

**MANDATE: DISTRICT COURT
TO COUNTY COURT**Ch. 6, Art. 15, App. 2
SCOTTS BLUFF COUNTY
DISTRICT COURT
Neb. Ct. R. § 6-1452(B)(9)(a)

NOV 20 2023

FILED

FILED

IN THE DISTRICT COURT OF Scotts Bluff, COUNTY, NEBRASKA

DARLA SIMPSON CLERK

TO: County Court of SCOTTS BLUFF County, NebraskaCASE NO. CR-21-482

WHEREAS, in an action in your court, captioned:

* STATE OF NEBRASKA

*

v.

* KULDIP SINGH

*

**Mandate: District Court to
County Court**

you rendered judgment.

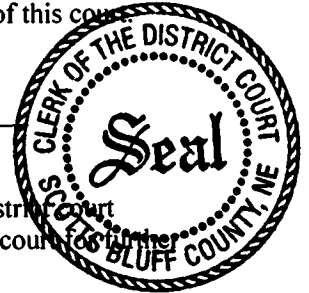
And WHEREAS, DEFENDANT has prosecuted an appeal to
this court.

ON CONSIDERATION OF and Pursuant to Neb. Rev. Stat. § 25-2733, the judgment which you rendered has been reviewed for error appearing on the record made in the county court and has been * AFFIRMED by the district court and has become a final order of this court on November 14, 2023. Costs of this appeal, including the costs in the county court, are to be paid by _____ and taxed at \$ _____ **.

NOW, THEREFORE, you shall without delay, proceed to enter judgment in conformity with the decision and opinion of this court attached hereto.

WITNESS the Honorable Leo Dobrovolny, District Judge, and the seal of this court.
DATED: November 17, 2023

Darla Simpson
Clerk of the District Court



* Affirmed, Affirmed but modified, Reversed, Reversed and remanded or Dismissed. (If the district court reverses, it may enter judgment in accordance with its findings or remand the case to the county court for further proceedings consistent with the judgment of the district court.)

District Court No. <u>CR-21-482</u>	/**COSTS ASSESSED IN DISTRICT COURT	
	/Costs due Clerk of District Court	\$ _____
County Court No. <u>CR-20-1900</u>	/Docket fee due	\$ _____
	/Due _____	\$ _____
Date District Court	/Due _____	\$ _____
judgment issued <u>11/14/23</u>	/Due _____	\$ _____
	/Due _____	\$ _____
	/Due _____	\$ _____
	/Due _____	\$ _____
	/Due _____	\$ _____

APPENDIX 2



000308543D21

NEBRASKA SUPREME COURT MANDATE

November 7, 2023

TO: Scotts Bluff County District Court

Supreme Court No. S-22-000672

Trial Tribunal No. CR21-482

Date Opinion Issued: 10/06/2023

WHEREAS, in a late action in your court, captioned:

State v. Kuldip Singh

you rendered judgment.

And, WHEREAS, defendant Kuldip Singh prosecuted an appeal to this court.

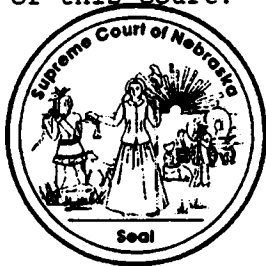
ON CONSIDERATION WHEREOF:

The judgment which you rendered has been affirmed by the Nebraska Supreme Court.

NOW, THEREFORE, you shall, without delay, proceed to enter judgment in conformity with the judgment and opinion of this court.

Costs of this appeal are to be paid by appellant.

