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STATE OF NEBRASKA, APPELLEE, V. RYAN L. VYHNALEK, APPELLANT.

814 N.W.2d 768

Filed June 19, 2012. No. A-11-739.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.
3. **Warrantless Searches.** The warrantless search exceptions include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
4. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
5. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
6. **Police Officers and Sheriffs: Search and Seizure: Probable Cause.** For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity.
7. **Search and Seizure: Probable Cause: Presumptions.** A seizure of property that is in plain view is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.
8. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.
9. **Search and Seizure: Probable Cause.** When a container is readily identifiable as a gun case, it is a single-purpose container, and the officers do not need a warrant to open the gun case, because it falls under the plain view exception.

Appeal from the District Court for Saline County: VICKY L. JOHNSON, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

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

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Ryan L. Vyhnalek appeals from his conviction for possession of a deadly weapon by a prohibited person in the district court for Saline County. On appeal, Vyhnalek asserts that the district court erred in overruling his motion to suppress evidence because the seizure of a gun case and rifle found within his home cannot be justified under the plain view exception to the warrant requirement of the Fourth Amendment. Because we find the district court did not err in overruling the motion to suppress, we affirm.

BACKGROUND

The State filed an information on June 25, 2010, charging Vyhnalek with one count of possession of a deadly weapon by a prohibited person, in violation of Neb. Rev. Stat. § 28-1206 (Reissue 2008), a Class III felony. Vyhnalek pled not guilty and subsequently filed a motion to suppress evidence, asking the trial court to suppress the rifle seized from his residence on the date of his arrest.

On February 24, 2011, a hearing was held on Vyhnalek's motion to suppress. The evidence presented at the hearing is summarized as follows:

On May 4, 2010, Deputy Kevin Vogel of the Saline County Sheriff's Department was on duty and received a call from the Jefferson County Sheriff's Department advising him that an individual who had just been stopped for a traffic violation relayed that he was worried about his daughter, Deanna Vyhnalek, because she and her husband, Vyhnalek, were having some type of confrontation at their residence

in Saline County. Vogel contacted Deputy Matt Jonas of the Saline County Sheriff's Department, and they drove in separate cruisers to the Vyhnalek residence. The two officers approached the residence, and Vogel knocked on the door. Deanna answered the door and appeared to be upset. Vogel asked if he and Jonas could speak to her, and she invited both officers into the residence. Deanna told the officers that she and Vyhnalek were having an argument about Deanna's children. Deanna indicated Vyhnalek was in the living room, so Vogel stayed with Deanna and Jonas made contact with Vyhnalek.

Deanna told Vogel that the altercation with Vyhnalek had not been violent, but that similar altercations had led to violence in the past. Vogel knew that Vyhnalek was a convicted felon and that he had been in possession of firearms in the past, despite being prohibited from doing so as a convicted felon, so Vogel asked Deanna if Vyhnalek had any weapons in the residence. Deanna told him that Vyhnalek had a ".30-06" in the bedroom, which Vogel knew was a hunting rifle.

Vogel then went into the living room where Vyhnalek and Jonas were located and asked Vyhnalek if he had any weapons in the residence. Vyhnalek denied that he did. Vogel told him that he had information to the contrary, to which Vyhnalek stated that the rifle belonged to Deanna. Vogel told Vyhnalek he was being arrested for being in possession of a weapon and placed him in handcuffs. Vyhnalek was wearing only boxer shorts at the time, and he asked if he could put on a shirt. Vyhnalek indicated that his clothes were located in a bedroom that was just off of the living room. Vogel and Jonas escorted Vyhnalek to the bedroom to get him a shirt. There were piles of folded clothes on the bed, and Jonas began looking through the clothes for a shirt for Vyhnalek. While in the bedroom, Vogel and Jonas both observed a black gun case leaning against a wall in the bedroom. Vogel testified that the gun case was large enough to contain a rifle or shotgun and that the case was a type used to store firearms.

