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we affirm the decision of the Court of Appeals which affirmed the judgment of the district court.

AFFIRMED.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ALBERTO C. MAGALLANES, APPELLANT.
824 N.W.2d 696

Filed December 21, 2012. No. S-11-1033.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
3. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
4. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
5. **Statutes: Appeal and Error.** An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.
7. **Search and Seizure.** In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne.
8. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.
9. ____. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
10. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed in part, and in part reversed and remanded with direction.

Thomas C. Riley, Douglas County Public Defender, and Jami L. Jacobs for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

WRIGHT, J.

NATURE OF CASE

The appellant, Alberto C. Magallanes, was stopped on Interstate 80 for driving on the shoulder of the highway in violation of Neb. Rev. Stat. § 60-6,142 (Reissue 2010). After consent to search was given, drugs were found in the gasoline tank of the car Magallanes was driving. Magallanes was charged with and convicted of two counts of possession with intent to deliver a controlled substance and two counts of failure to affix a drug tax stamp. Following a bench trial, he was convicted on all counts. He was sentenced to 20 to 40 years' imprisonment for each possession conviction and 1 to 2 years' imprisonment for each conviction for failure to affix a tax stamp, with all terms running concurrently. Magallanes appealed, challenging whether probable cause existed to stop his vehicle and arguing that consent to search the vehicle was not properly given because of the illegal stop.

SCOPE OF REVIEW

[1] The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

[2] A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

FACTS

Traffic Stop

At approximately 10:30 p.m. on November 30, 2009, Kristopher Peterson, a deputy with the Douglas County sheriff's office K-9 interdiction unit, was patrolling Interstate 80. He observed a vehicle with Arizona license plates traveling eastbound. He decided to follow the vehicle and observed it temporarily cross outside its lane of travel onto the shoulder of the road for roughly 1 second or approximately 100 feet at two separate locations. Only the width of the right-side tires crossed over the fog line onto the shoulder. Peterson continued to follow the vehicle for about another 1½ miles before he pulled it over for what he believed was a violation of Nebraska law that prohibits driving on the shoulder of a highway.

Peterson approached the driver's side of the vehicle and told Magallanes that he pulled Magallanes over because he "'drove on the shoulder a couple times.'" Peterson also asked Magallanes if he was "'ok to drive.'" Magallanes said he was confused because of the Interstate 680/80 junction, and Peterson responded that confusion at that particular location "'happens quite a bit.'"

Magallanes was then taken to Peterson's cruiser and asked additional questions about his travel plans. Peterson separately asked Magallanes' passenger about their travel plans. During the traffic stop, Deputy Eric Olson arrived at the scene. Peterson wrote Magallanes a warning ticket for driving on the shoulder and then asked if he could search the vehicle. Magallanes consented to the search. Magallanes sat in Peterson's cruiser while the search occurred, and the passenger was asked to wait in Olson's cruiser. Peterson informed Magallanes that if, at any time, he wanted to end the search, he could do so by honking the cruiser's horn. Peterson and Olson then began to search the vehicle.

A search of the passenger compartment and the trunk revealed no contraband. However, Peterson noticed an odor of gasoline in the car and that Magallanes had air fresheners scattered throughout the car. He testified that newer cars, like

the one Magallanes was driving, should not have a strong gasoline odor inside the car and that the smell was an indication that someone had tampered with the fuel injector and sending unit. The two deputies removed the car's back seat and noticed that the fuel injector cover had grease and scratches on it, indicating that it had been tampered with. They used tools to remove the cover, and when they looked into the gasoline tank, they saw items that appeared to be contraband. Ultimately, five packages of methamphetamine and six packages of cocaine were recovered. Magallanes and his passenger were arrested.

Procedural History

On September 16, 2010, the State filed an information in Douglas County District Court charging Magallanes with one count of possession with intent to deliver more than 140 grams of methamphetamine, one count of possession with intent to deliver more than 140 grams of cocaine, and two counts of failure to affix a tax stamp. The first two counts were Class IB felonies, and the other two counts were Class IV felonies.

