

THE NEBRASKA INTERSTATE DRUG STOP DEFENSE BOOK
Defending Interstate Drug Crimes from Start to Finish



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INTRODUCTION

The Berry Law Firm has represented persons charged with crimes since 1965. A significant part of our practice involves federal and state drug cases. While our office regularly handles federal and state drug conspiracy, manufacturing and intent to distribute cases, we believe that some of the most important cases are interstate drug stops particular on Interstate 80.

Over the past several years we have seen the Fourth Amendment rights of those traveling on the Interstate erode. Our mission as defense lawyers is to support and defend the constitution. While John Stevens Berry and John S. Berry have supported the constitution as army officers deployed in combat zones, they believe the need to support and defend the constitution at home is equally important. The attorneys at the Berry Law Firm have successfully argued Fourth Amendment issues and had illegally obtained evidence suppressed in state and federal courts.

Chapter 1: The Familiar Drug Bust Story



Often vehicles with out-of-state plates are stopped for a minor traffic violation. The officer requests the driver's license and registration and invites the driver to the passenger seat of the officer's cruiser. The driver is then asked a series of questions and a check on criminal history and warrants known as a "Triple I" is run by the officer. The officer engages in what is known as "casual conversation" with the motorist. After a short period of time, the information from the Triple I comes back and the officer hands the license and registration back to the driver and explains that the traffic stop has been completed and issues a warning or a traffic ticket. This should be the end of the traffic stop. However, most of the time it is not.

After the license and registration are returned, the motorist is asked to answer additional questions. The officer asks questions about transportation of drugs or illegal weapons and eventually requests permission to search the vehicle.

If permission to search is denied, the officer may claim to have reasonable suspicion to detain the motorist while waiting for a drug dog to arrive to sniff the vehicle.

Once the drug dog arrives the handler allows the dog to sniff the vehicle. In Nebraska the dogs used to search vehicles are known as passive indicators. This means that when the dog smells the odor of drugs the dog will find the strongest odor and sit. Once the dog sits, the officer claims he has probable cause to search the vehicle and the vehicle is searched regardless of consent. At this point, the driver and passenger are likely in the back seat of cop car. In many cases, the driver and the passenger converse about what has happened and any incriminating information is caught on the officer's recording camera in the vehicle. The motorist and any passengers are then taken to the local jail where they are booked and processed until they can appear before a judge. Eventually the motorist appears before a judge who sets the bond.

Chapter 2: Getting Out On Bond

Once the motorist has been arrested, he has the right to have a reasonable bond set. In Nebraska, regardless of whether the drugs seized during the stop were marijuana, cocaine, methamphetamine, heroin, K2, or any other controlled substance the motorist is generally booked into the local jail. After the booking process the police reports will go to the prosecutor who will determine which crimes will be charged. Eventually the defendant is brought before a magistrate judge who sets bond.

When setting the bond, the judge will consider several factors including:

1. Defendant's prior criminal history,
2. Ties to the State of Nebraska,
3. Potential flight risk,
4. Danger of to harming himself or others; and
5. Severity of the charges and the allegations made which could include:
 - a. whether there was a weapon involved,
 - b. the amount and type of drugs found in the vehicle, and
 - c. whether the defendant was disruptive during the arrest

The judge will review the probable cause affidavit, which is a brief description of the arrest and probable cause for the arrest. The prosecutor will suggest a bond amount and the defense attorney will have the opportunity to request an amount as well and the judge will set bond.

If the defendant cannot afford the bond or feels that the bond set was not reasonable, the defendant can request a bond review. At the bond review hearing, the defense attorney asks the judge to reconsider the bond amount and states specific reasons why the bond is not reasonable and/or unconstitutional.

Once bond has been set it can be paid by the defendant. Often those stopped on Interstate 80 do not live in the State of Nebraska and rely on others to send money to have them bonded out. In most cases the person bonding out the defendant either wires money to an attorney's trust account (through bank or credit card) to be used for bond, or brings cash. The jails in Nebraska do not accept personal checks or credit cards for bond payments.

Once the bond money is paid the defendant is released pursuant to conditions of bond and is processed out of the jail. In most counties in Nebraska the defendant is allowed to leave the state while his case is pending. It is important to note that while most marijuana cases are prosecuted at the state level, interstate drug stops involving a significant amount of cocaine, heroin, crack, methamphetamine, or other hazardous drugs are often pursued by the federal government. However, the federal indictment usually does not occur until after state charges have been filed. Most of the time, once federal charges have been filed, the state charges are dismissed.

