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portions of new building and fence encroaching on owner's land was not inequitable); *Seminary v. DuPont*, 41 So. 3d 1182 (La. App. 2010) (finding that neighbor's fence encroached upon homeowner's property, supporting issuance of mandatory injunction); *Crow v. Batchelor*, 456 S.W.2d 241 (Tex. Civ. App. 1970) (determining trial court's grant of mandatory injunction requiring defendant to remove fence was not abuse of discretion).

The district court properly enjoined the appellants. Therefore, we affirm the order of the district court.

CONCLUSION

The appellees are the rightful owners of both Lot 9 and the accretion north of the centerline of the slough, as the district court correctly determined. Because the appellees own the land, the appellants' intentional installation of a fence on the land constituted a continuous trespass, and the appellees were entitled to an injunction, as the district court ordered. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUSTIN D. HOWELL, APPELLANT.

822 N.W.2d 391

Filed October 26, 2012. No. S-12-115.

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, the 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 the appellate court reviews independently of the trial court's determination.
2. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

3. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs.** The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?
4. **Search and Seizure: Police Officers and Sheriffs: Intent.** The permissible scope of a search is not to be determined on the basis of the subjective intentions of the consenting party or the subjective interpretation of the searching officer.
5. **Search and Seizure.** Consensual searches generally cannot be destructive.
6. **Search and Seizure: Police Officers and Sheriffs: Evidence.** Before an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed.
7. **Search and Seizure.** The scope of a search is generally defined by its expressed object.
8. **Search and Seizure: Motor Vehicles: Police Officers and Sheriffs.** The general rule is that when a suspect does not limit the scope of a search, and does not object when the search exceeds what he later claims was a more limited consent, an officer is justified in searching the entire vehicle.
9. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.
10. ____. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
11. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed in part, and in part reversed and remanded with direction.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

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

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

CASSEL, J.

INTRODUCTION

The principal issue in this appeal is whether a reasonable person would understand that a general consent to search

a vehicle for illegal drugs authorized the opening of a gift-wrapped box in the vehicle's storage area. Because (1) the object of the search was clearly disclosed, (2) the container was not equivalent to a locked container and was not destroyed, and (3) the consent was not withdrawn after the officer's interest in the container was communicated to its owner, the search did not exceed the scope of the consent. Thus, we affirm the conviction for possession of a controlled substance with intent to distribute. However, because the record contains no evidence of the absence of a drug tax stamp, we find plain error and reverse the judgment of conviction for that offense.

BACKGROUND

The State charged Justin D. Howell with possession of a controlled substance with intent to distribute and no drug tax stamp. Howell moved to suppress the evidence obtained from within a gift-wrapped box because he did not specifically consent to its search.

Trooper Russell Lewis provided the sole testimony at the hearing on the motion to suppress. He stopped Howell's vehicle for speeding and had Howell sit in the patrol car while he completed a warning ticket.

Lewis asked Howell if there were drugs or weapons in the vehicle, and Howell answered, "No." Lewis then obtained Howell's consent to search the vehicle. Lewis moved to the rear cargo area of the vehicle and observed luggage and a gift-wrapped box. Lewis asked Howell, who remained in the patrol car, about the ownership of the gift-wrapped box. Howell stated that his aunt had given it to him to give to his brother as a birthday gift.

Lewis decided to search the box, but he did not ask for specific authorization to do so. At the suppression hearing, he agreed that Howell would not have been able to see what he was doing inside of the vehicle as he opened the box. Lewis used a knife to cut the tape on the wrapping paper and unwrapped one side of the box. The box tore as he opened it to look inside. Lewis observed two packages of marijuana. In response to Lewis' question about the ownership of the box, Howell stated that it was his. Howell told Lewis that the box

contained approximately 2 pounds of marijuana and that he sold the drug in addition to personally using it.

The district court overruled Howell's motion to suppress. The court determined that Howell gave Lewis general consent to search, that Howell did not limit or revoke his consent or say that Lewis could not search the box, and that Howell did not object to the search of the box. The court further reasoned that a person "could reasonably expect illegal substances to be transported in such packaging" and that "[c]utting the package did not destroy the contents and caused only minimal damage to a cardboard box of nominal value."