Magallanes filed three separate motions to suppress the evidence in district court. The first was filed on October 19, 2010, and sought to suppress any and all evidence derived from the search of the vehicle because the stop and seizure were conducted in violation of the 4th, 5th, 6th, and 14th Amendments to the U.S. Constitution and article I of the Nebraska Constitution. The second motion, filed January 24, 2011, alleged that the scope of the search went beyond the consent given by Magallanes, in violation of his state and federal constitutional rights. The third motion, filed on April 7, alleged that Magallanes did not voluntarily consent to the search and that any evidence obtained should be suppressed. All three motions were overruled by the district court.

On July 29, 2011, the matter came before the district court for a bench trial. The court found Magallanes guilty on all four counts. On November 23, he was sentenced to 20 to 40 years in prison on counts I and II, and 1 to 2 years in prison on counts III and IV, with all terms running concurrently.

On December 1, 2011, Magallanes appealed to the Nebraska Court of Appeals. We moved the case to our docket pursuant to our authority to regulate the dockets of this court and the Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

Magallanes assigns as error, restated, that the district court erred (1) when it denied Magallanes' motion to suppress, because Peterson did not have probable cause to stop Magallanes' vehicle, resulting in an illegal seizure, and (2) when it overruled Magallanes' motion to suppress, because the evidence obtained by the deputies during the illegal stop and seizure should have been suppressed as fruit of the poisonous tree.

ANALYSIS

Validity of Stop

[3] A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 158, 184 L. Ed. 2d 78. Peterson believed that Magallanes had committed a violation of § 60-6,142 when he twice crossed the fog line onto the shoulder of the road. Section 60-6,142 reads:

> No person shall drive on the shoulders of highways, except that:
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> (1) Vehicles may be driven on the shoulders of highways (a) by federal mail carriers while delivering the United States mail or (b) to safely remove a vehicle from a roadway;
>
> (2) Implements of husbandry may be driven on the shoulders of highways; and
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> (3) Bicycles and electric personal assistive mobility devices may be operated on paved shoulders of highways included in the state highway system other than Nebraska segments of the National System of Interstate and Defense Highways.

Magallanes argues that momentarily crossing the fog line does not constitute a violation of § 60-6,142 because

"driv[ing]" means using the shoulder as a thoroughfare or for primary travel—not the momentary, inadvertent event that took place in the case at bar. The State argues that any crossing onto the shoulder is a violation of the statute.

[4,5] Statutory language is to be given its plain and ordinary meaning. *State v. Halverstadt*, 282 Neb. 736, 809 N.W.2d 480 (2011). An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.* Neither party argues that § 60-6,142 is ambiguous. Therefore, it should be analyzed for its plain meaning.

Although we find § 60-6,142 unambiguous, a court in Nebraska that has addressed this issue came to a different conclusion in defining the word "driving." It determined that a momentary crossing of the fog line, without more, is not a violation of the Nebraska statute. See *U.S. v. Magallanes*, 730 F. Supp. 2d 969 (D. Neb. 2010), citing State v. Latham, Buffalo County District Court, No. CR 98-57. However, we conclude that any crossing of the fog line, even momentarily and inadvertently crossing onto the shoulder, is enough to violate the statute. There should not be a subjective determination of what constitutes driving on the shoulder of a highway.

Most recently, a single judge of the Court of Appeals determined in a memorandum opinion that any crossing of the fog line constituted "driving" on the shoulder in violation of the statute. See *State v. Medina*, No. A-11-377, 2011 WL 2577268 (Neb. App. June 28, 2011) (selected for posting to court Web site). The judge concluded that "[t]o reach the conclusion that [the defendant] was not driving, one must add words to the statute that simply are not there." *Id.* at *3. The judge found that § 60-6,142 was unambiguous and determined that giving the statutory language its plain and ordinary meaning, any crossing onto the shoulder was sufficient to violate the statute. See, also, *State v. Davis*, No. A-07-104, 2007 WL 2257886 (Neb. App. Aug. 7, 2007) (not designated for permanent publication) (single judge of Court of Appeals noted there was no authority in Nebraska to conclude that momentary, inadvertent crossing of fog line did not constitute driving, so officer had reasonable suspicion to

conduct traffic stop). We agree with the above reasoning and therefore hold that momentarily crossing the fog line onto the shoulder of the highway constitutes driving on the shoulder in violation of § 60-6,142. Therefore, the violation constituted probable cause for Peterson to stop the vehicle Magallanes was driving.