In the Nebraska Federal Criminal Judicial System, defendants rarely post bond. They are generally either given pretrial release or detained pending trial. In most cases where someone is indicted for an interstate drug stop and is charged with a federal crime they will appear before a federal magistrate and after the initial charges are read a detention hearing is held to determine whether the person detained should be released pursuant to specific conditions of pretrial release which may include living in a specific residence, drug treatment, and any other conditions imposed by the court.

Often in interstate drug stops involving a significant amount of drugs the court will require a third party custodian to provide supervision subject to release while the case is pending. A third party custodian has several duties and is often a close relative or family member of the defendant.

Chapter 3: Preliminary Hearing



The next tactical decision that the defendant and his criminal defense lawyer have to make in an interstate drug stop case is whether to have the preliminary hearing or whether to waive it in exchange for police reports. Almost every time a motorist and his passenger are stopped on the interstate and a large amount of drugs are found in the vehicle the driver and all passengers are charged with a drug trafficking crime. At the preliminary hearing the burden is on the government to establish probable cause that a crime was committed and that the defendant

committed the crime. The standard for probable cause is low. The officer merely has to establish well grounded facts to show that the crime was committed and that the defendant committed the crime.

The real purpose of a preliminary hearing is just to determine whether there is enough evidence for the case to go forward. If the court determines that there is enough evidence the case will be bound over to the district court. Unfortunately in the preliminary hearing stage the magistrate does not have the authority to determine whether a stop or search of a vehicle was in violation to the defendants Fourth Amendment right or whether the state can actually prove the case beyond a reasonable doubt. At the preliminary hearing the magistrate's job is simply to determine whether the case should go forward. In interstate drug cases the magistrate almost always finds that there is enough evidence to bind the case over to the district court for both the driver and all passengers of the vehicle.

In certain types of criminal cases the preliminary hearing can be a useful discovery tool. However, in most interstate drug stop cases, the preliminary hearing has limited discovery value especially when the defense attorney does not have access to the officers' reports. Generally only one officer will appear at the preliminary hearing and rules of evidence do not apply. After the preliminary hearing, the interstate drug stop case will be dismissed or bound over to the district court and set for arraignment

Chapter 4: Arraignment

The arraignment is the procedural step where the defendant pleads guilty or not guilty. In some cases where there is a defect in the charges the defendant may file a plea and abatement, a plea in bar, or a motion to quash prior to the arraignment. However, most interstate drug stops raise fourth and fifth amendment issues that the court will not hear until after the arraignment.

Once the defendant pleads not guilty at the arraignment he is generally given 14 days to file motions for discovery.

In many jurisdictions in Nebraska the district court allows an arraignment by written waiver. The written waiver is signed by the defendant and the attorney. The defendant acknowledges that he understands the charges and his rights and the attorney acknowledges that he represents the defendant.

Chapter 5: Discovery

In most Nebraska Criminal cases, it is not until after the arraignment that the defendant receives discovery materials from the prosecution. Discovery materials for an interstate drug stop generally include police reports and audio and video recordings of the traffic stop, drug dog search, officer search, and interrogations.

Because many Nebraska state troopers and deputies wear microphones on their uniforms most of the police-citizen encounter is caught on tape. Most of the cruisers also have the ability to record what happens in the interior of the patrol cars. In many cases co-defendants are placed in the back of one patrol car and their conversations are recorded and later used against them. Sometimes the police reports and audio video recordings do not tell the whole story. In these instances attorneys may need to attain dispatch logs, the performance records of a drug dog, or other information that may show law enforcement did not lawfully stop or search the vehicle.

In Nebraska state felony cases the defendant may take depositions of witnesses including police officers. Depositions can be a great discovery tool and can aid in preparing for a suppression hearing. Furthermore, when the state uses drug dogs or alleged expert witnesses the information obtained in a deposition can go a long way in preparing a suppression hearing that results in the suppression of illegally obtained evidence.

Chapter 6: The Suppression Hearing

In any interstate drug stop case the fourth amendment right of the defendant is at issue. At a suppression hearing the government bears the burden of proving that the traffic stop, detention, questioning, and search did not unlawfully produce the evidence the government intends to use to prove the defendant's guilt.

In order for the traffic stop to be valid, the officer must have probable cause to believe that a traffic violation has taken place or reasonable suspicion that criminal activity is afoot. Sometimes a defendant will argue that his conduct did not constitute a traffic violation and that the officers mistake as to the law regarding the traffic violation does not give probable cause for traffic stop. In other cases the issue is whether the officer had probable cause to believe that a traffic violation occurred (which are usually recorded on his front dash video camera).