At a trial to the bench, the only evidence offered was a six-page exhibit consisting of the "police report from the officer" and a "copy of the lab[oratory] report for the marijuana that was seized by the officer." The police report synopsis states that Howell "was arrested and charged with Possession of Marijuana with Intent and No Drug Tax Stamp." However, neither the police report narrative nor the laboratory report contains any fact regarding the absence of a drug tax stamp. There were no verbal or written stipulations that would otherwise expand the evidence. The court was not asked to take judicial notice of the evidence adduced at the suppression hearing. After the trial, the district court found Howell guilty of possession of a controlled substance with intent to distribute and no drug tax stamp. The court subsequently sentenced Howell.

Howell timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Howell assigns that the court erred in (1) denying his motion to suppress after determining that his general consent to the search of his vehicle authorized the cutting open of the gift-wrapped box located inside the vehicle and (2) finding him guilty of possession of a controlled substance with intent to distribute and no drug tax stamp.

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[1] See Neb. Rev. Stat. § 24-1106 (Reissue 2008).

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.[2]

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[3]

ANALYSIS

Consent to Search.

The issue in this case is narrow: Did Howell's general consent to search his vehicle authorize Lewis to open the gift-wrapped box? At oral argument, the State conceded that the validity of the search depended solely upon Howell's consent.

[3,4] The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?[4] The permissible scope of a search "is *not* to be determined on the basis of the subjective intentions of the consenting party or the subjective interpretation of the searching officer."[5]

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[2] *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[3] *State v. Ross*, 283 Neb. 742, 811 N.W.2d 298 (2012).

[4] *Florida v. Jimeno*, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991).

[5] 4 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 8.1(c) at 19 (4th ed. 2004) (emphasis in original).

We begin our analysis with the seminal case of *Florida v. Jimeno*.[6] In that case, the officer informed the defendant that he believed the defendant was carrying narcotics in the car and asked for permission to search the car. After receiving consent to search, the officer saw a folded, brown paper bag on the car's floorboard. The officer opened the bag and found cocaine. The U.S. Supreme Court upheld the search, stating that it was objectively reasonable for the officer to conclude that the general consent to search the car included consent to search closed containers within the car which might hold drugs. The Court explained, "A reasonable person may be expected to know that narcotics are generally carried in some form of container" and that they "'rarely are strewn across the trunk or floor of a car.'"[7] Significantly, the Court specifically declined to add to the basic test of objective reasonableness a requirement that police must separately request permission to search each closed container within a car. The Court cautioned, however, that "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk . . . ."[8] As the *Jimeno* opinion demonstrates, there is no bright-line rule prohibiting the opening of closed containers during a search of a vehicle conducted pursuant to general consent.

The Nebraska Court of Appeals has considered whether, post-*Jimeno*, general consent to search a vehicle extended to closed containers located therein. In *State v. Claus*,[9] the officer asked the suspect if he had any drugs or weapons and obtained general consent to search the vehicle. The officer observed a "'small blue safety glasses bag'"[10] on the front seat of the vehicle and asked the suspect if the bag was his. After the suspect said that it was, the officer unzipped the bag—without specific permission to do so—and found drugs and drug paraphernalia.

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[6] *Florida v. Jimeno, supra* note 4.

[7] *Id.*, 500 U.S. at 251.

[8] *Id.*, 500 U.S. at 251-52.

[9] *State v. Claus*, 8 Neb. App. 430, 594 N.W.2d 685 (1999).

[10] *Id.* at 432, 594 N.W.2d at 687.

In upholding the search, the Court of Appeals noted that the suspect did not object to the scope of the search or otherwise protest it. More recently, in *State v. Rathjen*,[11] the Court of Appeals was confronted with the search of a locked toolbox in the bed of a pickup truck. The driver gave the officer consent to search his truck, and the officer searched the toolbox by using a key he found on the keyring hanging from the key in the ignition. The officer discovered methamphetamine inside a black bag located in the toolbox. The officer did not ask for additional consent before searching the toolbox, and the driver was not present or within earshot at the time of the search. The Court of Appeals viewed the locked toolbox as being analogous to the trunk of an automobile and determined that the driver's general consent authorized the search. The Court of Appeals emphasized the fact that the driver did not object when the search extended to the toolbox.