We also point out that the U.S. District Court for the District of Nebraska has concluded that momentarily and inadvertently crossing the fog line is sufficient for probable cause to initiate a traffic stop. Most recently, the district court concluded that although there were no definitive interpretations of § 60-6,142 in Nebraska case law, momentarily swerving across the fog line was a violation of the statute. *U.S. v. Coleman*, No. 4:10CR3108, 2011 WL 2182180 (D. Neb. May 20, 2011) (unpublished opinion), *affirmed* 700 F.3d 329 (8th Cir. 2012). In coming to its conclusion, the court looked to unpublished Nebraska opinions as well as published opinions from the U.S. Court of Appeals for the Eighth Circuit that have interpreted § 60-6,142 and similar laws. See, *U.S. v. Herrera Martinez*, 354 F.3d 932 (8th Cir. 2004), *vacated on other grounds* 549 U.S. 1164, 127 S. Ct. 1125, 166 L. Ed. 2d 889 (2007) (crossing fog line one time was sufficient probable cause to stop vehicle under South Dakota law); *U.S. v. Mallari*, 334 F.3d 765 (8th Cir. 2003) (crossing onto shoulder three times and having deficient rear license plate light were sufficient probable cause for traffic stop); *U.S. v. Pollington*, 98 F.3d 341 (8th Cir. 1996) (motor home tires' crossing shoulder line four times was probable cause for traffic stop).

The reasoning used in the above cases is sound. By applying the plain and ordinary meaning of the words in the statute, any crossing of the fog line onto the shoulder constitutes driving on the shoulder and is a violation of § 60-6,142.

[6] At a prior hearing, Peterson indicated that Magallanes crossed the fog line twice while Peterson followed his vehicle. Peterson pulled the vehicle over for a violation of § 60-6,142. An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred. *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873

(2010). Because Peterson observed the traffic violation, he had probable cause to stop the vehicle.

Magallanes crossed the fog line onto the shoulder while driving on Interstate 80, and he does not fall within one of the exceptions stated in § 60-6,142. The stop was objectively reasonable, and Magallanes' first assignment of error is without merit.

Evidence Obtained Was Not Fruit of Poisonous Tree

After Peterson concluded the traffic stop, he asked to search Magallanes' car. Magallanes consented to the search, and drugs were eventually found. Magallanes' argument rests on the premise that the drugs were found after an unlawful stop.

[7] In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne. *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). Because Peterson's stop was lawful under § 60-6,142, Magallanes' consent to search his vehicle was sufficient to allow the deputies to search the vehicle and the evidence found in the search of the vehicle was properly admitted into evidence. There was no unlawful conduct that would require suppression of the evidence. This assignment of error is also without merit.

No Evidence of Tax Stamp on Drugs

Magallanes was charged with and convicted of two counts of failure to affix a tax stamp. However, our review of the record reveals no evidence regarding the absence of a tax stamp. This issue was not raised by either party on appeal, and therefore, we analyze the issue for plain error.

[8-10] Consideration of plain error occurs at the discretion of an appellate court. *State v. Howell, ante* p. 559, 822 N.W.2d 391 (2012). Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *Id*. Only where

evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id*.

We found plain error related to a conviction for failure to affix a tax stamp in *Howell*. There was no evidence in the record to show the absence of a tax stamp, even though the State argued that pictures not received into evidence at trial clearly showed there was no tax stamp. Because no evidence was offered on the matter at trial, the State was not able to meet its burden and the conviction was overturned.

