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STATE OF NEBRASKA, APPELLEE, V. JAY V. BORST, APPELLANT.

795 N.W.2d 262

Filed March 18, 2011. No. S-09-1084.

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 recognized by the Nebraska Supreme Court 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. **Warrants: Affidavits: Evidence.** Ordinarily, evidence from which the court can determine that an arrest warrant was legally valid will consist of the arrest warrant and supporting affidavit; however, the affidavit requirement will be forgiven where the record establishes the "personal knowledge exception."
7. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and CASSEL, Judges, on appeal thereto from the District Court for Sarpy County, WILLIAM B. ZASTERA, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, and Mandy M. Gruhlkey, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Jay V. Borst appealed his convictions in the district court for Sarpy County for manufacture of a controlled substance (marijuana) and possession of a controlled substance (methamphetamine) to the Nebraska Court of Appeals. The Court of Appeals determined that although the actual arrest warrants were not in evidence, the testimony of law enforcement officers that they had outstanding arrest warrants was sufficient to establish that the officers had valid arrest warrants and therefore a lawful right to be in Borst's home when they saw the controlled substances in plain view. The Court of Appeals, in a memorandum opinion filed June 21, 2010, concluded that the district court did not err when it overruled parts of Borst's motion to suppress, and the Court of Appeals therefore affirmed Borst's convictions.

We granted Borst's petition for further review. We reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions to reverse Borst's convictions and to remand the cause to the district court for a new trial on both charges.

STATEMENT OF FACTS

On July 2, 2008, three officers from the Sarpy County sheriff's office came to Borst's home to serve outstanding misdemeanor arrest warrants on Borst. While at the home, the officers observed, in plain view, a growing marijuana plant and a syringe containing methamphetamine. Borst told the officers that both items belonged to him. Later, after he had been taken to a holding cell and given *Miranda* warnings, Borst stated

that he had started growing the marijuana plant from seeds and that he had purchased the methamphetamine earlier in the day. Borst was charged with manufacture of a controlled substance (marijuana) and possession of a controlled substance (methamphetamine).

Prior to trial, Borst moved to suppress the physical evidence seized from his home and the statements he made to the officers. He asserted in his motion to suppress that there were no exigent circumstances permitting the officers to enter his home without a search warrant, that the officers did not have a valid arrest warrant for him, and that the officers began an exploratory search after they illegally entered his home to arrest him without a valid warrant.

Following a suppression hearing, the district court found that the officers had a lawful right to be in Borst's home, that they had an active warrant for Borst's arrest, and that they were serving the warrant in a proper manner. The court's findings were based on the officers' testimony that they had outstanding traffic-related arrest warrants for Borst. The State did not offer the actual arrest warrants into evidence. The court overruled Borst's motion to suppress the physical evidence—specifically, the marijuana plant and the syringe—seized from the home. The court sustained the motion to suppress the statements Borst made in the home, because he was in custody and had not been given *Miranda* warnings. However, the court ruled that the statements Borst made at the jail regarding controlled substances after receiving *Miranda* warnings were admissible.

Following a bench trial, Borst was found guilty of the charged offenses, and the court sentenced him to 20 months' to 4 years' imprisonment for each offense and ordered the sentences to be served concurrently. Borst appealed his convictions to the Court of Appeals and claimed, inter alia, that the district court erred when it overruled parts of his motion to suppress. Borst argued that the court's findings were erroneous, because the State did not offer the arrest warrants as evidence at the suppression hearing or at trial, the court never examined the warrants, and thus the State failed to establish the validity of the arrest warrants, which, in turn, would have

justified the warrantless search. The Court of Appeals rejected Borst's arguments. The Court of Appeals noted that although the arrest warrants were not offered or received into evidence, testimony by the officers was sufficient to establish that "there were three valid outstanding warrants for Borst." The Court of Appeals rejected Borst's other arguments and affirmed his convictions.

Borst filed a petition for further review. We granted the petition.

ASSIGNMENT OF ERROR

Borst asserts on further review that the Court of Appeals erred when "it affirmed the trial court's overruling of the Motion to Suppress because the [S]tate never offered the arrest warrants it used to justify [Borst's] arrest."

STANDARDS 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. Garcia, ante* p. 1, 792 N.W.2d 882 (2011).

