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and this court also all agree that some guidance from the Legislature concerning this important undefined term would be beneficial for future cases.

V. CONCLUSION

The evidence adduced was clearly insufficient to support the conviction. We reverse the conviction and remand the matter with directions to dismiss.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V.
JAY J. SCHUETZ, APPELLANT.
790 N.W.2d 726

Filed November 9, 2010. No. A-10-276.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Sentences: Appeal and Error.** The sentencing court rather than the appellate court is entrusted with the power to impose sentences for the commissions of crimes against the State, and the judgment of the sentencing court cannot be interfered with in the absence of an abuse of discretion.
3. **Criminal Law: Probation and Parole.** A motion to revoke probation is not a criminal proceeding.
4. ____: ____. A probation revocation hearing is considered a continuation of the original prosecution for which probation was imposed—in which the purpose is to determine whether a defendant or a juvenile has breached a condition of his existing probation, not to convict or adjudicate that individual of a new offense.
5. ____: ____. A probation revocation hearing is not part of a criminal prosecution or adjudication and therefore does not give rise to the full panoply of rights that are due a defendant at a trial or a juvenile in an adjudication proceeding.
6. **Criminal Law: Probation and Parole: Sentences.** Violation of probation is not itself a crime or offense, and the court may impose a new sentence for the offense for which the offender was originally convicted or adjudicated.
7. **Double Jeopardy: Probation and Parole.** Double jeopardy is not implicated by probation revocation proceedings.
8. **Sentences.** The considerations for sentencing an offender are well known and include the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.

9. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
10. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
11. **Drunk Driving: Licenses and Permits: Revocation.** Under Neb. Rev. Stat. § 60-6,197.03(3) (Supp. 2009), driving under the influence, second offense, is a Class W misdemeanor, and the court shall order the offender not to drive any motor vehicle for any purpose for a period of 1 year.

Appeal from the District Court for Gage County, PAUL W. KORSLUND, Judge, on appeal thereto from the County Court for Gage County, STEVEN B. TIMM, Judge. Judgment of District Court affirmed.

Gerald M. Stilmock, of Brandt, Horan, Hallstrom & Stilmock, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

INTRODUCTION

This case involves the interplay between a probationary sentence, a subsequent revocation of probation, the imposition of a new sentence, and the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions. Jay J. Schuetz contends that the new sentence imposed after his probation was revoked is a double jeopardy violation, but we disagree and therefore affirm his sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On August 25, 2008, Schuetz entered a plea of guilty to driving under the influence, second offense, in exchange for the Gage County Attorney's agreement not to charge Schuetz with operating a vehicle with a blood alcohol content in excess of .15 of 1 gram of alcohol per 100 milliliters of his blood. The Gage County Court accepted the plea, convicted Schuetz, sentenced him to 16 months' probation, and ordered him to pay a $500 fine, plus the usual fees associated with probation.

Schuetz' driver's license was revoked for 1 year as a condition of probation by the court's order, which stated:

> [Schuetz] is ordered not to drive a motor vehicle for a period of ONE (1) YEAR, except a vehicle equipped with an ignition interlock device. Pursuant to [§] 60-6,211.05, [Schuetz] shall install an ignition interlock device on his automobile and the Department of Motor Vehicles shall issue a restricted Class O license for the period of time he is ordered not to drive under his order of probation. He shall not drive until the following conditions have been met . . . .

The conditions referenced were payment of fees and costs, enrollment and attendance in treatment programs, installation of the ignition interlock device, and acquisition of a Class O license. Schuetz was also ordered to spend 10 days in the Gage County jail, beginning on October 24, 2008.

While our record does not contain a motion to revoke probation or a supporting affidavit, the bill of exceptions shows that Schuetz appeared pro se before the Gage County Court on October 19, 2009, for a hearing on the revocation of his probation. The record reveals that Schuetz was accused of consuming alcohol on or about September 6, 2009, in Otoe County, Nebraska, while he was on probation. After being advised of his rights and indicating that he wished to proceed without counsel, Schuetz admitted that the allegation was true and that he did consume alcohol while on probation. The factual basis provided to the court was that on September 6, 2009, a deputy sheriff for Otoe County responded to a complaint about the operation of all-terrain vehicles in Unadilla, Nebraska. The deputy determined that Schuetz was one of the drivers and gave him a preliminary breath test, which registered .254 of 1 gram of alcohol per 210 liters of Schuetz' breath. The court found there was a factual basis for the plea that Schuetz had violated the terms and conditions of his probation. The trial court judge indicated he was going to revoke Schuetz' probation and sentence him according to the applicable statute. The sentence pronounced was a $500 fine plus court costs and 45 days in jail with credit for 11 days previously served. Schuetz was ordered "not to operate a motor vehicle for any purpose