This case is similar to *Howell* because nothing in the record proves that no tax stamps were affixed to the drugs recovered from Magallanes' car. The State carries the burden to prove all elements of the crimes charged. Here, the State presented no evidence relating to the existence or absence of tax stamps. Because there was no evidence in the record on the issue, Magallanes' convictions for failure to affix a tax stamp cannot stand.

CONCLUSION

Peterson properly stopped Magallanes for violating § 60-6,142. At the conclusion of the lawful stop, Peterson asked if he could search Magallanes' car and Magallanes gave consent. There was no violation of Magallanes' rights, and the evidence was properly admitted at trial. Therefore, we affirm the judgments of conviction and sentences for possession with intent to deliver a controlled substance.

Because the record contained no evidence regarding the absence of drug tax stamps, we reverse the judgments of conviction and sentences on those counts and remand the cause with direction to dismiss the charges for failure to affix a tax stamp.

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

CONNOLLY, J., concurring.

I concur in the judgment, but write separately to express my disagreement with the majority's rationale. Neb. Rev. Stat. § 60-6,142 (Reissue 2010) generally prohibits "driv[ing] on" the shoulders of highways. The majority concludes that this

phrase is plain and unambiguous and that any time a driver crosses the fog line onto the shoulder—even when that crossing is "momentar[y] and inadvertent"—the driver has violated § 60-6,142. I cannot agree. The phrase is ambiguous, and the majority's interpretation is contrary to the ordinary meaning of "driv[ing] on" the shoulder and considers the language out of context. In my view, § 60-6,142 only prohibits using the shoulder as a thoroughfare or primary travel area, which Magallanes did not do.

So I conclude that Peterson did not have probable cause to stop Magallanes. But I do not address whether Peterson otherwise had reasonable suspicion for the stop (as the district court determined) because I conclude that sufficient attenuation existed between the stop and the consent to search. The exclusionary rule is therefore inapplicable, and so I agree that the district court properly denied Magallanes' motion to suppress.

Although the language of § 60-6,142 is plain, it is not unambiguous because it is unclear exactly what conduct § 60-6,142 prohibits. I concede that "driv[ing] on" the shoulder could be read to include Magallanes' actions. Webster's dictionary defines the verb "to drive" as "to operate the mechanism and controls and direct the course of."[1] An argument could be made that by Magallanes' driving the car and crossing the fog line, he "operated" the car and "directed" its course onto the shoulder. So a person could conclude that, technically speaking, Magallanes had violated § 60-6,142 by "driv[ing] on" the shoulder.

But we give plain language its *ordinary* meaning,[2] rather than any *possible* meaning.[3] The ordinary meaning of a phrase is, basically, the mental picture that the phrase creates in the mind of the reader or listener.[4] So what picture does "driv[ing]

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[1] Webster's Third New International Dictionary Unabridged 692 (1993).

[2] See, e.g., *In re Interest of Erick M., ante* p. 340, 820 N.W.2d 639 (2012).

[3] See, *Smith v. United States*, 508 U.S. 223, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993) (Scalia, J., dissenting; Stevens and Souter, JJ., join); *McBoyle v. United States*, 283 U.S. 25, 51 S. Ct. 340, 75 L. Ed. 816 (1931).

[4] See *McBoyle, supra* note 3.

on" the shoulder create? At the very least, I do not believe it is what Magallanes did here—a momentary and inadvertent crossing of the fog line. Indeed, a Nebraska motorist might be surprised to find that the State could criminally prosecute and fine him or her for a momentary and inadvertent crossing of just a few inches of the fog line.[5] Instead, and as District Judge John P. Icenogle asserted in a previous case, I believe "driv[ing] on" the shoulder only means using the shoulder as a thoroughfare or primary travel area.[6]

So the question is this: Does § 60-6,142 prohibit any and all technically possible meanings of "driv[ing] on" the shoulder or prohibit only the ordinary understanding of "driv[ing] on" the shoulder? Either interpretation would be reasonable, which makes the language of § 60-6,142 ambiguous.[7] That judges have come to different conclusions about the meaning of § 60-6,142 empirically supports this conclusion.[8] And where the language of a statute is ambiguous, our job is to discern its meaning. In interpreting a statute, courts "construe language in its context and in light of the terms surrounding it."[9] Reading the language in context, I conclude that § 60-6,142 only prohibits using the shoulder as a thoroughfare or primary travel area.

