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further performance. There was no contract at that point for the liquidator to disavow. In fact, during oral argument before this court, counsel for the liquidator conceded that if the contracts were breached before the liquidation order, "disavowal would not become an issue."

CONCLUSION

We conclude that Amwest breached its obligation to perfect NetBank's interests in the collateral. We also conclude that Amwest does not have any meritorious defenses. We reverse, and remand to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY A. LAMB, APPELLANT.

789 N.W.2d 918

Filed October 29, 2010. No. S-09-1201.

1. **Courts: Appeal and Error.** Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.
2. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
3. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the lower courts.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Criminal Law: Sentences: Judgments.** In a criminal case, entry of judgment occurs with the imposition of a sentence.
6. **Sentences: Probation and Parole: Appeal and Error.** The imposition of the sentence, absent the pendency of an appeal, concludes the "proceedings" referred to in Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008).
7. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.

8. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
9. **Constitutional Law: Statutes: Standing.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.
10. **Investigative Stops: Search and Seizure.** An investigative stop is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning.
11. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect might be involved.
12. ____: ____: ____. A stop is justified when an officer observes a traffic offense—however minor.
13. **Criminal Law: Police Officers and Sheriffs: Testimony: Corroboration.** When testimony regarding speed is used in connection with a charge other than speeding, the officer's testimony of speeding, if believed, is sufficient and need not be corroborated.
14. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
15. ____: ____: ____. In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop.
16. **Investigative Stops: Police Officers and Sheriffs: Drunk Driving: Probable Cause.** An officer is required to have only a reasonable, articulable suspicion that a motorist was driving under the influence in order to expand the scope of the initial traffic stop and detain him or her for field sobriety tests.
17. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. Courts must determine whether reasonable suspicion exists on a case-by-case basis.
18. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention. It is something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
19. **Trial: Convictions.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
20. **Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition.

21. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
22. **Legislature: Criminal Law: Public Policy: Sentences: Courts.** The Legislature declares the law and public policy by defining crimes and fixing their punishment. The responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.
23. **Drunk Driving: Sentences: Probation and Parole.** Neb. Rev. Stat. § 60-6,197.03(5) (Supp. 2007) provides for the possibility of a sentence of probation.

Appeal from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions.

Thomas R. Lamb, of Anderson, Creager & Wittstruck, P.C., for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

Jeffrey A. Lamb, appellant, was arrested for driving under the influence (DUI) in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004). Prior to trial, Lamb filed a motion to quash in the county court for Lancaster County in which he challenged the constitutionality of Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008) on various bases, all to the effect that this statute improperly prevented the trial court from imposing a sentence of probation. The motion was denied. A subsequent motion to suppress evidence of intoxication was also denied. Lamb was convicted of DUI, second offense, and sentenced to 90 days' incarceration, revocation of his license for 1 year, and a $500 fine. The district court affirmed Lamb's conviction and

sentence. Lamb appeals. Because § 60-6,197.09, about which Lamb complains, does not apply to him, we conclude that Lamb does not have standing to challenge the constitutionality of this statute. We further conclude that the district court did not err when it affirmed Lamb's conviction, and we affirm in part. However, because neither the county court nor the district court considered probation as a sentencing option, we find error in connection with the sentence, and reverse the district court's order in part and remand the cause with directions to the district court to vacate the sentence and remand the case to the county court to resentence Lamb.

STATEMENT OF FACTS

On November 11, 2006, Lamb was stopped by an officer of the Lincoln Police Department in Pioneers Park. The officer stopped Lamb because Lamb had entered Pioneers Park after the park was closed and Lamb appeared to be traveling in excess of the speed limit. The officer approached the vehicle, smelled the odor of alcohol, saw other signs of intoxication, and asked Lamb to exit the vehicle for field sobriety tests. The officer believed that Lamb was under the influence of alcohol. Lamb was arrested and transported to the Lincoln Police Department for a chemical breath test. The result of the test was .20 of 1 gram of alcohol per 210 liters of breath, which exceeded the legal limit. See § 60-6,196(1).