WITNESS the Honorable Michael G. Heavican, Chief Justice, and the seal of this court. Clerk of the Supreme Court



Wendy G. Warner

Cost	Amount Assessed	Amount Paid	Payor
Costs in the Supreme Court			
Appellant Kuldip Singh			
Automation Fee	\$ 8.00	\$ 8.00	Appellant
Uniform Data Analysis Fee	\$ 1.00	\$ 1.00	Appellant
Dispute Resolution Fee	\$ 0.75	\$ 0.75	Appellant
Docket/Judges Retirement Fee	\$ 50.00	\$ 50.00	Appellant
Docket Fee	\$ 50.00	\$ 50.00	Appellant
NSC Education Fee	\$ 1.00	\$ 1.00	Appellant
Indigent Defense Fee	\$ 3.00	\$ 3.00	Appellant
Judges Retirement Fee	\$ 9.00	\$ 9.00	Appellant
Legal Services Fee	\$ 6.25	\$ 6.25	Appellant
Costs Due to the Clerk of the Nebraska Supreme Court:		\$.00	
OTHER COSTS			
Appellant Kuldip Singh			
Transcript Fee	\$ 1.00		

CERTIFIED COPY

Page Document
1 Memo Opinion

Date
10/06/2023

I, Wendy A. Wussow, Clerk of the Nebraska Supreme Court, certify that I have compared the following 12 page(s) to be a full, true, and correct copy of the original record on file.

Supreme Court No: S-22-0672
Caption: State v. Kuldip Singh
Trial Court: Scotts Bluff County District Court
Trial Court No: CR21-482



IN TESTIMONY WHEREOF, I have placed my signature and seal of said court

Date: October 6, 2023

BY THE COURT:

Wendy A. Wussow

CLERK

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

State of Nebraska,	)	No. S-22-672.
	)	
Appellee,	)	
	)	Memorandum Opinion
v.	)	and
	)	Judgment on Appeal
Kuldip Singh,	)	
	)	
Appellant.	)	
	)	

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK,
and FREUDENBERG, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Kuldip Singh appeals the order of the district court for Scotts Bluff County that affirmed his convictions and sentences in the Scotts Bluff County Court for four counts of evasion of liquor tax and four counts of acquiring liquor other than from a licensed dealer. Singh claims the district court erred when it failed to find plain error related to prosecutorial misconduct, excessive sentences, and ineffective assistance of trial counsel. We affirm the district court's order.

STATEMENT OF FACTS

The State originally charged Singh with 20 misdemeanor offenses related to the sale of liquor. Several counts were dismissed either prior to trial or at trial prior to submission to the jury. Ultimately, 12 counts were submitted to the jury. The jury acquitted Singh of four counts related to illegal transport of liquor, but it found Singh guilty of four counts each of evasion of liquor tax under Neb. Rev. Stat. § 53-164.02 (Reissue 2021) and acquiring liquor other than

from a licensed dealer under Neb. Rev. Stat. § 53-175 (Reissue 2021). The four counts of each offense were alleged to have occurred in the months of June, July, August, and September 2020.

The charges against Singh arose from an investigation that began in April 2019 after the Nebraska Liquor Control Commission (NLCC) received a complaint about Cheema's Gas and Liquor (Cheema's), a business located in Scottsbluff, Nebraska. The record in this case indicates that Singh operates the business. However, as will be discussed further herein, there is an issue regarding what name is on the retail liquor license for Cheema's. There was testimony at trial that the license is in Singh's name, but Singh asserts on appeal that it is in the name of a limited liability company and that therefore, he was not the proper defendant.

The complaint to the NLCC came from a licensed Nebraska wholesaler, who reported having seen liquor in Cheema's that the wholesaler had not sold to the store in years. The wholesaler asserted that the only way Cheema's could have obtained the liquor was by transporting it from another store, rather than buying it through a licensed wholesaler as required by Nebraska law. The wholesaler suspected that Singh was transferring liquor to Cheema's from a liquor store in Torrington, Wyoming, that was another of Singh's businesses.

The NLCC referred the complaint to the Nebraska State Patrol (NSP), and Investigator Robby Jackson opened an investigation. As part of the investigation, Jackson surveilled Cheema's by setting up a surveillance camera, or "pole cam," outside the building for several months. When reviewing video from the pole cam, Jackson observed boxes that he believed contained liquor being unloaded from personal vehicles and carried into the store.

Jackson's investigation also included gathering information from liquor control officials in Wyoming. In Wyoming, the State of Wyoming is the sole wholesaler of all liquor in the state and all retail licensees are required to order through the State of Wyoming. Jackson obtained information regarding the amount of liquor that had been purchased for Singh's store in Wyoming, and he determined that the

amount seemed very excessive based on the expected volume of sales at Singh's Wyoming store. This information increased Jackson's suspicion that Singh was transporting liquor from the Wyoming store to the Cheema's store in Scottsbluff.

In January 2020, Jackson learned of an anonymous tip that had been received from a former employee of Singh's, who asserted that on various occasions over the last 2 years, Singh had transported liquor from the Wyoming store to Cheema's and to another store operated by Singh in Bridgeport, Nebraska. The tipster stated that Singh did this because liquor was cheaper in Wyoming and because he did not think Nebraska authorities would ever know what he was doing.

Jackson worked with Wyoming liquor control officials to gather evidence to determine whether Singh was transporting liquor from Wyoming to Nebraska. Jackson and the Wyoming agents developed a plan whereby they placed small star-shaped stickers on bottles of liquor that were sold and delivered by the State of Wyoming to Singh's Wyoming store. After sales of liquor bottles with the stickers had been made to Singh's Wyoming store, Jackson went to Cheema's in Scottsbluff and observed bottles with the stickers on them on the shelves of the store. Jackson had other investigators go into the store and purchase bottles of liquor with the star stickers attached. Undercover investigators purchased numerous marked liquor bottles from Cheema's throughout the months of June, July, August, and September 2020. In October, Jackson obtained and executed a search warrant, pursuant to which numerous additional marked liquor bottles were seized.

Charges based on the investigation were filed against Singh in the county court, and the matter went to a jury trial on May 24, 2021. Evidence presented by the State at Singh's trial included testimony by Jackson and others regarding the investigation. The marked liquor bottles that had been purchased and those that had later been seized from Cheema's were also received as evidence at trial. Singh did not present evidence in his defense.

During Jackson's testimony, the State questioned Jackson regarding his investigation, including the use of the pole cam. At one point, the State asked a question referring to what Jackson saw on the pole cam video. When Jackson began to respond, Singh objected on various bases, including "misrepresentation by the state about use." The court overruled the objection, and Jackson testified regarding what he had observed on the video. Singh objected again when Jackson began to testify that the video showed boxes that appeared to contain liquor. The court called a recess to hear argument on the objection outside the presence of the jury.

Singh argued, *inter alia*, that the State had "told [him] they weren't going to use this evidence" and that the questioning of Jackson violated the State's pretrial representation. Singh offered and the court received into evidence a copy of an email from the prosecutor to Singh's attorney in which the prosecutor stated, "I talked with the NSP investigators about what the pole cam would or wouldn't show and after that conversation, I don't plan on using any of it for the trial. You don't need to worry about getting them [sic] external hard drives." The State argued that the State's representation in the email was merely that it did not plan to play the videos at trial or to offer the videos as evidence. The State noted that it had provided Singh with Jackson's investigative report and that the report included information regarding what Jackson had seen on the videos. The State also stated that Singh's counsel had watched two videos that showed boxes being removed from vehicles. The court overruled Singh's objection. The court reasoned that the substance of Jackson's testimony was included in the investigative report supplied to Singh and that the State's representation in the email was an assertion by the State that it would not offer the video itself as evidence or play the video to the jury, an assertion with which the State complied. Jackson thereafter testified regarding what he had seen on the video.

During his testimony, Jackson testified that he had seen a liquor license at Cheema's, but Jackson was not asked and did not testify regarding the name on the license. Another witness at trial was

Mark Davis, a fiscal compliance analyst for the NLCC who took part in the investigation. When the State asked Davis whether Singh held a retail liquor license in Scotts Bluff County, Davis testified that Singh did and that it was the license for Cheema's. A copy of the license was not offered as evidence.

The jury found Singh guilty of the four counts of evasion of liquor tax and the four counts of acquiring liquor other than from a licensed dealer, but it found him not guilty of the four counts relating to illegal transport of liquor. Singh had new counsel at sentencing. For each count of liquor tax evasion, the county court sentenced Singh to 30 days in jail, to be served consecutively, and a \$1,000 fine; the court also ordered Singh to pay \$55.05 in evaded excise taxes and \$55.05 in penalties. For each count of acquiring liquor from other than a licensed dealer, the court ordered Singh to pay a \$500 fine.

Singh appealed his county court convictions and sentences to the district court. Singh's counsel on appeal to the district court was counsel who had replaced his trial counsel after the trial and before sentencing. Singh's appellate counsel did not file a statement of errors, and the district court denied Singh's motion to file a statement of errors out of time. The district court reviewed for plain error, but it was guided by the substantive arguments made by Singh. Singh made various assertions of error in his district court appellate briefing, but at oral argument, he focused on three assertions: (1) that the county court abused its discretion when it allowed Jackson to testify regarding what he had seen on the video from the pole cam, (2) that the county court imposed excessive sentences, and (3) that trial counsel provided ineffective assistance by failing to move to quash the complaint for naming the wrong defendant.

Regarding admission of Jackson's testimony concerning what he saw on the pole cam video, Singh argued that the testimony should not have been allowed because in the email the State had represented to trial counsel that it did not intend to use evidence related to the video at the trial and that therefore, the State engaged in prosecutorial misconduct when it offered Jackson's testimony regarding the contents

of the video. Singh asserted that the statement in the email that the State did not “plan on using any of it for the trial” should be read to include any testimony regarding the contents of the video. Singh argued that because of the State’s alleged misconduct, he did not have the opportunity to prepare a response to Jackson’s testimony.

Regarding excessive sentences, Singh focused on the jail sentences totaling 120 days for the four convictions for liquor tax evasion. Singh argued that the sentences were excessive considering his “minimal” criminal history. Singh also argued that there was an irregularity at the sentencing hearing because the county court disclosed specific information from Singh’s presentence investigation report (PSR). This information included prior criminal charges of which he was not convicted and the results of testing from his probation screening and needs assessment. Singh argued that the county court’s reading of this information in court was a violation of Neb. Rev. Stat. § 29-2261(6) (Cum. Supp. 2020), which provides that a PSR is privileged and forbids unauthorized disclosure of the information. Singh further characterized the county court’s statements to the effect that Singh had “cheated” as “emotional words” that, combined with the reading of information from the PSR, indicated that the court was “acting out of anger” rather than acting impartially.

Regarding ineffective assistance of counsel, Singh asserted that the liquor license for Cheema’s was held under the name “Cheema Capital LLC” (LLC) and that therefore, the proper defendant in this case should have been the LLC rather than Singh personally. Singh therefore argued that trial counsel was ineffective for failing to file a motion to quash the complaint or to otherwise raise the issue whether Singh was the proper defendant and whether instead the defendant should have been the named license holder.

Notwithstanding the absence of a statement of errors, the district court considered the issues, as do we. The district court rejected each of Singh’s arguments and affirmed Singh’s convictions and sentences. Regarding the pole cam evidence, the court determined that no prosecutorial misconduct occurred related to Jackson’s

testimony. The court indicated that a reasonable reading of the email was that the State did not intend to offer the video itself as evidence. The court also indicated that because Jackson's investigative report was provided to Singh and because Jackson's testimony at trial--made known to Singh prior to trial--was consistent therewith, no error occurred. Regarding the excessive sentence argument, the court rejected Singh's claim that the county court had "personalized" the case, and it did not find an abuse of discretion. Regarding ineffective assistance of counsel relating to the proper defendant, the court noted that "[a]t a minimum there is strong circumstantial evidence at trial that . . . Singh was the retail license holder" of Cheema's and that even if Singh was not the named licensee, there was sufficient evidence to show that Singh was an aider and abettor. Because an instruction had been given on aiding and abetting, the court reasoned that Singh made no showing of prejudice related to the claim that trial counsel was deficient for not having challenged whether Singh was the wrong defendant.

Singh appeals the order of the district court, which affirmed his convictions and sentences.

ASSIGNMENTS OF ERROR

Singh claims that the district court erred when it failed to conclude that (1) the county court abused its discretion when it allowed Jackson's testimony after the State indicated that it would not use pole cam evidence at trial, (2) the consecutive sentences totaling 120 days in jail for the four convictions for liquor tax evasion were excessive, and (3) trial counsel was ineffective for failing to advise Singh that he had a viable defense based on the State's identification of the wrong defendant.

STANDARDS OF REVIEW

Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error. *State v. Warren*, 312 Neb. 991, 982 N.W.2d 207 (2022). In cases

where no statement of errors was filed, but the record showed that the district court considered an issue that was also assigned to a higher appellate court, the Nebraska Supreme Court or the Court of Appeals may consider that issue. *Id.* As reflected in the analysis section below, because the district court considered them, we also consider the issues.

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Ezell*, 314 Neb. 825, 993 N.W.2d 449 (2023). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law. *State v. Mabior*, 314 Neb. 932, 994 N.W.2d 65 (2023). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance. *Id.* The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice as a matter of law, or that trial counsel's actions could not be justified as a part of any plausible trial strategy. *Id.* Conversely, an ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *Id.*

ANALYSIS

District Court Did Not Err When It Found No Prosecutorial Misconduct Related to the Pole Cam Evidence.

Singh first claims that the district court erred when it failed to conclude that the county court abused its discretion when it allowed Jackson's testimony regarding what he saw on the pole cam videos

after the State indicated that it would not use pole cam evidence at trial. We reject this claim.

Singh contends that admitting Jackson's testimony regarding the contents of the pole cam videos constituted an abuse of discretion. He argues that the testimony violated the promise the State made when a prosecutor sent a pretrial email to Singh's counsel that stated: "I talked with the NSP investigators about what the pole cam would or wouldn't show and after that conversation, I don't plan on using any of it for the trial. You don't need to worry about getting them [sic] external hard drives." Singh argues that it was prosecutorial misconduct for the State to offer the evidence after it said it would not.

When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct. *State v. Mabior, supra*. We have observed that "prosecutorial misconduct" cannot be neatly defined but generally encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial. *Id.* If the appellate court concludes that a prosecutor's acts were misconduct, the court next considers whether the misconduct prejudiced the defendant's right to a fair trial. *Id.* Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infects the trial that the resulting conviction violates due process. *Id.*

The district court in this case found no prosecutorial misconduct. The court agreed with the State's characterization that the prosecutor's statement in the email meant only that the State would not introduce or play the actual videos at trial. The court also noted that the State had provided Singh with Jackson's investigative report, which included his description of what he saw on the pole cam videos, and the court further noted that Jackson's testimony at trial was consistent with what was in the report.

We find no error in the district court's finding that there was no prosecutorial misconduct related to Jackson's testimony. We agree with the district court that the email addressed only the use of the

videos themselves as evidence, and the State did not offer the videos themselves as evidence. Moreover, Singh had been provided Jackson's investigative report, and Jackson's testimony at trial regarding the contents of the pole cam video was consistent with the report. The State therefore did not present evidence that had not been provided to Singh; Singh had the opportunity to prepare for testimony by Jackson consistent with his investigative report. We agree that there was no prosecutorial misconduct, and we conclude the district court did not err when it concluded that the county court did not abuse its discretion when it admitted the testimony.

*District Court Did Not Err When It Found
No Abuse of Discretion in Sentencing.*

Singh next claims that the district court erred when it failed to conclude that the consecutive sentences totaling 120 days in jail for the four convictions for liquor tax evasion were excessive. We reject this claim.

Singh focuses his excessive sentence argument on the jail sentences he received for the four convictions for liquor tax evasion. Pursuant to § 53-164.02, evasion of a liquor tax is a Class II misdemeanor, and under Neb. Rev. Stat. § 28-106 (Reissue 2016), the maximum sentence for a Class II misdemeanor is 6 months' imprisonment, a \$1,000 fine, or both. Singh does not take issue with the fine imposed, and his jail sentences are within the statutory limit. Therefore, the question is whether the jail sentences were an abuse of discretion. See *State v. Ezell*, 314 Neb. 825, 993 N.W.2d 449 (2023).

Singh contends that the county court abused its discretion in sentencing him, and he argues that what he describes as "unusual conduct" by the court at the sentencing hearing is evidence of such abuse. Brief for appellant at 23. In support of this argument, Singh points to the county court's disclosure of specific information from the PSR and the court's use of "emotional words," such as claiming Singh "cheated." *Id.* at 11. Singh argues that the court's conduct indicates an abuse of discretion when considered in connection with relevant

factors, such as his lack of an extensive criminal history, which he asserts would have warranted lesser sentences.

Although Singh asserts the court improperly disclosed information from the PSR, Singh did not appear to seek any sort of remedy for the alleged violation of § 29-2261(6). Instead, Singh argues that the county court's allegedly "unusual" references to the PSR are evidence of the court's abuse of its discretion in sentencing. Brief for appellant at 23. The district court explicitly found that the county court did not violate § 29-2261(6), but we do not find it necessary to consider whether the statute prohibited the county court from referring to portions of the PSR. We consider the references only in the context of whether they show an abuse of discretion.

We do not read the county court's references to information from the PSR as indicating an abuse of discretion. Instead, we read the references as the court's articulating its reasoning for the sentences it imposed and highlighting specific information from the PSR that supported that reasoning. We also do not find indications of abuse of discretion in the court's characterization of the offenses for which Singh was convicted. Instead, these remarks were the court's description of the nature and seriousness of the offenses, which factored into the court's determination of appropriate sentences.

We do not think the county court's comments or references to the PSR show bias or a consideration of improper factors. We therefore conclude the district court did not err when it found no abuse of discretion in the county court's sentencing.

Record on Direct Appeal Is Not Sufficient to Resolve Singh's Claim of Ineffective Assistance of Trial Counsel.

Singh finally claims that the district court erred when it failed to conclude that trial counsel was ineffective for failing to advise him that he had a viable defense based on the theory that the State had charged the wrong defendant. We reject this claim.

Singh argues that he was not the proper defendant and that his trial counsel was ineffective for not advising Singh of a viable defense

based on this purported misidentification. Singh asserts that the retail liquor license for Cheema's is not in Singh's name and that instead, the LLC was the liquor license holder. He argues, therefore, that the LLC was the proper defendant.

Singh's claim of ineffective assistance depends entirely on the license holder being the LLC, rather than Singh. However, there is nothing in the record to show the facts to support Singh's claim, and, as the district court noted, the record from the county court showed at least circumstantial evidence that Singh was the license holder. Singh concedes that there is no evidence in the record other than his unsupported assertion that the LLC is the license holder.

The record on direct appeal to the district court and to this court was not sufficient to review Singh's claim of ineffective assistance based on misidentification of Singh. We therefore conclude that the district court did not err when it failed to grant relief on this claim.

CONCLUSION

We conclude that the district court did not err when it rejected Singh's arguments regarding prosecutorial misconduct or excessive sentences. We also conclude that the record on direct appeal was not sufficient to consider Singh's claim of ineffective assistance of trial counsel. We therefore affirm the district court's order that affirmed Singh's convictions and sentences.

AFFIRMED.