ANALYSIS

The State Was Required to Offer the Arrest Warrants and Affidavits Into Evidence in Order for the District Court to Determine Whether the Officers Had Valid Arrest Warrants and Therefore Had a Legal Right to Be in Borst's Home.

Borst claims that the Court of Appeals erred when it affirmed the district court's order that overruled his motion to suppress both the physical evidence that was seized from his home and the statements he made in the holding cell. Borst asserts that because the State relied on the officers' testimony that they had outstanding warrants rather than offering the actual warrants into evidence, the State failed to prove an exception justifying a warrantless search of his home. We agree that in order

to determine whether the officers had a legal right to be in Borst's home, it was necessary for the State to offer the arrest warrants and supporting affidavits into evidence. Without the arrest warrants and affidavits in evidence, the court could not determine their validity. We conclude therefore that the district court erred when it overruled Borst's motion to suppress the physical evidence seized from his home and the statements he made in the holding cell and that the Court of Appeals erred when it affirmed the ruling.

[2-4] There is no dispute in this case that the officers did not have a search warrant to search Borst's home. Therefore, this case must be analyzed as a warrantless search and seizure case. We have stated that 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. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010). The warrantless search exceptions recognized by this court 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. *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. *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

[5] The district court in this case found the warrantless search to have been justified as a search 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. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). The court overruled Borst's motion to suppress the seized physical evidence after it found that when the officers saw the evidence, they "had a lawful right to be where they were [and] they had an active warrant for [Borst]."

The sole evidence admitted at the suppression hearing to support the finding that the officers had an active arrest warrant and therefore had a lawful right to be in Borst's home was the testimony of one of the three officers, who testified that they had outstanding warrants for Borst's arrest. At trial, that officer and the other two officers each testified that they had arrest warrants when they went to Borst's home. The State did not offer the actual arrest warrants or supporting affidavits into evidence at either the suppression hearing or the trial.

Borst argues that the State did not meet its burden to show the applicability of the plain view exception to the warrant requirement, because it did not offer the arrest warrant or warrants into evidence. Without the arrest warrants, Borst argues, the court could not determine that the warrants were valid and that therefore the officers had a legal right to be in his home, where the evidence they seized could be plainly viewed. We agree with Borst's argument.

In support of his argument, Borst cites *State v. Wenke*, 276 Neb. 901, 758 N.W.2d 405 (2008), which involved a warrantless search sought to be justified as a search incident to an arrest based on an arrest warrant. The present case involves a warrantless search asserted to be justified based on the plain view exception. Although this case and *Wenke* involve different exceptions justifying a warrantless search and seizure, in both cases, the existence of a valid arrest warrant was at issue and was necessary to establish the exception. In order to establish the requirement of the plain view doctrine that the officers had a legal right to be in the place in which the evidence was in plain view, the State in this case asserted that the officers had a legal right to be in Borst's home because they were there to serve valid arrest warrants. To succeed on this theory, the State needed to establish that the arrest warrants were valid.

In *Wenke*, we concluded that the warrantless search of the defendant's person was constitutionally permissible as a search incident to a lawful arrest because the warrant/order of commitment issued by the county court served as a valid arrest warrant. As Borst notes, it is apparent that both this court and the trial court in *Wenke* examined the actual warrant to determine whether it was a valid arrest warrant. Courts in other

jurisdictions have stated in cases involving suppression that in order to establish that an arrest warrant is valid, the actual warrant and supporting affidavit must ordinarily be offered into evidence. The Supreme Court of Rhode Island has stated in part that

> [i]t is well-settled law that when a state intends to justify an arrest on the basis of a warrant, the burden is on the state to produce the warrant and supporting affidavit in order that the trial court can determine whether the warrant was properly issued and constitutionally sufficient.

State v. Taylor, 621 A.2d 1252, 1254 (R.I. 1993) (cases collected). The Court of Criminal Appeals of Texas has held that

> when an accused objects to admission of evidence on the ground that it is tainted by a warrantless arrest and the State relies on an arrest warrant, in the absence of waiver, reviewable error will result unless the record reflects that the arrest warrant was exhibited to the trial judge for a ruling.

Gant v. State, 649 S.W.2d 30, 33 (Tex. Crim. App. 1983).

In the present case, Borst asserted in his motion to suppress that the officers "did not have a valid arrest warrant for him." The issue of the validity of the arrest warrant was therefore before the court, and Borst did not waive the issue. The State had the burden to prove the justification for the warrantless search, and part of the State's asserted justification was that the officers had a legal right to be in Borst's home because they were serving valid arrest warrants. In order to establish such legal right, the State needed to prove that the arrest warrants were valid, and the officers' testimony was not competent to establish that the arrest warrants were legally valid. Whether the warrants were valid was a question of law that needed to be determined by the court, and the court could not decide the issue based only on the officers' testimony. In *State v. Davidson*, 9 Neb. App. 9, 607 N.W.2d 221 (2000), a case involving a warrantless search incident to an arrest, the defendant challenged the validity of the arrest warrant, and the Court of Appeals concluded that the defendant's motion to suppress should have been granted. The Court of Appeals reasoned that although the arrest warrant was in evidence, the State failed to establish that

the search was the result of a valid, legally issued arrest warrant, because the State failed to present the supporting affidavit or other evidence from which it could be determined that the warrant was valid and the arrest was justified.

On further review, we stated in *State v. Davidson*, 260 Neb. 417, 422, 618 N.W.2d 418, 424 (2000), that

> [i]n most instances, the lack of a sufficient affidavit or other supporting document establishing probable cause means that the warrant is invalid. See, generally, *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

However, in *Davidson*, we adopted the "personal knowledge exception" to the customary necessity of requiring an affidavit in recognition of "the commonsense notion that there is no point in a judge executing an affidavit when that judge has personal knowledge of facts establishing probable cause." 260 Neb. at 424, 618 N.W.2d at 425. In this context, personal knowledge includes not only events witnessed by the issuing judge but also records of the court which the issuing judge has reviewed. In *Davidson*, notwithstanding the State's urging, the evidence did not meet the requirements of the personal knowledge exception.

On further review in *Davidson*, although we agreed with the Court of Appeals' analysis with respect to certain weaknesses in the evidence, we reversed the Court of Appeals' decision. After considering the content of the warrant and the testimony of an arresting officer who was an investigator, we concluded that although the evidence did not establish the arrest warrant was valid, the arresting officers relied in good faith on the arrest warrant, and that therefore evidence obtained as a result of the search incident to the arrest did not need to be excluded. *Davidson, supra* (citing *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), setting forth the good faith exception to the exclusionary rule).

[6] Our cases indicate that in order to prove a justification for a warrantless search when the justification is based on a valid arrest warrant, there must be evidence in the record from which the court can determine that the arrest warrant

was legally valid. Ordinarily, this evidence will consist of the arrest warrant and supporting affidavit; however, the affidavit requirement will be forgiven where the record establishes the "personal knowledge exception."

In *Davidson*, we concluded that the evidence did not need to be excluded, because the State's justification for the warrantless search was based on the officers' good faith reliance on the arrest warrant and the record established this justification was warranted. In contrast, in the present case, the State did not assert a good faith exception. Instead, the State in the instant case based its justification for the warrantless search on the existence of active valid arrest warrants. Given the fact that Borst challenged the validity of the arrest warrants in his motion to suppress, the burden fell on the State to establish the existence of a valid arrest warrant, and the State failed to do so.

The State sought to establish its justification for the warrantless search in this case on the basis that the officers testified that they were executing valid arrest warrants and in so doing observed the challenged evidence in plain view. The record does not contain the arrest warrants or supporting affidavits. On the record presented, the State did not establish the validity of the warrant or warrants and it did not establish justification of the warrantless search. Thus, the district court erred when it overruled Borst's motion to suppress the physical evidence seized from Borst's home. The Court of Appeals similarly erred when it affirmed this ruling.

Borst's Statements in the Holding Cell Were Further Fruit of the Warrantless Search and Similarly Should Have Been Suppressed.

The Court of Appeals affirmed the district court's ruling that overruled the portion of Borst's motion to suppress which sought to suppress statements he made in jail regarding his ownership of the marijuana and methamphetamine. Borst challenged this affirmance on further review. The State responds that the jailhouse statements should not be suppressed, because Borst had been given *Miranda* warnings by then. We agree with Borst that the jail statements should have been suppressed.

We have stated that *Miranda* warnings, standing alone, are "an insufficient intervening circumstance to separate a subsequent confession from the taint of an illegal search." *State v. Gorup*, 279 Neb. 841, 861, 782 N.W.2d 16, 32 (2010) (citing *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989)). In *Abdouch*, we stated that

> the *Miranda* warning, by itself, does not preclude exclusion of a defendant's custodial statement induced by confrontation with evidence obtained through a constitutionally invalid search because the *Miranda* warning does not break the cause-and-effect relationship between an illegal search and a defendant's subsequent incriminating statement, confession, or admission.

230 Neb. at 948, 434 N.W.2d at 329.

In both *Gorup* and *Abdouch*, we quoted Professor LaFave's treatise with respect to evaluating the effect of the *Miranda* warnings following a Fourth Amendment violation: "'"[I]t is crystal clear that giving the defendant the *Miranda* warnings will not break the causal chain between an illegal search and a subsequent confession. . . ."'" *Gorup*, 279 Neb. at 856, 782 N.W.2d at 29 (quoting 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 11.4(c) (2d ed. 1987)). Accord *Abdouch, supra*.

In *Abdouch*, we noted that being confronted with the illegally seized evidence, the defendant who was being interrogated at the county corrections facility "undoubtedly recognized the futility of remaining silent and admitted her participation in production of the contraband marijuana." 230 Neb. at 949, 434 N.W.2d at 329. We therefore concluded that the defendant's "custodial statements were obtained as an exploitation of the constitutionally invalid search and seizure of evidence at [her] residence and, as such, were the 'fruit of the poisonous tree'" and should be suppressed. *Id.*

In the present case, Borst made his statements at issue in the holding cell after being given *Miranda* warnings. At this point, the search had been fruitful and Borst knew it. He knew that the officers had seized the marijuana plant and the syringe from his home, which knowledge likely prompted him to admit his involvement with the controlled substances. We conclude

that Borst's statements in the holding cell were the fruit of the search and seizure that occurred in his home. Because, as we have determined above, the State failed to justify the warrantless search and seizure of physical evidence from Borst's home, the subsequent statements in jail were tainted, and these statements should also have been suppressed. The Court of Appeals erred when it affirmed the district court's ruling denying this portion of the motion to suppress.

The Evidence Presented at Trial Was Sufficient to Support Borst's Convictions, and Therefore the Cause Should Be Remanded for a New Trial.

[7] Denial of those portions of Borst's motion to suppress seeking suppression of the physical evidence in his home and his statements in jail was error, and the Court of Appeals erred when it affirmed these rulings. These errors are reversible error. Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Borst's convictions. If it was not, then concepts of double jeopardy would not allow a remand for a new trial. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009). The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *Id.*

The record shows that the evidence presented in this case, including the physical evidence of the marijuana plant and the syringe seized from Borst's home and the statements Borst made in jail, was sufficient to sustain convictions for manufacture of a controlled substance (marijuana) and possession of a controlled substance (methamphetamine). The cause therefore should be remanded for a new trial on both charges.

CONCLUSION

The record does not establish an exception to the prohibition against warrantless searches. The State failed to offer the actual arrest warrants and supporting affidavits into evidence and therefore did not establish that the arrest warrants were valid. The district court erred when it determined that the officers

had a legal right to be in Borst's home and when it overruled Borst's motion to suppress both the physical evidence seized from Borst's home and the subsequent tainted statements he made in the holding cell. Consequently, the Court of Appeals erred when it affirmed the district court's ruling on the motion to suppress. We reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions to reverse Borst's convictions and to remand the cause to the district court for a new trial on both charges.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

BRYAN S. BEHRENS, AN INDIVIDUAL, ET AL., APPELLANTS AND CROSS-APPELLEES, V. CHRISTIAN R. BLUNK, AN INDIVIDUAL, ET AL., APPELLEES AND CROSS-APPELLANTS.

796 N.W.2d 579

Filed March 18, 2011. No. S-10-342.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

David A. Domina and Terry A. White, of Domina Law Group, P.C., L.L.O., for appellants.

Mark C. Laughlin and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellees Christian R. Blunk and Berkshire & Blunk.

William R. Johnson, of Lamson, Dugan & Murray, L.L.P., for appellees Christian R. Blunk and Abrahams, Kaslow & Cassman, L.L.P.

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