On December 4, 2006, a complaint was filed in the county court for Lancaster County against Lamb for DUI, second offense, in violation of § 60-6,196.

Lamb filed a motion to quash the complaint. In summary, Lamb challenged the constitutionality of § 60-6,197.09 as vague, overbroad, a denial of due process, and inconsistent with other statutes. The essence of the challenge was that § 60-6,197.09 deprived him of an opportunity to be sentenced to probation. On May 23, 2007, the county court denied the motion to quash. In its order, the county court incorporated language from another trial level order which had found that § 60-6,197.09 was constitutional and applicable to a case similar to Lamb's.

Before trial, Lamb also filed a motion to suppress. The county court held a hearing on the motion and ultimately denied the motion to suppress.

A bench trial was held on February 27, 2008, and Lamb was found guilty of DUI, second offense, by the county court on February 28. The county court also found that Lamb's breath alcohol content was more than .15 of 1 gram of alcohol per 210 liters of breath, making the offense a Class I misdemeanor.

On May 23, 2008, Lamb was sentenced to 90 days' incarceration, revocation of his license for 1 year, and a $500 fine. At the enhancement hearing, the State offered an exhibit, received into evidence, which established that Lamb had been previously convicted of DUI in the county court for Saline County on April 6, 2006, and was sentenced to 18 months' probation on July 18.

Lamb appealed his conviction and sentence in this case to the district court for Lancaster County. On appeal, restated, Lamb claimed that (1) § 60-6,197.09 as amended effective July 14, 2006, was unconstitutional; (2) the county court erred when it denied his motion to quash; (3) the county court erred when it denied his motion to suppress; (4) the judgment of conviction was not supported by the evidence; and (5) the sentence imposed was erroneous.

The district court affirmed the judgment of the county court. The district court engaged in a constitutional analysis of § 60-6,197.09, which is not necessary to repeat here. The district court concluded that § 60-6,197.09 was not unconstitutional and that the statutory language precluded a sentence of probation and was applicable to Lamb's case. The district court rejected Lamb's remaining assignments of error and thus affirmed Lamb's conviction and sentence.

Lamb appealed.

ASSIGNMENTS OF ERROR

On appeal, Lamb claims, restated, that the district court erred when it affirmed the orders of the county court which had (1) denied Lamb's motion to quash challenging the constitutionality of § 60-6,197.09; (2) denied Lamb's motion to suppress; (3) found there was sufficient evidence to convict

Lamb of DUI, second offense; and (4) imposed a sentence of 90 days' incarceration, revocation of Lamb's license for 1 year, and a fine of $500.

STANDARDS OF REVIEW

[1,2] Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *State v. Prescott, ante* p. 96, 784 N.W.2d 873 (2010). In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *Id.*

[3] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the lower courts. *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

ANALYSIS

Lamb Does Not Have Standing to Challenge the Constitutionality of § 60-6,197.09.

At issue in this appeal is § 60-6,197.09, which provides:

> Notwithstanding the provisions of section 60-498.02 or 60-6,197.03, a person who commits a violation punishable under subdivision (3)(b) or (c) of section 28-306 or a violation of section 60-6,196, 60-6,197, or 60-6,198 *while participating in criminal proceedings for a violation of section 60-6,196, 60-6,197, or 60-6,198 . . . shall not be eligible to receive a sentence of probation*, a suspended sentence, or an employment driving permit authorized under subsection (2) of section 60-498.02 for either violation committed in this state.

(Emphasis supplied.)

Lamb claims that the district court erred when it affirmed the county court's denial of his motion to quash. In his motion to quash, Lamb challenged the constitutionality of § 60-6,197.09 on various bases, all to the effect that § 60-6,197.09 improperly prevented the trial court from imposing a sentence of probation in this case because, according to Lamb, he was "participating

in criminal proceedings" for the prior DUI case in Saline County when he committed the instant offense.

The State responds that Lamb does not have standing to challenge the constitutionality of § 60-6,197.09. The State refers us to the proposition that an individual who is not affected by the challenged statute lacks standing to bring a constitutional challenge thereto. See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). The State notes that Lamb was on probation from the prior DUI case when he committed the current offense. The State contends that, as a probationer, Lamb was not "participating in criminal proceedings for a violation of section 60-6,196 [the DUI statute]," as that expression is used in § 60-6,197.09, at the time of the current offense, and that therefore, § 60-6,197.09, which precludes a sentence of probation, does not apply to him. We agree with the State.

[4] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009). In reviewing the plain language of § 60-6,197.09, the portion relevant to the State's standing argument provides that a person who commits DUI in violation of § 60-6,196 "while participating in criminal proceedings for a violation of section 60-6,196 . . . shall not be eligible to receive a sentence of probation." The record shows that at the time that Lamb was arrested for the present offense of DUI in violation of § 60-6,196, he was on probation for a prior violation of § 60-6,196 in Saline County. The judgment of 18 months' probation for the prior offense was entered on July 18, 2006, and there is no suggestion that the judgment was appealed. The current offense occurred on November 11, 2006. Accordingly, to determine whether § 60-6,197.09 applies to this case, we must determine whether a defendant who is serving a sentence for a prior DUI when he or she commits a subsequent DUI violation, absent the pendency of an appeal, is "participating in criminal proceedings" for the prior DUI offense for purposes of § 60-6,197.09.

[5,6] We have not previously explained "participating in criminal proceedings" under § 60-6,197.09. However,

elsewhere, we have addressed the definition of "proceeding" and find such exposition useful in reading § 60-6,197.09. See *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). In *Long*, we relied on the Black's Law Dictionary 1221 (7th ed. 1999) definition of "proceeding," noting that "proceeding" had been defined as "'1. [t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.'" 264 Neb. at 90, 645 N.W.2d at 559. In a criminal case, entry of judgment occurs with the imposition of a sentence. See *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009). Thus, the imposition of the sentence, absent the pendency of an appeal, concludes the "proceedings" referred to in § 60-6,197.09, and a defendant is no longer "participating in criminal proceedings" after the sentence is imposed.

In the instant case, Lamb was sentenced on July 18, 2006, for the prior DUI. When Lamb committed the current offense on November 11, he was serving a sentence for probation and was not "participating in criminal proceedings" with respect to the prior DUI. We conclude that § 60-6,197.09 did not apply to Lamb, and he therefore does not have standing to challenge the statute.

[7,8] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006). Indeed, as an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009).

[9] Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). In

this case, Lamb was not, and was not about to be, adversely affected by the language of the statute or deprived of a right under § 60-6,197.09, because the language of the statute did not apply to Lamb's case. Accordingly, Lamb does not currently have standing to challenge the constitutionality of § 60-6,197.09. We affirm the decision of the district court, albeit for reasons other than those articulated by the district court, which affirmed the order of the county court denying Lamb's motion to quash.

It Was Not Error for the District Court to Affirm the Denial of Lamb's Motion to Suppress.

Lamb claims that the district court erred when it affirmed the county court's denial of his motion to suppress. He argues that the evidence presented at the hearing on the motion to suppress shows that there was a Fourth Amendment violation in connection with the stop of his vehicle. We reject this assignment of error.

[10] An investigative stop is "'limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning.'" *State v. Van Ackeren*, 242 Neb. 479, 486, 495 N.W.2d 630, 636 (1993), quoting *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984). Therefore, while this type of encounter is considered a "seizure" and invokes Fourth Amendment safeguards, because of its less intrusive character, this type of encounter requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. *State v. Wollam, ante* p. 43, 783 N.W.2d 612 (2010).

[11,12] The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect might be involved. See *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996). In addition, a stop is justified "'[w]hen an officer observes a traffic offense—however minor . . . .'" *State v. Chronister*, 3 Neb. App. 281, 285, 526 N.W.2d 98, 103 (1995), quoting *U.S. v. Cummins*, 920 F.2d 498 (8th Cir. 1990).