Often the questioning of an out of state motorist during a routine traffic stop can exceed the scope of the stop. In other words, law enforcement will stop a vehicle for a minor traffic violation and proceed to ask irrelevant questions and unnecessarily and unlawfully detain the driver and/or passenger. In Nebraska, law enforcement can ask about the purpose and destination of travel and may also run a Triple I report to check wants, warrants, and criminal history. However, when the questioning is outside the scope of the traffic stop, the detention based on the questioning outside the scope of the traffic stop may rise to an unlawful detention. If a motorist is unlawfully detained, evidence obtained pursuant to the illegal detention must be suppressed.

Invalid Consent

Officers in Nebraska will often times ask permission to search a vehicle. Some drivers consent, some do not. However, the matter becomes complicated when the law enforcement officer make it appear as though the driver has no choice but to consent to the search. In some cases the officer may make it appear that if the defendant does not consent to the search a dog will be called and will sniff the air around the vehicle and determine whether a search will occur.

If the officer does not have reasonable suspicion to detain the driver at that point an officers' statement that the driver can either wait for a drug dog or consent to a search immediately may create an unlawful detention. The legal remedy at this point is to exclude any and all evidence obtained pursuant to the unlawful detention and invalid consent.

The Unlawful Search

In some instances where law enforcement may have reasonable suspicion to detain they do not have probable cause to search but search regardless. In one instance I represented a man who was the passenger of a vehicle and had a suitcase that contained 50 pounds of cocaine. The officer asked his brother, the driver, permission to search, the brother only gave permission to search the vehicle and his own bags not my clients bags. The officers then proceeded to place my client in the back of the cruiser and search my clients bags without his permission. The officer claimed that he had permission from the brother. However, the court found the consent of the brother invalid and all evidence found in my clients luggage illegally obtained.

Unlawful Detention

As discussed in the previous paragraph pertaining to the scope of questioning, an officer may only detain a motorist as long as it takes to effectuate the purpose of the traffic stop. In other words, police cannot unreasonably detain someone during a routine traffic stop. Furthermore, once the routine traffic stop is complete the driver is free to go unless law enforcement has reasonable suspicion to believe that criminal activity is afoot or has probable cause to arrest. Most of the time law enforcement ask questions during the traffic stop in an effort to build suspicion. This can include questioning both the driver and the passenger about their travel plans. If law enforcement has reasonable suspicion that criminal activity is afoot they may detain the driver and all occupants of the vehicle and call for a drug dog to establish probable cause to search.

The duration of the detention while waiting for the drug dog must be reasonable. Based on court rulings it appears that about an hour is a reasonable amount of time. However, time of the detention is only one of many factors. The bigger question is whether the officers had reasonable suspicion to detain the driver and/or his passengers in the first place. Reasonable suspicion is an objective suspicion based on facts and circumstances that criminal activity is taking place. An officer's hunch that a vehicle is transporting drugs is insufficient to detain the vehicle's occupants.

Even if law enforcement has reasonable suspicion to detain the defendant that doesn't mean they have probable cause to search the vehicle. In most cases, where valid consent to search is not given and probable cause cannot be established through other means, law enforcement will contact a drug dog handler and have a drug dog brought to the scene to sniff the vehicle. If the dog indicates to the odor of narcotics law enforcement will have probable cause to search the vehicle even though they may not have consent. However, drug dogs are not always accurate and in some cases evidence obtained through the search using a drug dog may be

suppressed if the drug dog is found to be unreliable or found to have not indicated on the drugs.

In Nebraska most drug dogs are trained as passive indicators. This means that when a drug dog walks around the car he will sniff for the source of contraband and at the area where the odor is strongest he will show an interest. This is what handlers refer to as an alert. After the dog alerts he will sit down at the location of the strongest odor of the contraband and the sitting action will be the indication.

While in the past aggressive alert dogs were used, it was found that because they would paw and scratch it would damage vehicles. The passive indicating dog that sits at the greatest odor of the contraband causes less harm to the vehicle. When analyzing these cases the first issue to review is whether the dog actually indicated. In some cases it appears that the dog did not sit down or was either intentionally or unintentionally cued by the dog handler. An officer can certainly give commands for the dog to sit but some dog handling experts believe that officers often unintentionally cue the dog.

Dog Training



The general issue in determining whether a dog sniff established probable cause to search a vehicle is whether the dog is reliable. The dogs reliability may be established through training and field records. Criminal defense attorneys often request these records through the discovery process. After reviewing those records we can determine a reliability rate of the dog.

Additionally, criminal defense attorneys often hire expert witnesses to help analyze data to provide an outside perspective on whether the dog was accurately trained and whether the dog actually indicated to the odor of drugs.

The Inherent Unreliability of a Drug Dog

It is important to understand that the drug dog is trained to alert to the odor of narcotics. This does not necessarily mean that narcotics are present, only that narcotics were present in the past or that the odor of narcotics is present. While the courts have found that a dog indicating to the odor of drugs is sufficient for search it is important to recognize that drug dogs can falsely indicate to an odor where no drugs are present because they are only indicating to the odor. This makes analyzing the dog's records problematic in many instances because officers will claim that even though no drugs were found the odor of the drug can be present. In other words there may not much by way of scientific basis to validate the officers theory as to the reliability of his own dog. On the other hand, if it is shown through other cases that the dog has been accurate in the past, the dog will likely be found reliable by the court.

Other Probable Cause

In some cases, law enforcement notices drug paraphernalia in the vehicle or marijuana within plain view. Law enforcement will claim to see crumbs or what is known as marijuana "shake" in a vehicle. They will then claim because they see the presence of marijuana in the vehicle that they had probable cause to search. Another example of when law enforcement has probable cause to search is when they ask if the driver has any drugs on his person and the driver says he only has a personal amount of marijuana. The officer then may search the entire vehicle based on the personal amount of marijuana.

A couple of years ago we argued at the Nebraska Supreme Court the law enforcement had badgered our client about whether he had personal use marijuana so relentlessly that he appeared to be in custody and his fifth amendment right that protected him from self incrimination and the fact that he was not mirandized was enough to have his statement thrown out and the evidence.

Chapter 7: Trial

In most interstate drug stop cases the case is won or lost at the suppression hearing. In other words if the stop, detention, or search was illegal any evidence found pursuant to that illegal stop, detention, or search must be suppressed and the government will not have enough evidence to pursue it's case at trial.

However, if the evidence is not suppressed the government still must prove that the person it wishes to convict had knowledge that the drugs were in the vehicle. This is known as the Constructive Possession Doctrine. Essentially the theory is that if you know drugs are in the vehicle and you can exercise dominion or control over them that you can be found guilty or possession (or possession with intent) or aiding and abetting. However, in some cases it is clear

that one of the occupants of the vehicle knew about the drugs and it is questionable as to whether other occupants did as well.

When interstate drug stop cases are taken to trial, the jury must determine whether the occupant of the vehicle that is being charged knew the drugs were in the vehicle. In some cases, the driver will admit to having knowledge and testify that the passenger had no knowledge. While prosecutors will often charge both the driver and passenger in these cases, the passenger may have a decent shot at trial depending on specific facts and statements made during the traffic stop. Over the years we have handled several cases where one party accepts responsibility upon law enforcement finding drugs in the vehicle and vows that his or her traveling companion had no knowledge of the hidden drugs.

Another issue that often goes to trial is whether the occupant of the vehicle is guilty of simple possession or possession with intent to distribute. As an example, a person stopped on the interstate with 12 ounces of marijuana can be charged with the misdemeanor offense of possession of marijuana more than one ounce but less than one pound. In Nebraska the penalty for this offense is up to a year and jail and a up to a \$1,000.00. However, prosecutors often charge this type of case as a possession with intent to distribute case. The issue at trial is whether the marijuana is for personal use or whether the weight of the drug along with other evidence proves beyond a reasonable doubt that the person possessing the marijuana intended to sell or distribute some of it. Often, the prosecution will argue that the presence of scales and baggies are evidence of the intent to distribute.

Chapter 8: Plea Agreements

The prosecution generally makes a plea offer prior to the suppression hearing. In this instance, the prosecution will likely threaten to revoke the plea offer if the defendant goes through with the suppression hearing. In most cases if the prosecution loses the suppression hearing there is no trial. On the other hand, the prosecutor also knows that if he wins the suppression hearing he will win the trial. One of the toughest decisions in an interstate drug stop case is whether to take a plea offer prior to having a suppression hearing. As criminal defense attorneys, we always prefer to challenge the government at the suppression hearing. However, the decision as to whether to take any deals ultimately belongs to the client and not the attorney. While we have a duty to advise our clients as to whether the deal is good or not, we must present any plea offer to the client and let the client decide.