I agree with Judge Icenogle that the exceptions listed in § 60-6,142 support a conclusion that a momentary and

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[5] See, Neb. Rev. Stat. §§ 60-682 and 60-689 (Reissue 2010); *Miller v. Peterson*, 208 Neb. 658, 305 N.W.2d 364 (1981), *disapproved on other grounds, Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993).

[6] See, *U.S. v. Magallanes*, 730 F. Supp. 2d 969 (D. Neb. 2010); *United States v. Graumann*, No. 8:00-CR-61, 2000 U.S. Dist. LEXIS 23037 (D. Neb. July 20, 2000) (order) (citing State v. Latham, Buffalo County District Court, No. CR 98-57).

[7] See *In re Interest of Erick M., supra* note 2.

[8] Compare, e.g., *Graumann, supra* note 6, with *State v. Medina*, No. A-11-377, 2011 Neb. App. LEXIS 83 (Neb. App. June 28, 2011) (selected for posting to court Web site).

[9] *Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004). See, also, Steven Wisotsky, *How to Interpret Statutes—Or Not: Plain Meaning and Other Phantoms*, 10 J. App. Prac. & Process 321 (2009).

inadvertent crossing of the fog line is not "driv[ing] on" the shoulder. Section § 60-6,142 provides:

> No person shall drive on the shoulders of highways, except that:
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> (1) Vehicles may be driven on the shoulders of highways (a) by federal mail carriers while delivering the United States mail or (b) to safely remove a vehicle from a roadway;
>
> (2) Implements of husbandry may be driven on the shoulders of highways; and
>
> (3) Bicycles and electric personal assistive mobility devices may be operated on paved shoulders of highways included in the state highway system other than Nebraska segments of the National System of Interstate and Defense Highways.

We give effect to the entire language of a statute, and we reconcile different provisions of the statute so that they are consistent, harmonious, and sensible.[10] Here, the Legislature used the same phrasing multiple times within the statute—variations of the verb "to drive" (or its equivalent) combined with "on . . . shoulders of highways."[11] And in each exception, it is clear that the language meant driving on the shoulder as a thoroughfare or primary travel area. Both the legislative history and a commonsense reading of the exceptions support this conclusion.

In passing the bill creating an exception for federal mail carriers to drive on the shoulder, one senator explained the purpose of the mail carrier exception: "In the rural areas, often it is necessary for the mail carriers to drive on the road shoulder from one mailbox to the next. It is believed this is safer than having him pull out into the roadway each time."[12] This explanation illustrates that the Legislature intended for federal mail carriers to use the shoulder as a thoroughfare or primary

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[10] See, e.g., *AT&T Communications v. Nebraska Public Serv. Comm.*, 283 Neb. 204, 811 N.W.2d 666 (2012).

[11] See § 60-6,142(1).

[12] Transportation Committee Hearing, L.B. 969, 90th Leg., 2d Sess. 50 (Feb. 2, 1988).

travel area. The same is true of the Legislature's second exception to allow "[i]mplements of husbandry" (farm equipment) to be "driven on the shoulders of highways."[13] Experience tells us that people driving farm equipment use the shoulder as a thoroughfare or primary travel area because farm equipment is generally slower and wider than ordinary vehicles. Finally, allowing a person to "operate" a bicycle or an electric personal assistive mobility device "on . . . shoulders of highways" necessarily contemplates that the driver will use the shoulder as a thoroughfare or primary travel area.[14] Because the Legislature used the same (or essentially the same) language in the exceptions as in the general rule, it makes sense to give the language of the general rule the same meaning as that of the exceptions—to use the shoulder as a thoroughfare or primary travel area.