After finding a shirt for Vyhnalek, both officers escorted Vyhnalek from the bedroom. Vogel then escorted Vyhnalek out of the house, and Jonas went back into the bedroom to retrieve

the gun case. Jonas picked up the gun case, placed it on the bed, and opened it, finding a rifle inside. Jonas made sure the rifle was not loaded, put it back in the case, and carried it outside. He gave the case to Vogel, who opened it and observed the weapon inside, a hunting rifle which was the same caliber of weapon Deanna had described. The officers seized the gun case and the rifle.

Following the motion to suppress hearing, the trial court overruled Vyhnalek's motion to suppress, finding that the gun case and rifle were seized lawfully under the plain view exception to the warrant requirement of the Fourth Amendment. A jury trial was subsequently held, and Vyhnalek renewed his motion to suppress by seeking a continuing objection to any testimony relating to the rifle and to the admission of the rifle itself. The continuing objection was overruled. The jury found Vyhnalek guilty of possession of a deadly weapon by a prohibited person. He was subsequently sentenced, and this appeal followed.

ASSIGNMENT OF ERROR

Vyhnalek assigns that the trial court erred in overruling his motion to suppress, because the seizure of the gun case and rifle cannot be justified under the plain view exception to the warrant requirement.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

ANALYSIS

The issue before us in regard to Vyhnalek's motion to suppress is whether the seizure of the gun case and rifle was accomplished lawfully. There is no dispute in this case that the gun case and rifle were seized without a warrant. Therefore,

this case must be analyzed as a warrantless search and seizure case.

[2-4] Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications. *State v. Borst, supra.* The warrantless search exceptions include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. See *id.* In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *Id.*

[5] The district court in this case found the warrantless seizure of the gun case and rifle to have been justified as a seizure of evidence in plain view. A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *Id.*

Vyhnalek argues that neither the seizure of the gun case nor the seizure of the rifle can be justified under the plain view doctrine. We first address the seizure of the gun case.

The evidence establishes, and Vyhnalek does not contest, that the officers had a legal right to be in the bedroom of Vyhnalek's home, where they observed the gun case, and had a lawful right of access to the gun case. The only issue in regard to the seizure of the gun case itself is whether its incriminating nature was immediately apparent.

[6-8] For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). A seizure of property that is in plain view is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. *Id.* Probable cause is a flexible, commonsense standard. *Id.* It

merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. *Id.* A practical, nontechnical probability that incriminating evidence is involved is all that is required. *Id.*

The officers needed probable cause to associate the gun case with criminal activity. In the instant case, the evidence shows that both officers observed a black gun case in the bedroom where Vyhnalek indicated his clothes were located. Before observing the gun case, Vogel knew that Vyhnalek was a convicted felon and had been in possession of firearms in the past. In addition, Deanna had told Vogel that Vyhnalek had a ".30-06" in the bedroom, which Vogel knew was a hunting rifle. Vyhnalek had also admitted that there was a weapon in the house when he told Vogel that the rifle belonged to Deanna. Vogel testified that the gun case he saw in the bedroom was of the size and shape consistent for holding a rifle and that the case was a type used to store firearms. Further, based on the substituted picture of the gun case in the record before us, the gun case had a tag on it that read, "SE Series Single Scope Rifle/Shotgun," and the case was molded to fit a rifle-sized firearm.

We conclude that the facts known to the officers gave them probable cause to associate the gun case with criminal activity, i.e, that it contained the rifle that Deanna had described and which Vyhnalek was prohibited from possessing. Accordingly, the incriminating nature of the gun case was immediately apparent and the officers had probable cause to seize the gun case under the plain view doctrine.

Our analysis does not end there, as Vyhnalek also argues that even if the officers were justified in seizing the gun case under the plain view exception to the warrant requirement, the search of the gun case and seizure of its contents were not. He argues that a warrant was required before the gun case could be opened and the rifle seized.