[13] At the suppression hearing, the officer testified that he was patrolling the area near Pioneers Park in Lincoln in his marked police cruiser, when he observed a vehicle enter the park after it was closed and further observed that the vehicle was exceeding the posted speed limit. The officer stopped Lamb's vehicle. On this record, Lamb's vehicle was stopped based on the officer's belief that Lamb had committed the criminal activity of entering the park after it had closed and speeding. When testimony regarding speed is used in connection with a charge other than speeding, the officer's testimony of speeding, if believed, is sufficient and need not be corroborated. See *State v. Prescott, ante* p. 96, 784 N.W.2d 873 (2010). See, also, *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997); *State v. Hiemstra*, 6 Neb. App. 940, 579 N.W.2d 550 (1998), *disapproved on other grounds, State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281 (2003). We determine in this case that the officer did not violate Lamb's Fourth Amendment rights when he stopped Lamb's vehicle.

[14-18] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *State v. Prescott, supra*. In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop. *Id*. We have further held that an officer is required to have only a reasonable, articulable suspicion that a motorist was driving under the influence in order to expand the scope of the initial traffic stop and detain him or her for field sobriety tests. *Id*. Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. *Id*. Courts must determine whether reasonable suspicion exists on a case-by-case basis. *Id*. Reasonable suspicion entails some minimal level of objective justification for detention. *Id*. It is something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id*.

Here, the officer who stopped Lamb's vehicle did have a reasonable, articulable suspicion to expand the scope of the initial traffic stop. The officer testified that after stopping the

vehicle, he approached the vehicle and observed that Lamb's movements were very deliberate and that Lamb had to concentrate on what the officer had asked Lamb to provide to the officer. The officer further testified that he smelled the odor of alcohol and that because he suspected alcohol use, he asked Lamb to exit the vehicle to conduct field sobriety tests. Based on Lamb's performance on these tests, the officer believed that Lamb was under the influence of alcohol. The officer arrested Lamb and transported him to the Lincoln Police Department.

Given the record, the officer properly stopped Lamb's vehicle and had a reasonable, articulable suspicion to expand the scope of the stop to conduct field sobriety tests. The district court did not err when it affirmed the county court's denial of Lamb's motion to suppress.

The District Court Did Not Err When It Affirmed the County Court's Finding That the Evidence Was Sufficient to Sustain Lamb's Conviction.

Lamb claims that the evidence adduced at trial was insufficient to sustain a conviction for DUI and that the district court erred when it affirmed the county court's finding of guilt. We reject this assignment of error.

[19-21] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009). In making this determination, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. See *id*. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

The evidence presented at trial established that Lamb had been driving on a public roadway and that Lamb's breath

alcohol level was .20 of 1 gram of alcohol per 210 liters of his breath. Lamb stipulated to these test results at trial. These results exceed the legal limit. Lamb also stipulated to the fact that the officer who administered the breath test was licensed and followed the requirements of title 177 of the Nebraska Administrative Code. Applying the standards set forth above to the instant case, we conclude that the district court did not err when it affirmed the county court's finding that the evidence of DUI was sufficient.

The District Court Erred When It Affirmed the Sentence Imposed by the County Court.

Lamb claims that the district court erred when it affirmed the sentence imposed by the county court. Lamb argues that, given their understanding of § 60-6,197.09, the lower courts did not consider probation a sentencing option and, as a result, erred in imposing and affirming his sentence. We agree.

[22] It is fundamental that the Legislature declares the law and public policy by defining crimes and "'"'fixing their punishment.'"'" *In re Petition of Nebraska Community Corr. Council*, 274 Neb. 225, 230, 738 N.W.2d 850, 854 (2007). We have stated that "the responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature." *State v. Divis*, 256 Neb. 328, 334, 589 N.W.2d 537, 541 (1999).

In this case, the county court denied Lamb's motion to quash and, in the order, incorporated the following language from an order in an unrelated Lancaster County District Court case dealing with a similar issue: "If any Defendant being sentenced for DUI has been arrested for another DUI offense, probation is not an option." This order also states: "The statute [§ 60-6,197.09] [a]ffects all Defendants standing convicted of DUI at sentencing." On appeal, the district court affirmed the denial of the motion to quash and observed that § 60-6,197.09 eliminated the option of probation. When it affirmed the sentence imposed by the county court, the district court considered § 60-6,197.09 applicable to Lamb's case. The record indicates that the lower courts erroneously determined probation was not a sentencing option in this case and that the district court did

not consider the imposition of probation in evaluating the propriety of the sentence actually imposed.

Lamb was convicted of second-offense DUI with a breath alcohol content of more than .15. Neb. Rev. Stat. § 60-6,197.03(5) (Supp. 2007) applies to this case. Section 60-6,197.03(5) provides:

> If such person has had one prior conviction and, as part of the current violation, had a concentration of fifteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood or fifteen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath or refused to submit to a test as required under section 60-6,197, such person shall be guilty of a Class I misdemeanor, and the court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of at least one year but not more than fifteen years from the date ordered by the court and shall issue an order pursuant to section 60-6,197.01. Such revocation and order shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked. The court shall also sentence such person to serve at least ninety days' imprisonment in the city or county jail or an adult correctional facility.
>
> If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order that the operator's license of such person be revoked or impounded for a period of at least one year but not more than fifteen years from the date ordered by the court unless otherwise authorized by an order issued pursuant to section 60-6,211.05 and shall issue an order pursuant to section 60-6,197.01, and such order of probation or sentence suspension shall also include, as conditions, the payment of a one-thousand-dollar fine and confinement in the city or county jail for thirty days.

[23] We note the phrase "[i]f the court places such person on probation" in the statute quoted immediately above. By its terms, § 60-6,197.03(5) provides for the possibility of a

sentence of probation in a case such as the present one, and as discussed above, § 60-6,197.09 does not preclude the imposition of probation in the present case.

Notwithstanding the availability of probation, the State urges this court to affirm the district court's affirmance of Lamb's sentence. The State argues, inter alia, that because the sentence actually imposed was suitable and did not exceed the statutory limit, we should affirm. We decline to do so.

Given the fact that the lower courts did not consider probation an option, they failed in their duty to consider the statutorily available range of punishments. On appeal, we will not attempt to "'read the mind of the sentencing judge'" in an effort to divine whether the sentencing judge would have imposed probation had she known it was an available option. *State v. Clark*, 278 Neb. 557, 563, 772 N.W.2d 559, 564 (2009).

The county court erred as a matter of law when it did not consider probation at sentencing, and the district court erred when it affirmed the sentence based on the same misperception of the applicable law. We, therefore, reverse that portion of the district court ruling which affirmed the sentence imposed by the county court, and remand the cause with directions to the district court to vacate the sentence and remand the case to the county court for resentencing.

CONCLUSION

Lamb challenged the constitutionality of § 60-6,197.09. However, because this statute did not apply to him, Lamb did not have standing to challenge the constitutionality of this statute. Although our reasoning differs from that of the district court, we affirm the order of the district court which affirmed the county court's denial of Lamb's motion to quash. We affirm the district court's order which affirmed the county court's denial of Lamb's motion to suppress and affirmed the county court's finding that the evidence was sufficient to convict Lamb of DUI, second offense. However, with respect to the sentence imposed on Lamb, the county court and district court incorrectly determined that § 60-6,197.09 precluded probation and applied to Lamb; thus, the lower courts failed to consider probation as a sentencing option. We reverse the portion of

the order of the district court which affirmed the sentence, and remand the cause with directions to the district court to vacate the sentence and remand the case to the county court for resentencing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RODNEY L. BAKER, APPELLANT.
789 N.W.2d 702

Filed October 29, 2010. No. S-09-1312.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
4. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
5. **Trial: Witnesses: Testimony: Appeal and Error.** When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.
6. **Trial: Testimony: Appeal and Error.** Determinations regarding cross-examination of a witness on specific instances of conduct are specifically entrusted to the discretion of the trial court.
7. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.