Furthermore, in construing a statute, we look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served by the statute.[15] One objective for prohibiting "driv[ing] on" the shoulder, and of passing the Nebraska Rules of the Road in general, was to promote safer travel on our roadways.[16]

The majority's interpretation of the statute does not further that purpose because it essentially makes the statute a strict liability crime—no matter the circumstances, any crossing of the fog line violates § 60-6,142. But this will not prevent a driver from inadvertently crossing the fog line, as Magallanes did here, because an *inadvertent* crossing is by definition unintentional.[17] Nor will penalizing a driver in such circumstances deter future violations because, again, an inadvertent crossing is unintentional. Instead, it makes more sense to read the statute as prohibiting a driver from using the shoulder as a thoroughfare or primary travel area because penalizing such

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[13] See § 60-6,142(2).

[14] See § 60-6,142(3).

[15] See, e.g., *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

[16] Statement of Purpose, L.B. 136, 72d Leg. (Jan. 31, 1961); Neb. Rev. Stat. § 60-602 (Reissue 2010).

[17] Webster's, *supra* note 1 at 1140.

conduct can influence a driver's actions and thereby promote safer travel on the roadways.

In sum, the prohibition in § 60-6,142 of "driv[ing] on" the shoulder is ambiguous because it is unclear exactly what conduct is proscribed. I conclude, however, that § 60-6,142 only prohibits driving on the shoulder as a thoroughfare or primary travel area. That is the ordinary meaning of the language, and it is the only meaning that is consistent with the rest of the statute. Moreover, that interpretation reasonably promotes safer travel on the roadways.

In this case, Magallanes twice crossed the fog line at two separate locations, but each crossing was momentary and inadvertent. Magallanes did not use the shoulder as a thoroughfare or primary travel area. In my view, he did not violate § 60-6,142, and Peterson did not have probable cause to stop Magallanes.

But the district court also concluded that based on the totality of the circumstances, Peterson reasonably suspected that Magallanes was driving while impaired and that the stop was justified on that basis. I do not address that issue, however, because I conclude that sufficient attenuation existed between the allegedly illegal stop and the consent to search.

The record shows that following the stop, Peterson handed Magallanes a warning ticket for driving on the shoulder of the highway and then asked Magallanes if he could search his vehicle. Magallanes agreed to that search, which ultimately led to the discovery of methamphetamine and cocaine in the gasoline tank.

When a consensual search is preceded by a Fourth Amendment violation, two things must be proved to avoid the exclusionary rule: (1) that the consent was voluntary and (2) that there was sufficient attenuation, or a break in the causal connection, between the illegal conduct and the consent.[18] Only the second requirement is at issue here. The relevant facts for sufficient attenuation will depend upon the facts of a particular case but include (1) the proximity between the illegality and the consent to search, (2) the presence of intervening factors,

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[18] See *In re Interest of Ashley W., ante* p. 424, 821 N.W.2d 706 (2012).

and (3) the flagrancy of the governmental misconduct involved in the case.[19]

On this record, I am convinced that the exclusionary rule does not apply because sufficient attenuation existed between the consent to search and the illegal stop. Although Magallanes gave the consent to search soon after the illegal stop, other circumstances outweigh this temporal proximity. The officer gave Magallanes a warning ticket, which would indicate that the stop was essentially over. This weakens the causal chain between the illegal stop and the consent to search. It also lessens any concern that the consent was simply a resignation or submission to police authority[20]—Magallanes would have understood that the stop was over before agreeing to the search. Peterson also told Magallanes more than once that he did not have to consent to the search, and Peterson informed Magallanes that if, at any time, he wanted to end the search, he could do so by honking the cruiser's horn. Finally, the governmental misconduct—the allegedly illegal stop—was slight because it was unclear at the time exactly what constituted "driv[ing] on" the shoulder and the officer believed that Magallanes had committed a traffic infraction. Considering these facts, I conclude that the court properly denied Magallanes' motion to suppress because sufficient attenuation existed between the allegedly illegal stop and the consent to search. I concur in the judgment.

McCormack, J., joins in this concurrence.

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[19] See *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010).

[20] See *id.*

Carolyn Jean Spady, appellee, v.
Roger Paul Spady, appellant.
824 N.W.2d 366

Filed December 21, 2012. No. S-12-139.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution