second class city and village attorneys can sign complaints for a violation of city or village ordinances, according to Neb. Rev. Stat. §24-533 (Supp. 1974) and the primary class city attorney has the same power regarding complaints for violations of city ordinances according to Neb. Rev. Stat. §15-322 (1974).

NOTICE

411 WHAT MUST A POLICE OFFICER DO TO COMPLY WITH NEB. REV. STAT. §29-401 (SUPP. 1974) WHEN HE WISHES TO DETAIN A JUVENILE?

As a general rule, the twenty-four hour requirement of §29-401 must be complied with. However, there appears to be a dichotomy in juvenile detention situations: on the one hand, if the detention is viewed as an arrest, the twenty-four rule must be complied with; on the other hand, should the detention be viewed as a "taking into custody" under Neb. Rev. Stat. §43-205.02 (1974), the twenty-four hour rule may not have to be complied with.

OBSTRUCTION OF JUSTICE

554 WHAT ARE THE ESSENTIAL ELEMENTS FOR CONVICTION UNDER 18 U.S.C. §1503, THE GENERAL FEDERAL STATUTE DEALING WITH OBSTRUCTION OF JUSTICE?

In order to be convicted the accused must: (1) know that the intended "victim" is a witness or officer in a federal court proceeding; (2) have notice of the pendency of a proceeding in a United States Court and (3) have attempted to influence, intimidate or impede the witness or officer because the individual was a witness or officer.

OPENING STATEMENTS

502 WHAT MAY THE PROSECUTOR AND DEFENSE COUNSEL SAY IN THE OPENING AND CLOSING STATEMENTS TO THE JURY?

In general, the trial court has wide discretion in determining the latitude permitted in the argument of counsel, provided the remarks do not mislead or unduly influence the jury and thereby prejudice the rights of a defendant.

ORDINANCES

511 IS A VILLAGE ORDINANCE MAKING IT ILLEGAL TO "LOITER," WITHOUT FURTHER DEFINITION, VOID FOR VAGUENESS?

It would appear that the ordinance on its face would be void for vagueness, however, it could be construed by the court in such a manner that the ordinance should be held valid.

562 WHAT ARE THE FACTORS WHICH WOULD MAKE THE CITY NUISANCE ORDINANCE UNCONSTITUTIONAL BECAUSE OF VAGUENESS OR OVERBREADTH?

To be constitutional, the ordinance must: (1) contain terms meaningful in light of common experience and usage; and (2) be a bona fide exercise of the police power.

651 WHAT FACTORS WOULD MAKE A MUNICIPAL INTOXICATION ORDINANCE, IN LANGUAGE IDENTICAL TO NEB. REV. STAT. §53-196 (1943), UNCONSTITUTIONAL BECAUSE OF OVERBREADTH?

To be constitutional, such an ordinance 1) must have a substantial relation to the health, safety, morals, and welfare of the community, and 2) would not require unwarranted invasions of the right of privacy to be enforced.

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According to Neb. Rev. Stat. §29-404 (Supp. 1974) no complaint can be filed with a magistrate without the county attorney's approval or the submission of a surety bond to indemnify the person complained against for wrongful or malicious prosecution, with the exception that first class city, second class city and village attorneys can sign complaints for a violation of city or village ordinances, according to Neb. Rev. Stat. §24-533 (Supp. 1974) and the primary class city attorney has the same power regarding complaints for violations of city ordinances, according to Neb. Rev. Stat. §15-322 (1974).

PARENT AND CHILD

697 IS A 16 YEAR OLD CHILD ENTITLED TO SUPPORT PAYMENTS FROM HER PARENTS, WHEN SHE HAS LEFT HOME THROUGH NO FAULT OF HER PARENTS, AND THEY ARE READY, WILLING, AND ABLE TO SUPPORT HER IN THEIR HOME?

No, under the given facts, the child who has left home, through no fault of her parents, cannot force them to support her apart from their home.

PHOTOGRAPHIC IDENTIFICATION

626 UNDER WHAT CIRCUMSTANCES CAN LINE-UP IDENTIFICATIONS AND PHOTO-IDENTIFICATIONS BE EXCLUDED FROM EVIDENCE?

If the procedure was such as to be "impermissibly suggestive" the evidence may be excluded unless there is an independent basis for the identification.

PLEAS

096 WHAT ARE THE MINIMUM STANDARDS NECESSARY FOR ONE TO MAKE A KNOWING AND VOLUNTARY PLEA?

According to Nebraska Supreme Court decisions, the trial judge must substantially comply with the A.B.A. Standards relating to pleas of guilty, and the defendant must understand the relevant factors involved in a guilty plea.

PLEA BARGAINING

300 IF THERE IS NO RECORD OF DISTRICT COURT PROCEEDING IN WHICH GUILTY PLEA WAS ENTERED, IS THIS AN APPEALABLE ERROR?

Yes, however the pleas will not necessarily be set aside for this reason alone. The state must make an affirmative showing that the plea was intelligent and voluntary. The Appellate Court may remand for an evidentiary hearing, or allow the state to establish by other evidence a reasonably accurate account of what took place.

300 CAN DEFENDANT CHANGE HIS PLEA FROM GUILTY TO NOT GUILTY AT APPELLATE LEVEL?

Yes. The Appellate Court will vacate the plea if defendant proves that his plea was not voluntarily and intelligently made. Such a plea is a violation of due process and is therefore void.

300 CAN DEFENDANT RAISE THE ISSUE ON APPEAL THAT HIS SENTENCE DOES NOT REFLECT PLEA BARGAIN MADE AT DISTRICT COURT LEVEL?

Yes. In Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the United States Supreme Court held that if a guilty plea is based to any significant degree upon a promise of the prosecutor, the promise must be kept. If it is not the conviction cannot stand even if the breach of the agreement is unintentional.

POLICE

288 DOES DEFENDANT'S ACTION OF SAYING "FUCK YOU" TO A POLICE OFFICER WHILE BEING PLACED UNDER ARREST CONSTITUTE "ABUSE" OF AN OFFICER, A VIOLATION OF §28-729?

No. The authority is contra and such a construction might be unconstitutional in view of recent United States Supreme Court decisions.

POLICE REPORTS

589 MAY THE DEFENSE ATTORNEY EXAMINE POLICE REPORTS THROUGH PRE-TRIAL DISCOVERY?

The trial court has discretion to determine whether the defense attorney shall be permitted to examine police reports prior to trial.

POLYGRAPHS

205 SINCE THE STATE USED A LIE DETECTOR TEST ON THE ACCUSED AND HAD HIM SIGN A WAIVER FOR USE AGAINST HIM AT TRIAL, CAN COUNSEL OBTAIN A LIE DETECTOR TEST, USING HIS OWN EXPERT, AT THE EXPENSE OF THE STATE?

The persuasive powers of counsel will determine the outcome.

366 MAY THE RESULTS OF A POLYGRAPH TEST BE ADMITTED INTO EVIDENCE FOR ANY PURPOSE IN A CRIMINAL PROCEEDING IN NEBRASKA?

No, Nebraska has adhered to the majority view excluding polygraphic evidence as incompetent for any purpose in a criminal proceeding.

POSSESSION OF FIREARM BY FELON

164 IS INTENT AN ESSENTIAL ELEMENT IN CONVICTING UNDER NEB. REV. STAT. §28-1011.15, FOR POSSESSION OF A FIREARM BY A FELON?

Intent may be an essential element, but the intent considered is merely the intent to possess, not the intent to violate the statute.

PRELIMINARY HEARINGS

068 IF THERE IS NO PROBABLE CAUSE THAT THE ACCUSED HAD AN INTENT TO KILL, MAY THE PRESIDING MAGISTRATE OF A PRELIMINARY HEARING BIND THE ACCUSED OVER ON A LESSER CHARGE?

Yes. A charge of second degree murder includes a charge of manslaughter.

097 AFTER A PRELIMINARY HEARING ON A FELONY CHARGE, FOR EXAMPLE, GRAND LARCENY, MAY A MAGISTRATE COMMIT THE ACCUSED ON A LESSER CHARGE, FOR EXAMPLE, PETIT LARCENY, IF HE BELIEVES THAT THE DOLLAR VALUE REQUIRED BY THE FELONY OFFENSE CANNOT BE PROVEN?

Yes, but the complaint filed against the accused should be refiled and reverified.

343 IS EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH OR FIFTH AMENDMENT ADMISSIBLE FOR PURPOSES OF FINDING PROBABLE CAUSE IN A PRELIMINARY HEARING FOR A FELONY IN NEBRASKA?

Yes, the Nebraska Supreme Court has held that a preliminary hearing before a magistrate is not a criminal prosecution and in reception of evidence it is not strictly governed by technical rules applicable at the trial court level.

500 MAY A DEFENDANT BE BOUND OVER FOR TRIAL FROM A PRELIMINARY HEARING AT WHICH THE SOLE EVIDENCE IS AN UNAVAILABLE WITNESS' SWORN DEPOSITION, THAT WAS TAKEN AT A PROCEEDING WHICH THE DEFENSE ATTORNEY REFUSED TO ATTEND?

Probably, although a preliminary hearing is a personal right of the defendant, which only he can waive, the defense attorney's decisions pertaining to the preliminary hearing would probably be considered within his professional discretion.

506 DO NEB. REV. STAT. §29-501 (1964) AND NEB. REV. STAT. §29-502 (1964) APPLY TO PRELIMINARY HEARINGS?

Perhaps. A County Court has ruled in the negative, while a District Court has ruled in the affirmative.

PRESENCE OF ACCUSED

471A DOES THE ACCUSED HAVE A RIGHT TO BE PRESENT DURING THE HEARING ON A MOTION TO SUPPRESS OR A MOTION TO QUASH?

No, although the accused has a right to be present during trial, preliminary motions are not part of the trial in the constitutional sense, therefore the accused has no right to be present at the motion to quash. Similarly, the accused probably does not have the right for a motion to suppress.

PRESENTENCING REPORT

492 IS A PRESENTENCING REPORT NECESSARY IN CASES OF MISDEMEANORS?

No. A presentencing report is necessary where practical, only in cases of felonies.

PRESUMPTIONS

260 IN A PROSECUTION FOR DRUNKEN DRIVING UNDER NEB. REV. STAT. §39-669.07 (1973), IS A VALID TEST REVEALING .10% OR MORE ALCOHOL IN THE ACCUSED'S BLOOD CONCLUSIVE EVIDENCE OF A CRIME OR DOES SUCH A VALID TEST MERELY ESTABLISH A REBUTTABLE PRESUMPTION AGAINST THE ACCUSED?

A validly administered test is conclusive evidence of a crime.

PRE-TRIAL STIPULATIONS

366 IS THE ADMISSIBILITY INTO EVIDENCE OF THE RESULTS OF A LIE DETECTOR TEST AFFECTED BY THE FACT THAT THERE WAS A PRE-TRIAL STIPULATION AGREEMENT WHEREBY THE PARTIES THEMSELVES AGREED THAT THE TESTS WOULD BE ADMITTED INTO EVIDENCE?

Yes, despite traditional objections to the polygraph test, a pre-trial stipulation by the parties is recognized by some jurisdictions as an exception to the general prohibition against admission of lie detector tests into evidence.

PRIOR CONVICTION

346 WHAT IS THE EXTENT TO WHICH THE DEFENSE MAY EXAMINE A STATE'S WITNESS REGARDING HIS RELEASE FROM THE STATE PENITENTIARY BY AGREEMENT TO ACT AS UNDERCOVER AGENT?

By virtue of Neb. Rev. Stat. §25-1214 (1964), a witness may be interrogated as to his previous conviction for a felony. Cross-examination into factual details relating to witness' credibility is also statutorily provided. Neb. Rev. Stat. §25-1211 (1964).

PRIVILEGE

208 IN A PROSECUTION AGAINST A HUSBAND FOR A CRIME COMMITTED AGAINST HIS STEPDAUGHTER, MAY HIS WIFE (MOTHER OF THE CHILD) TESTIFY AGAINST HIM?

Although no Nebraska Supreme Court case has been found dealing with this issue, strong arguments may be advanced for the denial of the husband-wife privilege in this case.

226 MAY ONE SPOUSE TESTIFY AGAINST THE OTHER IN A PROSECUTION FOR ARSON BASED UPON THE BURNING OF THEIR JOINTLY OWNED DWELLING?

Yes. Arson arguably is a crime against the spouse within the meaning of Neb. Rev. Stat. §25-1203 (1964).

PRIVACY

651 WHAT FACTORS WOULD MAKE A MUNICIPAL INTOXICATION ORDINANCE, IN LANGUAGE IDENTICAL TO NEB. REV. STAT. §53-196 (1943), UNCONSTITUTIONAL BECAUSE OF OVERBREADTH?

To be constitutional, such an ordinance 1) must have a substantial relation to the health, safety, morals, and welfare of the community, and 2) would not require unwarranted invasions of the right of privacy to be enforced.

PROBABLE CAUSE

045 IS THE WARRANTLESS SEARCH OF AN AUTOMOBILE STOPPED FOR A MINOR TRAFFIC OFFENSE JUSTIFIED IF THE POLICE OFFICER CLAIMS TO HAVE SMELLED MARIJUANA EMINATING FROM THE VAN?

Yes. The warrantless search can be justified under the rule of Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

589 DOES A SHERIFF'S DEPUTY HAVE PROBABLE CAUSE TO ARREST, WHEN HE RELIES UPON FAULTY INFORMATION FROM A POLICE DEPARTMENT THAT AN ARREST WARRANT EXISTS FOR THE INDIVIDUAL

No, without a warrant in existence, there is no probable cause for the arrest.

681 DOES A POLICE OFFICER WHO STOPS A DEFENDANT FOR SPEEDING HAVE PROBABLE CAUSE TO CONDUCT A WARRANTLESS SEARCH OF THE DEFENDANT'S AUTOMOBILE FOR CONTRABAND WHERE THE DEFENDANT APPEARS TO BE NERVOUS AND IS DRIVING AN AUTOMOBILE WITH OUT-OF-STATE LICENSE PLATES WHEN PERSONS FROM SAME STATE HAD RECENTLY BEEN ARRESTED FOR POSSESSION OF MARIJUANA?

Probably not, although warrantless searches of automobiles are usually permissible where there are attendant exigent circumstances, there must first exist probable cause for the officer to conduct a search. The probable cause requirement demands that there be some objective facts from which the officer can make a reasoned conclusion that a crime is being committed. Mere suspicion of a crime does not suffice.

700 IS THE PRESENCE OF A SEED OR SEEDS WHICH RESEMBLE MARIJUANA SEEDS BUT ALSO COULD REASONABLY BE ANOTHER KIND OF A SEED, ON THE SEAT OF A VEHICLE, SUFFICIENT TO GIVE POLICE CAUSE TO SEARCH THE ENTIRE VEHICLE?

Maybe not. While there is no definitive case law or guidelines on what constitutes probable cause for a search, in these circumstances, reliance on the presence of two seeds could be challenged as inadequate to "warrant the person of reasonable caution that the search was appropriate."

PROBATION

152 MUST A PRELIMINARY HEARING BE HELD FOR PROBATION VIOLATORS?

Yes. Gagnon v. Scarpelli, 411 U.S. 778, 92 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

233 IS HEARSAY EVIDENCE TESTIFIED TO BY PROBATION OFFICER IN ITSELF SUFFICIENT TO JUSTIFY REVOCATION OF PROBATION?

Probably not, in that it emasculates the right of confrontation, is probably not clear and convincing evidence, and is probably not competent evidence.

282 HAS A PROBATIONER INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL FOR A PROBATION REVOCATION HEARING WHERE THE JUDGE HAS INFORMED PROBATIONER OF HIS RIGHT TO COUNSEL BUT NOT OF THE FACT THAT IF HE WAS INDIGENT, THE STATE WOULD APPOINT COUNSEL?

Arguably not, if *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) strictly applies. However, it may be necessary to show prejudice.

348 MAY A COURT REVOKE PROBATION SOLELY ON THE GROUND THAT THE PROBATIONER HAD BEEN ARRESTED?

No, since probation may only be revoked upon the proof of a violation of a condition of probation.

630 CAN A DEFENDANT BE HELD TO THE CONDITIONS OF HIS PROBATION ORDER BEFORE HE HAS SIGNED SUCH ORDER, WHEN THE JUDGE INFORMED THE DEFENDANT ORALLY THAT HE WAS ON PROBATION, BUT DID NOT EXPLAIN THE CONDITIONS?

It appears that the only condition which may be implied from a grant of probation is that the probationer will not violate any criminal law of the state.

PROOF

535 ARE JURY INSTRUCTIONS WHICH CONTAIN BOTH A) THE INFORMATION, ALLEGING THE MATERIAL ELEMENTS OF THE CRIME IN CONJUNCTIVE LANGUAGE, AND B) THE STATUTE, WHICH STATES THE ELEMENTS IN DISJUNCTIVE LANGUAGE, PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE ACCUSED?

Probably not, although an argument exists that such a practice is confusing as to what material elements must be proved to establish a violation of the statute.

607 IN A PROSECUTION FOR GRAND LARCENY, IS A VARIANCE BETWEEN THE ALLEGATIONS AND PROOF AS TO THE VALUE OF PROPERTY STOLEN, WHEN BOTH EXCEED THE VALUE REQUIRED BY STATUTE, A MATERIAL VARIANCE?

Probably not, though the state must prove the value exceeds the amount required by statute.

PROSECUTOR

330 DOES A DEFENDANT HAVE ANY RIGHT TO SPEEDY TRIAL ASIDE FROM NEB. REV. STAT. §29-1207 (SUPP. 1972)?

Yes, based upon his constitutional right to a speedy trial under the sixth amendment to the United States Constitution.

607 DOES A DEFENDANT HAVE TO BE CHARGED WITH A VIOLATION OF THE MOST SPECIFIC STATUTE, IF MORE THAN ONE COVERS THE ACT?

No, generally the prosecutor has discretion concerning what statute the defendant will be charged with violating.

663 IN THE EVENT THAT THE CITY OR VILLAGE HAS EMPLOYED AN ATTORNEY OTHER THAN THE COUNTY ATTORNEY AS CITY PROSECUTOR, IS THE CITY PROSECUTOR OBLIGATED TO CLEAR ALL CRIMINAL COMPLAINTS, I.E., FELONY AND MISDEMEANOR COMPLAINTS, WITH THE COUNTY BEFORE FILING IN THE COUNTY COURT?

According to Neb. Rev. Stat. §29-404 (Supp. 1974), no complaint can be filed with a magistrate without the county attorney's approval or the submission of a surety bond to indemnify the person complained against for wrongful or malicious prosecution, with the exception that first class city, second class city and village attorneys can sign complaints for a violation of city or village ordinances, according to Neb. Rev. Stat. §24-533 (Supp. 1974) and the primary class city attorney has the same power regarding complaints for violations of city ordinances, according to Neb. Rev. Stat. §15-322 (1974).

PSYCHIATRIC EXAMS

205 CAN AN INDIGENT DEFENDANT OBTAIN A COURT ORDERED PSYCHIATRIC OR PSYCHOLOGICAL EXAM TO TEST COMPETENCY, AT THE EXPENSE OF THE STATE, WITHOUT HAVING TO SHOW THE RESULTS TO EITHER THE COURT OR THE COUNTY ATTORNEY?

Probably not.

PUNISHMENT

003 MUST AN ATTORNEY BE APPOINTED TO REPRESENT INDIGENT MISDEMEANTS IF THE JUDGE IS TO HAVE OPEN TO HIM THE OPTION OF SENDING SUCH AN OFFENDER TO JAIL?

Yes.

008 WHAT SENTENCING ALTERNATIVES ARE AVAILABLE IN PASSING SENTENCE ON A CONVICTED MISDEMEANANT WHO HAS BEEN DIAGNOSED TO BE PSYCHOTIC?

Several alternatives are available, including a conditional probation and commitment to the Department of Correctional Services.

RADIO SIGNALS

111 IS §28-1128, ET SEQ. UNCONSTITUTIONAL FOR THE REASON THAT IT IS TOO BROAD AND PROHIBITS ANYONE TO HAVE IN HIS POSSESSION A RADIO CAPABLE OF EITHER RECEIVING OR TRANSMITTING RADIO FREQUENCY SIGNALS WITHIN THE FREQUENCY USED BY POLICE RADIO COMMUNICATIONS?

No. The statute will be interpreted to prohibit possession of such a device only when the possessor is violating subsections (1), (2), or (3) of §28-1128. If the court were to interpret the statute to prohibit mere possession, it would not be overbroad because it does not have a chilling effect on a first amendment right and it is a rational exercise of the state police power.

RECONTATION

154 CAN A DEFENDANT BE PREVENTED FROM TESTIFYING AS TO THE RECONTATION OF HIS FORMER FALSE TESTIMONY?

It is doubtful, since most courts hold that evidence of recantation is admissible to negate the element of intent necessary to sustain a conviction of perjury.

RECKLESS DRIVING

033 CAN A STATEMENT GIVEN BY THE ACCUSED TO AN INVESTIGATOR, THE DAY FOLLOWING THE ACCIDENT WHILE THE ACCUSED WAS HOSPITALIZED, BE USED AT THE TRIAL TO SHOW THE HIGH RATE OF SPEED AT WHICH THE ACCUSED WAS DRIVING, THE TIME OF DAY THE ACCIDENT OCCURRED, AND THAT THE ACCUSED WAS THE DRIVER OF THE CAR?

Voluntary admissions by the accused, if corroborated, may be used to establish the corpus delicti of the crime or the accused's connection with the crime or to impeach the accused's testimony.

053 IS SOMNAMBULISM OR SOMNOLENTIA A VALID DEFENSE TO CARELESS DRIVING?

No, although somnambulism or somnolentia, commonly known as sleepwalking, is a defense akin to insanity, it is not a valid defense when voluntarily induced through intoxication or when the crime involves strict liability.

659 CAN A MOTORIST BE CHARGED WITH WILLFUL RECKLESS DRIVING UNDER NEB. REV. STAT. §39-669.03 (1974) OR RECKLESS DRIVING UNDER NEB. REV. STAT. §39-669.01 (1974) WHEN HE IS DRIVING ON A PRIVATELY OWNED CAFE PARKING LOT?

Possibly. Although there is no Nebraska case law on this issue, the Colorado Supreme Court has held a careless driving statute

can be violated in a privately owned shopping plaza parking lot. Furthermore, neither Nebraska statute specifically provides the proscribed act must occur on a "highway."

RESTITUTION

237 WILL RESTITUTION OF AN INSUFFICIENT FUND OR NO-FUND CHECK NEGATE PROSECUTION UNDER NEB. REV. STAT. §28-1212 and §28-1213?

No, since the offense is complete when the insufficient fund or no-fund check is uttered or delivered, subsequent restitution by the defendant has no effect, as of right, on prosecution.

SCHOOLS

179 DOES NEBRASKA HAVE A MISPRISION STATUTE OR ANY OTHER PROVISION WHICH MIGHT COMPEL THE SCHOOL ADMINISTRATOR TO REPORT A STUDENT'S DRUG USE?

Nebraska does not have an applicable misprision statute, but there may be a possibility that the accessory after the fact statute, Neb. Rev. Stat. §28-202 (Reissue of 1964) could be applied.

SEARCH AND SEIZURE

014 CAN THE PROSECUTION BASE A CHARGE ON EVIDENCE OF A CRIME DISCOVERED DURING A SEARCH AUTHORIZED BY WARRANT IF THE WARRANT WAS LIMITED TO SEARCHING FOR EVIDENCE OF A DIFFERENT CRIME?

Yes, so long as the police had original justification for being where they found such other evidence; and so long as their actions fell within one of the exceptions to the warrant rule, such evidence may be used to support an additional charge.

034 IS A WARRANTLESS AUTOMOBILE SEARCH FOR ALCOHOLIC BEVERAGES JUSTIFIED IF THE DEFENDANT DRIVER WAS SPEEDING, HIS BREATH SMELLED OF ALCOHOL AND A BROWN PAPER BAG COULD BE SEEN FROM THE OUTSIDE OF THE CAR ON THE FRONT FLOORBOARD?

Yes. The warrantless search can be justified under the automobile exception rule of Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925). It also might be allowable under the plain view rule Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971) or an expanded interpretation of the recent Supreme Court case on search incident to arrest, United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

076 IS IT A VALID SEARCH IF THE PERSON TO BE SEARCHED CONSENTS TO THE SEARCH OF HIS PREMISES WHILE UNDER THE INFLUENCE OF ALCOHOL?

The validity of a consent is a question of fact. Unless the evidence clearly shows that the state of intoxication was so great as to negate the defendant's ability to consent, the consent will be considered valid.

078 IF CITY POLICE HAVE POWER TO STOP A SUSPECT OUTSIDE THE CITY LIMITS, IS A SUBSEQUENT SEIZURE OF EVIDENCE BY LATE ARRIVING STATE TROOPERS JUSTIFIED UNDER THE "PLAIN VIEW" DOCTRINE?

Not only is the stop by city police questionable, so is the seizure of evidence under the circumstances of this case.

126 MAY AN OFFICER VIEW THE DEFENDANTS WITH THE AID OF BINOCULARS?

Yes, unless the defendants harbor a reasonable expectation of privacy.

308 IS EVIDENCE FOUND DURING AN INVENTORY SEARCH OF AN IMPOUNDED VEHICLE ADMISSIBLE IN COURT?

The cases indicate that such evidence is admissible provided that three criteria are met. First, there must be a lawful arrest of the defendant. Second, there must be reasonable justification for impounding the vehicle. Third, the inventory search must not go to unreasonable lengths.

352 IS AN AFFIDAVIT FOR A SEARCH WARRANT INSUFFICIENT WHERE THE AFFIDAVIT STATES THAT AN INFORMANT WHO HAD "PROVIDED CREDIBLE INFORMATION TO THE AFFIANT ON AT LEAST THREE PREVIOUS OCCASIONS" TOLD THE AFFIANT THAT A NAMED DEFENDANT HAD "LEFT THE CITY ON FEBRUARY 1ST TO PURCHASE DRUGS, WITH AN UNKNOWN INDIVIDUAL, AND WOULD RETURN TO A STATED ADDRESS ON THE EVENING OF FEBRUARY 2ND OR IN THE EARLY MORNING HOURS OF FEBRUARY 3RD WITH THE DRUGS?"

Yes, although a defendant's veracity may have been proven, the informant must still show the underlying circumstances on which he based his information in a fashion sufficient for the magistrate to credit the hearsay elements.

355 WHERE THE SHERIFF OBTAINED A SEARCH WARRANT DIRECTED TO HIM PERSONALLY AND THE SEARCH WAS CONDUCTED BY HIS DEPUTY AT HIS DIRECTION BUT NOT IN HIS PRESENCE, MAY THE EVIDENCE THUS OBTAINED BE SUPPRESSED?

No. The deputy was acting for the sheriff according to a Neb. Rev. Stat. §25-2219 and where the defendant was not substantially prejudiced by this substitution, suppression of seized evidence would be unwarranted.

381 MAY A SEARCH OF DEFENDANT'S BACK PACK IN THE PATROL CAR BE JUSTIFIED AS A SEARCH INCIDENT TO ARREST?

Probably not, for under the facts of this case the search was conducted outside the area of the defendant's control.

471B DOES THE FOURTH AMENDMENT PROTECTIONS AGAINST ILLEGAL SEARCHES AND SEIZURES EXTEND TO PRIVATE CITIZENS?

No, search and seizure by private individuals do not fall within the protection of the fourth amendment.

471B IF THE SEARCH IS PURSUANT TO CONSENT BY DEFENDANT, IS THE EVIDENCE ADMISSIBLE REGARDLESS OF THE ILLEGALITY OF THE ARREST?

Yes, if the consent is valid and voluntary, then evidence obtained is admissible.

674 WAS A SEARCH OF A PICKUP OWNED BY THE DEFENDANT ILLEGAL BECAUSE IT WAS MADE APPROXIMATELY TEN MILES FROM THE SCENE OF THE ARREST, WAS NOT INCIDENT THERETO: WAS MADE WITHOUT A WARRANT, WITHOUT CONSENT, AND WITHOUT PROBABLE CAUSE?

Yes, the warrantless search of the truck was not within the scope of consent, was removed in time and place from the arrest and therefore not incident to the arrest. Nor can the search be justified as a constitutionally permissible automobile search, since it was made without probable cause.

681 DOES A POLICE OFFICER WHO STOPS A DEFENDANT FOR SPEEDING HAVE PROBABLE CAUSE TO CONDUCT A WARRANTLESS SEARCH OF THE DEFENDANT'S AUTOMOBILE FOR CONTRABAND WHERE THE DEFENDANT APPEARS TO BE NERVOUS AND IS DRIVING AN AUTOMOBILE WITH OUT-OF-STATE LICENSE PLATES WHEN PERSONS FROM SAME STATE HAD RECENTLY BEEN ARRESTED FOR POSSESSION OF MARIJUANA?

Probably not, although warrantless searches of automobiles are usually permissible where there are attendant exigent circumstances, there must first exist probable cause for the officer to conduct a search. The probable cause requirement demands that there be some objective facts from which the officer can make a reasoned conclusion that a crime is being committed. Mere suspicion of a crime does not suffice.

700 IS THE PRESENCE OF A SEED OR SEEDS WHICH RESUMBLE MARIJUANA SEEDS BUT ALSO COULD REASONABLY BE ANOTHER KIND OF A SEED, ON THE SEAT OF A VEHICLE, SUFFICIENT TO GIVE POLICE CAUSE TO SEARCH THE ENTIRE VEHICLE?

Maybe not. While there is no definitive case law or guidelines on what constitutes probable cause for a search, in these circumstances, reliance on the presence of two seeds could be challenged as inadequate to "warrant the person of reasonable caution" that the search was appropriate.

SECOND CLASS CITIES

- 507 DO THE POLICE OF A SECOND CLASS CITY HAVE INVESTIGATORY AND ARREST POWERS OUTSIDE THE CITY, BUT WITHIN THE COUNTY WHICH IS THE LOCUS OF THE CITY?

The applicable statutes and case law can be read to give the police such powers, however the safer procedure would seem to be to have a deputy sheriff accompany the police when entering the county, except in cases involving hot pursuit.

SELF-INCRIMINATION

- 344 CAN NEB. REV. STAT. §25-1210 (REISSUE OF 1964) BE CIRCUMVENTED BY A PROSECUTOR'S PROMISE THAT A WITNESS' TESTIMONY WILL NOT BE USED AGAINST HIM IN A SUBSEQUENT CRIMINAL PROCEEDING?

No, Neb. Rev. Stat. §25-1210, essentially reiterates and expands the federal and state constitutional privilege against self-incrimination. U.S. Const. Amend. V; Neb. Const. Art. I, §12.

- 362 IF A DEFENDANT TESTIFIES IN HIS OWN DEFENSE ON A CHARGE OF CONSTRUCTIVE POSSESSION OF MARIJUANA, MAY HE BE CROSS-EXAMINED ABOUT HIS ADMISSIONS TO THE POLICE, SMOKING MARIJUANA NOT FROM THE PACKAGE CONFISCATED?

If the charge is based solely on constructive possession of the marijuana in the package, then the defendant should not be required to answer questions concerning his admitted smoking. If the charge includes the smoking of the cigarette, then the defendant could be cross-examined in regard to the smoking.

SENTENCING

- 032 MAY A NEBRASKA TRIAL JUDGE CONSIDER HEARSAY EVIDENCE CONTAINED IN A PRESENTENCE REPORT FOR USE IN HIS DETERMINATION OF AN APPROPRIATE SENTENCE?

Yes. The case law in Nebraska, the Federal Courts, and many other jurisdictions hold that the trial judge may consider hearsay evidence contained in the presentence report.

- 040 FOLLOWING A REVOCATION OF A SENTENCE OF TWO YEARS PROBATION FOR THE CRIME OF BURGLARY, IS A ONE TO TWO YEAR SENTENCE EXCESSIVE?

When the punishment created by statute is left to the discretion of the court, within prescribed limits, a sentence will not be disturbed on appeal unless there is a clear abuse of discretion.

350 MAY A COUNTY COURT COMMIT A CRIMINAL DEFENDANT TO THE DEPARTMENT OF CORRECTIONAL SERVICES FOR UP TO 90 DAYS FOR PRESENTENCE INVESTIGATION PURSUANT TO NEB. REV. STAT. §83-1,105(3) (SUPP. 1974) OR IS THIS AUTHORITY LIMITED TO THE DISTRICT COURTS?

§83-1,105(3) (Supp. 1974) is not applicable to county courts. The authority to commit is available only to the district courts.

373 DOES THE DISTRICT COURT JUDGE IN NEBRASKA HAVE THE POWER TO SET ASIDE AND VACATE CRIMINAL SENTENCES LEGALLY IMPOSED?

No, although Nebraska has no statutes or case law directly on point, several cases strongly indicate that a District Court Judge has no power to vacate criminal sentences legally pronounced.

375 IS DEFENDANT'S SENTENCE EXCESSIVE WHERE HE RECEIVED TWO TO SIX YEARS IN A PENAL COMPLEX AND HIS CO-DEFENDANT, CHARGED WITH THE IDENTICAL CRIME, RECEIVED TWO YEARS PROBATION?

If the evidence indicates that the defendant receiving the least punishment is at least equally guilty, the Supreme Court may examine the evidence to determine whether the higher sentence should be reduced.

SEPARATE TRIALS

262 CAN A DEFENDANT SUCCESSFULLY OBTAIN A COURT ORDER FOR AN ELECTION OF SEPARATE TRIALS ON COUNTS OF BURGLARY AND GRAND LARCENY?

He can, although such a result is not likely.

SHERIFF

488 IS THERE ANY LIMIT ON THE SHERIFF'S AUTHORITY IN INCORPORATED AREAS OF THE COUNTY?

No, the sheriff's authority is county-wide and concurrent with the police force of any incorporated area within the county.

SIGNATURE

241 WHEN APPELLANT HAS DEPOSITED CASH IN LIEU OF A WRITTEN UNDERTAKING, AS PROVIDED IN R.R.S. §29-611, AND HAS FAILED TO EITHER SIGN THE BOND OR TO INCLUDE IN IT THE NECESSARY CONDITIONS OF SUCH A WRITTEN UNDERTAKING, IS THE BOND DEFECTIVE?

No, in accordance with Neb. Rev. Stat. §29-611, a cash bond is given in "lieu of" such an undertaking and need not meet the formal written requirements necessary to it.

SPECIFIC INTENT

354 DOES WANTON AND RECKLESS DISREGARD OF HUMAN LIFE CONSTITUTE THE NECESSARY SPECIFIC INTENT REQUIRED TO SUSTAIN A CHARGE OF SHOOTING AT ANOTHER WITH INTENT TO KILL, WOUND OR MAIM?

Probably not, as the specific intent must be directly proved and cannot be inferred from circumstances.

SPEEDING

504 IS A DEFENDANT CHARGED WITH SPEEDING ENTITLED TO A JURY TRIAL?

No, under the present statutory scheme, there is no right to a jury trial in cases of traffic infractions.

SPEEDY TRIAL

313 DOES THE SIX MONTH PERIOD IN NEB. REV. STAT. §29-1207 (SUPP. 1972) BEGIN TO RUN FROM THE FILING OF A COMPLAINT?

Only in misdemeanor cases. State v. Born, 190 Neb. 767, 212 N.W.2d 581 (1973).

330 DOES A DEFENDANT'S RIGHT TO SPEEDY TRIAL UNDER NEB. REV. STAT. §29-1207 (SUPP. 1972) BEGIN TO RUN FROM THE FILING OF A COMPLAINT?

Only in misdemeanor cases. State v. Born, 190 Neb. 767, 212 N.W.2d 581 (1973).

STATUTES

132 DOES NEB. REV. STAT. §53-180.02 (1974) PROHIBIT MINORS FROM POSSESSING OR CONTROLLING LIQUOR IN A PRIVATE PLACE OTHER THAN THEIR PERMANENT PLACE OF RESIDENCE?

This statute presents certain ambiguities which would require a court to interpret it in order to effect the intent of the Legislature and to avoid due process problems. The recommended construction would be that the statute prevents minors from possessing alcohol in any public place whatsoever, and in those private places when the circumstances were such that there was a reasonable likelihood of either a minor driving while under the influence of alcohol after a party, or there was a reasonable likelihood that the minors would cause injury to property or persons.

625 IN NEBRASKA, WILL A PENAL STATUTE WHICH MAY BE CONSTRUED AS EMBRACING NOT ONLY ACTS COMMONLY RECOGNIZED AS CRIMINAL, BUT ALSO OTHERS WHICH IT WOULD BE UNREASONABLE TO PRESUME WERE INTENDED TO BE MADE CRIMINAL, BE DECLARED VOID ON ITS FACE FOR UNCERTAINTY?

Probably, provided the construction proffered does not lead to injustice or absurd consequences, the subject matter does not require the use of somewhat broad terms to be effective, or the legislative intent cannot be discerned from the ordinary meaning of the words as used in the statute and in light of the evil to be remedied.

STATUTE OF LIMITATIONS

237 WHEN DOES AN INSUFFICIENT FUND OR NO FUND CHECK BECOME STALE TO PROSECUTION?

It the offense is a felony, in three years. If a misdemeanor, in one year and six months.

SUFFICIENCY OF EVIDENCE

476 IS A HABEAS CORPUS PROCEEDING THE PROPER WAY TO ATTACK THE ARREST PRIOR TO TRIAL?

Yes, habeas corpus is the traditional remedy to test the legality of custody, though it may not be used to attack the sufficiency of evidence adduced at a preliminary hearing.

TAPE RECORDING

518 CAN THE ACCUSED IN A CRIMINAL CASE BE CONVICTED WHEN THE SOLE EVIDENCE IS A TAPE RECORDING OBTAINED FROM A RECORDING DEVICE CONCEALED ON AN INFORMANT OR IS CORROBORATION REQUIRED?

If the recording contains all the elements of the offenses and is properly authenticated by oral testimony, the recording is probably sufficient.

596 IS THE RECORDING BY AN ELECTRONIC DEVICE CONCEALED UPON AN INFORMANT ADMISSIBLE INTO EVIDENCE?

Yes, the courts have held such evidence to be admissible, provided that proper foundation is established.

TESTIMONY

154 CAN A DEFENDANT BE PREVENTED FROM TESTIFYING AS TO THE RECANTATION OF HIS FORMER FALSE TESTIMONY?

It is doubtful, since most courts hold that evidence of recantation is admissible to negate the element of intent necessary to sustain a conviction of perjury.

TRAFFIC VIOLATIONS

311 WHERE THE DEFENDANT IS ACCUSED OF RUNNING A STOP SIGN, IS THERE A BURDEN UPON THE STATE TO PROVE THAT THE SIGN WAS ERECTED PURSUANT TO LOCAL LAW?

Absent proof to the contrary, there is a presumption that a stop sign placed on a public street within city limits was placed there legally.

349 WHAT POWERS DO THE POLICE HAVE TO ENSURE THE APPEARANCE OF NON-RESIDENT TRAFFIC VIOLATORS WHEN THEY CANNOT POST BOND AND WILL NOT SIGN A WAIVER?

A police officer having reason to believe that an accused does not have ties to the jurisdiction sufficient to assure his appearance at trial may take the accused into custody.

504 IS A DEFENDANT CHARGED WITH SPEEDING ENTITLED TO A JURY TRIAL?

No, under the present statutory scheme, there is no right to a jury trial in cases of traffic infractions.

TRESPASS

414 CAN A PERSON WHO REFUSES TO LEAVE A CAFE AFTER BEING TOLD TO LEAVE BY THE OWNER BE GUILTY OF CRIMINAL TRESPASS?

Yes, at least when the owner acts under circumstances from which a reasonable owner would anticipate a clear and present danger.

UNIFORM ACT ON FRESH PURSUIT

471B WHEN IS A PURSUIT BY A NEBRASKA POLICE OFFICER INTO IOWA JUSTIFIED?

Under the Uniform Act on fresh pursuit, a police officer can pursue an individual into another state when the person is believed to have committed a felony.

URINE TEST

496 IS ONE URINE TEST A VALID INDICATOR OF THE BODY FLUID ALCOHOL FOR A DRIVING WHILE INTOXICATED CHARGE?

Probably not, because the process by which alcohol passes to the urine, the dilution which may occur in the bladder, and the length of time the urine has been retained render one test unreliable. The recommended method is for the subject to empty his or her bladder and half an hour later to obtain another specimen.

- 662 DO MIRANDA WARNINGS HAVE TO BE GIVEN TO AN INDIVIDUAL ARRESTED FOR DRUNKEN DRIVING BEFORE THE CHEMICAL TEST TO DETERMINE THE ALCOHOLIC CONTENT OF HIS BLOOD, URINE, OR BREATH IS ADMINISTERED?

Miranda warnings are not required to be given an individual who is properly requested to submit to a chemical test of his alcoholic content, but failure to give warnings may render inadmissible testimonial evidence obtained from the individual subsequent to his arrest.

VACATION OF SENTENCE

- 373 DOES THE DISTRICT COURT JUDGE IN NEBRASKA HAVE THE POWER TO SET ASIDE AND VACATE CRIMINAL SENTENCES LEGALLY IMPOSED?

No, although Nebraska has no statutes or case law directly on point, several cases strongly indicate that a district court judge has no power to vacate criminal sentences legally pronounced.

VAGUENESS

- 361 IS NEB. REV. STAT. §28-4,127(g) (SUPP. 1974) VOID FOR VAGUENESS?

No, but an argument can be made that §28-4,127(g) cannot constitutionally be applied to a defendant who is innocently in the place where narcotics are being used and who has knowledge of such use, without more.

- 377 IS NEB. REV. STAT. §28-1001 (1964), WHICH PROHIBITS CARRYING CONCEALED WEAPONS EXCEPT WHEN THE PERSON IS EMPLOYED AND THE CIRCUMSTANCES JUSTIFY HIM IN CARRYING A WEAPON, UNCONSTITUTIONAL FOR THE REASON THAT IT IS TOO VAGUE AND INDEFINITE?

No, it appears that the proviso is sufficiently definite that men of common intelligence are capable of ascertaining its meaning.

- 511 IS A VILLAGE ORDINANCE MAKING IT ILLEGAL TO "LOITER," WITHOUT FURTHER DEFINITION, VOID FOR VAGUENESS?

It would appear that the ordinance on its face would be void for vagueness, however, it could be construed by the court in such a manner that the ordinance should be held valid.

625 IN NEBRASKA, WILL A PENAL STATUTE WHICH MAY BE CONSTRUED AS EMBRACING NOT ONLY ACTS COMMONLY RECOGNIZED AS CRIMINAL, BUT ALSO OTHERS WHICH IT WOULD BE UNREASONABLE TO PRESUME WERE INTENDED TO BE MADE CRIMINAL, BE DECLARED VOID ON ITS FACE FOR UNCERTAINTY?

Probably, provided the construction proffered does not lead to injustice or absurd consequences, the subject matter does not require the use of somewhat broad terms to be effective, or the legislative intent cannot be discerned from the ordinary meaning of the words as used in the statute and in light of the evil to be remedied.

651 WHAT FACTORS WOULD MAKE A MUNICIPAL INTOXICATION ORDINANCE, IN LANGUAGE IDENTICAL TO NEB. REV. STAT. §53-196 (1943), UNCONSTITUTIONAL BECAUSE OF OVERBREADTH?

To be constitutional, such an ordinance 1) must have a substantial relation to the health, safety, morals, and welfare of the community, and 2) would not require unwarranted invasions of the right of privacy to be enforced.

VARIANCE

123 CAN THE STATE VARY ITS EVIDENCE AS TO THE DATE ON WHICH AN OFFENSE WAS ALLEGED TO HAVE BEEN COMMITTED IN A BILL OF PARTICULARS?

The state can present evidence of similar offenses for limited purposes, but conviction can only be had upon the offense charged.

535 ARE JURY INSTRUCTIONS WHICH CONTAIN BOTH A) THE INFORMATION, ALLEGING THE MATERIAL ELEMENTS OF THE CRIME IN CONJUNCTIVE LANGUAGE, AND B) THE STATUTE, WHICH STATES THE ELEMENTS IN DISJUNCTIVE LANGUAGE, PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE ACCUSED?

Probably not, although an argument exists that such a practice is confusing as to what material elements must be proved to establish a violation of the statute.

607 IN A PROSECUTION FOR GRAND LARCENY, IS A VARIANCE BETWEEN THE ALLEGATIONS AND PROOF AS TO THE VALUE OF PROPERTY STOLEN, WHEN BOTH EXCEED THE VALUE REQUIRED BY STATUTE, A MATERIAL VARIANCE?

Probably not, though the state must prove the value exceeds the amount required by statute.

VENUE

212 MAY THE PROSECUTION OBTAIN A CHANGE OF VENUE IF IT APPEARS THAT AN IMPARTIAL TRIAL MAY NOT BE HAD IN THE COUNTY WHERE THE OFFENSE WAS COMMITTED?

Yes. This common law right of the prosecution remains intact in Nebraska.

- 237 WHERE DOES VENUE LIE IN PROSECUTION OF A NO ACCOUNT OR INSUFFICIENT FUND CHECK WHERE THE DRAWER RESIDES OUTSIDE THE COUNTY OR THE STATE?

Venue lies in the county wherein the check was uttered or delivered, assuming that the payee resides within the county of prosecution.

- 669 WHERE DOES VENUE LIE IN THE PROSECUTION OF AN INDIVIDUAL FOR ESCAPE FROM CUSTODY WHEN HE LEFT, WITHOUT PERMISSION, A FACILITY LOCATED IN A DIFFERENT COUNTY THAN THE ONE IN WHICH HE WAS NORMALLY INCARCERATED?

Venue may lie in both the county in which the individual is normally incarcerated and the county in which he escaped custody.

VERDICTS

- 483 IS AN INCONSISTENT VERDICT GROUNDS FOR REVERSAL, WHERE THE JURY CONVICTS ON ONE CHARGE AND ACQUITS ON A SECOND IDENTICAL CHARGE AND THE STATE'S EVIDENCE ON EACH CHARGE IS BASED UPON THE SAME TESTIMONY BY AN INFORMER?

Probably not, as the Nebraska Supreme Court has consistently held, the credibility of a witness is for the jury and will not be disturbed on appeal if the evidence sustains some rational theory of guilt. However, an argument can be made that as the state's case rests upon the testimony of one informer, who presented identical testimony on both charges and who the jury believed on one charge and not on the other, the court on appeal should examine the evidence carefully to prevent a miscarriage of justice.

VILLAGES

- 663 IN THE EVENT THAT THE CITY OR VILLAGE HAS EMPLOYED AN ATTORNEY OTHER THAN THE COUNTY ATTORNEY AS CITY PROSECUTOR, IS THE CITY PROSECUTOR OBLIGATED TO CLEAR ALL CRIMINAL COMPLAINTS, I.E., FELONY AND MISDEMEANOR COMPLAINTS, WITH THE COUNTY BEFORE FILING IN THE COUNTY COURT?

According to Neb. Rev. Stat. §29-404 (Supp. 1974) no complaint can be filed with a magistrate without the county attorney's approval or the submission of a surety bond to indemnify the person complained against for wrongful or malicious prosecution, with the exception that first class city, second class city and village attorneys can sign complaints for a violation of city or village ordinances, according to Neb. Rev. Stat. §24-533 (Supp. 1974) and the primary class city attorney had the same power regarding complaints for violations of city ordinances, according to Neb. Rev. Stat. §15-322 (1974).

WARRANTS

- 007 DOES A FORMAL COMPLAINT FROM THE COUNTY ATTORNEY'S OFFICE JUSTIFY THE ISSUANCE OF AN ARREST WARRANT, OR MUST THE COUNTY ATTORNEY ALSO FILE AN AFFIDAVIT SHOWING PROBABLE CAUSE?

A probable cause affidavit is required by statute.

- 014 CAN THE PROSECUTION BASE A CHARGE ON EVIDENCE OF A CRIME DISCOVERED DURING A SEARCH AUTHORIZED BY WARRANT IF THE WARRANT WAS LIMITED TO SEARCHING FOR EVIDENCE OF A DIFFERENT CRIME?

Yes, so long as the police had original justification for being where they found such other evidence; and so long as their actions fell within one of the exceptions to the warrant rule, such evidence may be used to support an additional charge.

- 345 MAY A NEBRASKA POLICE OFFICER ARREST A PERSON WITHOUT A WARRANT UPON RECEIVING A TELETYPE FROM ANOTHER JURISDICTION IN NEBRASKA REPORTING THAT THERE IS A WARRANT OUTSTANDING?

Yes, this satisfies the requirement of probable cause.

- 355 WHERE THE SHERIFF OBTAINED A SEARCH WARRANT DIRECTED TO HIM PERSONALLY AND THE SEARCH WAS CONDUCTED BY HIS DEPUTY AT HIS DIRECTION BUT NOT IN HIS PRESENCE, MAY THE EVIDENCE THUS OBTAINED BE SUPPRESSED?

No. The deputy was acting for the sheriff according to a Neb. Rev. Stat. §25-2219 and where the defendant was not substantially prejudiced by this substitution, suppression of seized evidence would be unwarranted.

- 589 DOES A SHERIFF'S DEPUTY HAVE PROBABLE CAUSE TO ARREST WHEN HE RELIES UPON FAULTY INFORMATION FROM A POLICE DEPARTMENT THAT AN ARREST WARRANT EXISTS FOR THE INDIVIDUAL?

No, without a warrant in existence, there is no probable cause for the arrest.

WEAPONS

- 138 WHAT MUST BE SHOWN TO CONVICT A DEFENDANT OF CARRYING A CONCEALED WEAPON UNDER NEB. REV. STAT. §28-1001 (1943), WHERE THE KNIFE WAS FOUND NEAR THE DEFENDANT?

There must be evidence connecting the defendant to the weapon showing that he had carried it and it was concealed.

- 164 IS INTENT AN ESSENTIAL ELEMENT IN CONVICTING UNDER NEB. REV. STAT. §28-1011.15, FOR POSSESSION OF A FIREARM BY A FELON?

Intent may be an essential element, but the intent considered is merely the intent to possess not the intent to violate the statute.

256 IS A CAN OF MACE A DANGEROUS WEAPON UNDER NEB. REV. STAT. §28-1001 (REISSUE OF 1964)?

Probably not in that it is not associated with criminal conduct nor is it likely to cause serious bodily injury.

WITNESSES

116 MAY A RESPONSE BY A WITNESS IN A CRIMINAL PROCEEDING BE USED AGAINST THAT WITNESS IN SUBSEQUENT PROCEEDINGS AGAINST HER?

Yes. The witness' privilege is one to decline to respond, not a prohibition against inquiries designed to elicit incriminating responses.

332 IS THE TESTIMONY OF THE ACCUSED'S GIRLFRIEND THAT THE ACCUSED ADMITTED DOING THE ACTS CONSTITUTING BURGLARY AND GRAND LARCENY SUFFICIENT TO CONVICT THE ACCUSED IN THE ABSENCE OF OTHER EVIDENCE?

No. According to the Nebraska Supreme Court, "[I]t is a fundamental in the law of this state that a defendant may not be properly convicted solely on an admission or confession made by him. Olney v. State, 169 Neb. 717, 723, 100 N.W.2d 838 (1960), Whomble v. State, 145 Neb. 667, 672, 10 N.W.2d 627 (1943).

332 ARE JUVENILE COURT RECORDS OF ADJUDICATIONS OF THAT COURT AVAILABLE TO IMPEACH WITNESSES?

Most likely not. Although no Nebraska case law exists on this point, the majority of other jurisdictions examined bar such use of the adjudication records.

483 IS AN INCONSISTENT VERDICT GROUNDS FOR REVERSAL, WHERE THE JURY CONVICTS ON ONE CHARGE AND ACQUITS ON A SECOND IDENTICAL CHARGE AND THE STATE'S EVIDENCE ON EACH CHARGE IS BASED UPON THE SAME TESTIMONY BY AN INFORMER?

Probably not, as the Nebraska Supreme Court has consistently held, the credibility of a witness is for the jury and will not be disturbed on appeal if the evidence sustains some rational theory of guilt. However, an argument can be made that as the state's case rests upon the testimony of one informer, who presented identical testimony on both charges and who the jury believed on one charge and not on the other, the court on appeal should examine the evidence carefully to prevent a miscarriage of justice.

END

7/26/50