The Eighth Circuit Court of Appeals has previously addressed the issue of whether a search of a gun case and

seizure of its contents without a warrant violated a defendant's Fourth Amendment rights. In *U.S. v. Banks*, 514 F.3d 769, 775 (8th Cir. 2008), police officers had obtained consent to search a residence for contraband, and while doing so, they found a locked, hard plastic container with the words "PHOENIX ARMS." An officer opened the container and found a Phoenix Arms semi-automatic pistol. The officer seized the gun and the gun case. In determining whether there was a violation of the defendant's Fourth Amendment rights, the court provided the following analysis:

> Observing objects in plain view violates no reasonable expectation of privacy, which obviates the need for a search warrant. *Horton v. California*, 496 U.S. 128, 133, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) (stating that no invasion of privacy occurs when an item is observed in plain view). Ordinarily, a warrant is necessary before police may open a closed container because by concealing the contents from plain view, the possessor creates a reasonable expectation of privacy. *Robbins v. California*, 453 U.S. 420, 427, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), *overruled on other grounds by United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). However, like objects that sit out in the open, the contents of some containers are treated similarly to objects in plain view. In *Arkansas v. Sanders*, the Court suggested that no warrant is required to open such containers: "some containers (for example . . . *a gun case*) by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance." *Arkansas v. Sanders*, 442 U.S. 753, 764-65 n. 13, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) (emphasis added), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). . . . This exception is limited to those rare containers that are designed for a single purpose, *Texas v. Brown*, 460 U.S. 730, 750-51, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (Stevens, J., concurring in the judgment), because the "distinctive configuration of [such] container[s] proclaims [their] contents; [consequently,] the

> contents cannot fairly be said to have been removed from a searching officer's view," *Robbins*, 453 U.S. at 427, 101 S.Ct. 2841. Individuals, therefore, possess a lesser expectation of privacy in the contents of such containers when the container is observed from a lawful vantage point.
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> . . . A gun case is the very model of a single-purpose container. *Robbins*, 453 U.S. at 427, 101 S.Ct. 2841; *Sanders*, 442 U.S. at 764-65 n. 13, 99 S.Ct. 2586. However, because gun cases vary in characteristics, each case must be evaluated on its own facts. If the container at issue is readily identifiable as a gun case by its distinctive configuration, then we will treat it as being a single-purpose container.

U.S. v. Banks, 514 F.3d at 773-75.

The Eighth Circuit Court of Appeals determined that the container at issue in *Banks* was readily identifiable as a gun case and that therefore, the container constituted a single-purpose container and fell within the plain view exception to search warrant requirements. The court concluded that the search of the gun case and the seizure of the gun inside did not violate the defendant's Fourth Amendment rights.

[9] Similarly, in the present case, the gun case was readily identifiable as a gun case by its distinctive configuration. As previously set forth, Vogel testified that the gun case was of the size and shape consistent for holding a rifle and was a type used to store firearms. The case had a tag on it indicating that its intended use was for storing an "SE Series Single Scope Rifle/Shotgun," and the case was molded to fit a rifle-sized firearm. Because the container at issue was readily identifiable as a gun case, it was a single-purpose container. Accordingly, we conclude that the officers did not need a warrant to open the gun case, because it fell under the plain view exception. The search of the gun case and the seizure of the rifle were lawful and did not violate Vyhnalek's Fourth Amendment rights.

The trial court did not err in overruling Vyhnalek's motion to suppress evidence, and his assignment of error is without merit.

CONCLUSION

We conclude that the district court was correct in determining that the gun case and the rifle were lawfully seized from Vyhnalek's home under the plain view exception to the warrant requirement of the Fourth Amendment. Accordingly, we affirm the order of the district court overruling Vyhnalek's motion to suppress and affirm Vyhnalek's conviction and sentence for possession of a deadly weapon by a prohibited person.

AFFIRMED.

HARRY CHARLES SUGHROUE, APPELLANT, V.
LORRAINE ANNE SUGHROUE, APPELLEE.
815 N.W.2d 210

Filed June 19, 2012. No. A-11-947.

1. **Child Custody: Property Division: Child Support: Alimony.** Domestic matters such as child custody, division of property, child support, and alimony are entrusted to the discretion of trial courts.
2. **Appeal and Error.** A trial court's determinations on domestic matters are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
3. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
4. **Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
5. ____. Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2008) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
6. **Property Division: Proof.** The burden of proof to show that property is nonmarital remains with the person making the claim.
7. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
8. **Property Division.** With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance.

Appeal from the District Court for Red Willow County: DAVID URBOM, Judge. Affirmed.