for a period of one year from this date, and [his] operator's license [was] revoked for that period of time." This sentence is in accordance with that provided for driving under the influence, second offense, under Neb. Rev. Stat. § 60-6,197.03(3) (Supp. 2009). Schuetz then appealed to the district court for Gage County.

DISTRICT COURT DECISION

In the district court, Schuetz argued that the revocation of his license on October 19, 2009, imposed after the revocation of his probation, violated his constitutional right against double jeopardy because he was not given credit for the time he was ordered not to drive under the probation order. He also argued that such failure was inconsistent with the trial court's grant of credit on his fine and jail sentence.

The district court found that § 60-6,197.03(3) provides for two separate instances in which an offender's license must be revoked. The first is following a conviction under the statute. The second is as a required condition of probation—unless otherwise authorized by an order for an ignition interlock permit and installation of an interlock device as provided for in Neb. Rev. Stat. § 60-6,211.05 (Supp. 2009). It is noteworthy that the statute in effect at all times material herein provides in part: "Such revocation shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked." § 60-6,197.03(3). The court then reasoned that the first instance of revocation was a condition of probation. And Schuetz' second revocation resulted from a finding that he violated his probation. The court then cited to Neb. Rev. Stat. § 29-2268 (Reissue 2008), which provides in part: "If the court finds that the probationer did violate a condition of his probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted." The court concluded there were no double jeopardy implications as a result of the new sentencing, nor was the sentence an abuse of discretion. Thus, the district court affirmed the sentence imposed by the county court. Schuetz now appeals to this court.

ASSIGNMENTS OF ERROR

Schuetz asserts that the district court committed error in failing to find that a second 1-year driver's license revocation did not constitute double jeopardy, and second, he claims that the imposition of driver's license revocation totaling 2 years is an excessive sentence.

STANDARD OF REVIEW

[1,2] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010). The sentencing court rather than the appellate court is entrusted with the power to impose sentences for the commissions of crimes against the State, and the judgment of the sentencing court cannot be interfered with in the absence of an abuse of discretion. See *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992).

ANALYSIS

Does Driver's License Suspension Imposed Upon Violation of Probation Violate Double Jeopardy Clause?

Schuetz argues that he already completed his 1-year order of driver's license revocation at the time he was sentenced again after his probation was revoked. He contends that the legislative history concerning § 60-6,197.03(3) did not contemplate a factual situation such as presented here, in that Schuetz will end up with 2 years of license revocation. His claim is based on the aspect of the Double Jeopardy Clause that prohibits multiple punishments for the same offense, see *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009), and based on § 60-6,197.03(3), which is applicable to driving under the influence, second offense, and provides for only a 1-year revocation "from the date ordered by the court." However, Schuetz appears to ignore the portion of the statute that provides such order "shall be administered upon sentencing, upon final judgment of any appeal or review, *or upon the date that any probation is revoked.*" § 60-6,197.03(3) (emphasis supplied). Schuetz then argues that this statute was

not intended to allow a second 1-year revocation following an order revoking probation.

The State's response is that Schuetz' first license revocation was a condition of probation and that his second revocation was the consequence of violating probation. And, under § 29-2268(1), such is a permissible sentence. Section 29-2268(1) provides that upon revocation of probation, the court may "impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted."

Thus, the State concludes that Schuetz has not been subjected to double jeopardy by the imposition of the second 1-year license revocation. Additionally, the State directs our attention to *In re Interest of Rebecca B.*, 280 Neb. 137, 144, 783 N.W.2d 783, 789 (2010), wherein the court said: "[D]ouble jeopardy is not implicated in probation revocation proceedings because the proceedings are a continuation of the original underlying conviction or adjudication. The jeopardy that is attached is the jeopardy that attached in the underlying prosecution or adjudication."