The most common drug found during interstate drug stops in Nebraska along Interstate 80 is marijuana. Those transporting marijuana are generally charged with possession with intent to distribute which carries a term of 1-20 years in prison. In some jurisdictions, prosecutors, on a case by case basis, will offer a reduced charge or possession of marijuana more than one pound. Depending on the facts of the case and whether there are any decent suppression issues this can be a fair deal. The simple possession of more than one pound is a Class 4 Felony which carries a term of 0-5 years in prison. However, the way the statute is written the maximum sentence imposed is 20-60 months. In Nebraska, a person who receives a maximum sentence on a Class 4

Felony is eligible for parole after 10 months. Furthermore, because there is no minimum sentence the court does not have to impose a sentence of imprisonment and can give county jail time, probation, or a fine.

Some prosecutors may offer a reduced charge from a Class 3 (1-20 years) to a Class 3A (0-5 years). The difference between a 3A and a Class 4 Felony is that the 3A is straight 0-5 which means under the maximum term the defendant could get 2 ½ years before being eligible for parole. However once again there is no minimum sentence on a 3A felony.

Interstate Drug Stops Involving Cocaine, Methamphetamine, Heroin, Ecstasy and other Hard Drugs

The potential sentencing for drugs other than marijuana is much more complicated and much more serious. Often times if the interstate drug stop nets a significant amount of methamphetamine, cocaine, heroin, etc. the United States Attorney's Office will pick up the case and the defendant will be indicted in federal court and in most cases faces a term of 10- Life depending on the quantity of drugs and several other factors. If the matter stays in state court the penalties also drastically increase for these types of drugs. Furthermore, if a firearm is found in the vehicle when the drugs are found there is also a higher probability that the defendant could face federal charge or additional state charges

Federal plea agreements are much more complicated than state court agreements. The federal sentencing guidelines are generally used as a starting point for negotiations and will provide a sentencing range of months depending on the weight of the drugs, criminal history, and a myriad of other factors. While a sentencing judge can depart or deviate from the guidelines, some prosecutors will require a defendant to waive his right to ask for a departure or variance pursuant to the plea agreement.

Chapter 9: Sentencing

In Nebraska state court interstate drug cases if the defendant is out on bond and pleads guilty pursuant to a plea agreement or otherwise he will generally be released on bond while sentencing is pending. The sentencing date is usually 6-8 weeks after the plea. During that time the defendant will be interviewed by the probation office. The probation office will write a report to the judge that will indicate whether the defendant is eligible for probation. It is important to note that even if the defendant is eligible for probation that does not mean the judge will order a sentence of probation.

In many instances prior to sentencing we recommend the client obtain a drug and alcohol evaluation, begin treatment, and obtain character letters to assist us in preparing an argument for probation or a minimal jail sentence.

We work out a detailed strategy with our client based the client's criminal history, employment, drug abuse history, and other factors to argue for the best possible sentence.

Chapter 10: Appeals

As stated earlier, most criminal interstate drug cases are won or lost at the suppression hearing. Many times if the suppression hearing is lost the case is lost. In federal court the suppression issue can be preserved without a trial through a conditional plea of guilty. A conditional plea will preserve the 4th amendment arguments and the defendant may then appeal the suppression issue to the 8th Circuit Court of Appeals.

State court appeals are preserved differently. In a Nebraska state court criminal case the defendant must go through trial in order to preserve the 4th amendment search and seizure issue. In most cases this is done through a stipulated bench trial where a defendant stipulates to certain facts, no jury is called, and the defendant asks the judge to reconsider the motion to suppress.

At this point the judge will likely determine if there is sufficient evidence to convict even though the defendant objects to the evidence based on the suppression hearing and fourth amendment issues. The case goes forward and may then be appealed to the Nebraska Court of Appeals.

While the appeal is pending we ask the court allow our client to post an appeal bond. Courts are not required to set an appeal bond but may do so at their discretion.

If the case is won on appeal it will be remanded back to the district court with an order suppressing the evidence which will result in the case being dismissed. If the appellate court's ruling on the motion to suppress is affirmed the case will be returned to the district court and the court will then order the defendant to appear in court and/or report to the jail or prison. However, the defendant may ask the appellate court to reconsider its decision or file a petition for further review by the Nebraska Supreme Court.

Summary

Interstate drug stops are fairly common in Nebraska. Contacting a criminal defense attorney as soon as possible is usually the best course of action after an arrest. Whether you will face federal or criminal charges depends on a myriad of factors. Regardless, the issues in all interstate drug stops are similar. A good attorney will attack the prosecution's case and thoroughly examine for the traffic stop, the scope of questioning, the length of detention, whether there was reasonable suspicion for the detention, and whether there was probable cause for the search. The key is to thoroughly examine the case and consider all options before committing to a strategic decision.