In re Interest of Rebecca B., supra, analyzed whether jeopardy had attached when the State moved to revoke the juvenile's probation—which required her to complete a court-supervised drug treatment program—because she failed two chemical tests. She had already been ordered to serve two periods of detention for the failed drug tests. She contended that basing the motion to revoke on those same failed tests was a violation of the Double Jeopardy Clause. When the juvenile court dismissed the motion to revoke, the State appealed to this court rather than the district court. The Supreme Court, in *In re Interest of Rebecca B., supra*, found that the issue of whether the district court or the Court of Appeals had jurisdiction over the State's appeal was determined by whether the revocation motion placed the juvenile "in jeopardy." *Id.* at 139, 783 N.W.2d at 786. Because the Supreme Court concluded that probation revocation did not place her in jeopardy, the appeal was properly to the district court under Neb. Rev. Stat.

§ 43-2,106.01(2)(d) (Reissue 2008). Thus, the Supreme Court dismissed the appeal.

[3-7] The question for us is whether the court's holding in *In re Interest of Rebecca B., supra*, that the Double Jeopardy Clause does not apply to probation revocation proceedings, is the definitive answer to Schuetz' claim of a double jeopardy violation. Because of the lack of jurisdiction, the Supreme Court did not directly decide whether the juvenile in *In re Interest of Rebecca B.* could be punished further after a probation revocation, even though she had been punished by serving detention at a juvenile facility for each violation. Nonetheless, we believe that the holding of *In re Interest of Rebecca B., supra*, disposes of Schuetz' claim of a double jeopardy violation. The Supreme Court said:

> [A] motion to revoke probation is not a criminal proceeding. A probation revocation hearing is considered a continuation of the original prosecution for which probation was imposed—in which the purpose is to determine whether a defendant or a juvenile has breached a condition of his existing probation, not to convict or adjudicate that individual of a new offense.
>
> . . . It is well established that a probation revocation hearing is not part of a criminal prosecution or adjudication and therefore does not give rise to the full panoply of rights that are due a defendant at a trial or a juvenile in an adjudication proceeding. Furthermore, violation of probation is not itself a crime or offense . . . and the court may impose a new sentence for the offense for which the offender was originally convicted or adjudicated.

In re Interest of Rebecca B., 280 Neb. 137, 142-43, 783 N.W.2d 783, 788 (2010). Moreover, the *In re Interest of Rebecca B.* court said, "Simply stated, it is black letter law that double jeopardy is not implicated by probation revocation proceedings." 280 Neb. at 144, 783 N.W.2d at 789.

Given such holdings and the reasoning behind them, we conclude that *In re Interest of Rebecca B., supra*, conclusively answers Schuetz' claim that the new term of license revocation upon the admitted violation of his probation is a double

jeopardy violation—it is not. Schuetz' first assignment of error is thus without merit.

Was Revocation of Schuetz' Driver's License After Revocation of His Probation Excessive Sentence?

[8-10] Schuetz argues that his resentencing after the revocation of his probation, which prohibited him from operating a motor vehicle for "a second full year," is an abuse of discretion. Brief for appellant at 12. The considerations for sentencing an offender are well known, as set forth in *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). Such include consideration of the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

[11] Driving under the influence, second offense, is a Class W misdemeanor, and the court shall order the offender not to drive any motor vehicle for any purpose for a period of 1 year. See § 60-6,197.03(3). Therefore, the sentence is within statutory limits. In the factual basis at the revocation hearing, it was indicated that in addition to the arrest for driving the all-terrain vehicle with a preliminary breath test result indicating a breath alcohol content of .254—which we note is nearly identical to the test result of .259 on the underlying second-offense driving under the influence conviction—the ignition interlock device recorded failures on September 20 and October 1 and 4, 2009. Thus, it appears that not only has Schuetz continued to drink during his probation, he may well have done so with some frequency, given his attempts to drive his vehicle when the ignition interlock device indicated he had been drinking.

Thus, Schuetz can hardly be heard to say that he fulfilled the probationary conditions that he not drink, let alone not drink and drive.

CONCLUSION

Because the sentence does not violate the Double Jeopardy Clause and we cannot say the sentence at issue was an abuse of discretion, we affirm.

AFFIRMED.