[5] Howell relies principally upon precedent from the Eighth Circuit. In *U.S. v. Alverez*,[12] troopers received consent to search a car. During the search, they unbolted a spare tire, shook it, heard several thudding noises, and tried to break the tire loose from the rim. Ultimately, the troopers cut through the tire's sidewall and discovered methamphetamine. The Eighth Circuit determined that cutting the spare tire "likely exceeded the scope of the consensual search,"[13] but that the troopers had probable cause to examine the tire more closely. A later case, *U.S. v. Santana-Aguirre*,[14] involved a search at a bus terminal where the defendant consented to a search of his suitcase. A drug interdiction investigator found two large wax candles, cut into them, and discovered methamphetamine. The Eighth Circuit reasoned that consensual searches generally cannot be destructive and stated that "[c]utting or destroying an object during a search requires either explicit consent for the destructive search or articulable suspicion that supports a finding

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[11] *State v. Rathjen*, 16 Neb. App. 799, 751 N.W.2d 668 (2008).

[12] *U.S. v. Alverez*, 235 F.3d 1086 (8th Cir. 2000).

[13] *Id.* at 1089.

[14] *U.S. v. Santana-Aguirre*, 537 F.3d 929 (8th Cir. 2008).

that probable cause exists to do the destructive search."[15] The Eighth Circuit ultimately did not reach the issue of consent because it concluded that there was probable cause to support the search. Both of these cases involved the destruction of a closed container in such a manner that the container could no longer be used for its intended purpose.

[6] The damage to or destruction of a closed container is a factor in the objective reasonableness analysis. In *U.S. v. Osage*,[16] during a search on a train, the defendant gave an officer permission to search his suitcases and produced a key to open the locked suitcase. The officer observed four cans labeled "'tamales in gravy'"[17] inside the locked suitcase and noticed that the label on one of the cans appeared to have been tampered with. When he shook the can, it did not feel and sound like it contained tamales in liquid, but, rather, felt like a container of salt. The officer opened the can and discovered methamphetamine. The 10th Circuit determined that the defendant's failure to object to the search of the sealed container did not permit the officer to destroy the can. The court analogized the opening of a sealed can—which made the can useless and incapable of performing its intended function—to breaking open a locked briefcase and contrasted it with the opening of a folded paper bag. The court held: "[B]efore an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed."[18] In a later case from the 10th Circuit, *U.S. v. Jackson*,[19] an agent used a knife to take off the top of a baby powder container located within a bag. The 10th Circuit reasoned that removing the lid of the container did not exceed the scope of consent because it did not destroy or render the

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[15] *Id.* at 932.

[16] *U.S. v. Osage*, 235 F.3d 518 (10th Cir. 2000).

[17] *Id.* at 519.

[18] *Id.* at 522.

[19] *U.S. v. Jackson*, 381 F.3d 984 (10th Cir. 2004).

container useless and the container could still perform its designated function.

Several courts have considered the opening of a taped box during a general consent search. In *U.S. v. Mendoza-Gonzalez*,[20] border patrol agents obtained permission to look inside a trailer and saw a few brown cardboard boxes which were sealed with a piece of tape over the top. An agent used a pocketknife to slice the tape on one of the boxes and discovered bricks of marijuana. The defendant argued that the search of the cardboard box exceeded the scope of his consent, but the Fifth Circuit upheld the search. The court reasoned that because the defendant knew the boxes contained marijuana, he should have limited his consent if he deemed it necessary to do so, which would have clarified any ambiguity about whether the agent had consent to search the boxes. The Fifth Circuit noted that it had previously placed the responsibility to limit the scope of consent on the defendant because it is the defendant who knows the contents of the vehicle. In analyzing the reasonableness of a search of a closed container, the Fifth Circuit looked at "the varying impact that such a search has upon two interests: (1) the owner's expectation of privacy as demonstrated by his attempt to lock or otherwise secure the container; and (2) the owner's interest in preserving the physical integrity of the container and the functionality of its contents."[21] The Fifth Circuit rationalized that the defendant's expectation of privacy in the box did not rise to the level of that of a locked container, particularly where the box could be opened by merely removing or cutting through a piece of tape. The court pointed out that the agent did not "damage the box, render it useless, or endanger its contents during the course of the search" and that "cardboard boxes that were once taped, glued, or closed in some other manner are just as capable of performing their function on subsequent occasions with the help of a brand new piece of tape."[22]

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[20] *U.S. v. Mendoza-Gonzalez*, 318 F.3d 663 (5th Cir. 2003).

[21] *Id.* at 671.

[22] *Id.* at 672.

In *U.S. v. Maldonado*,[23] which involved a search on a train, agents obtained consent to search the defendant's luggage and located two boxes marked "'juicer'"[24] inside. The defendant testified that he told one of the agents he did not want to open the juicer boxes—which were taped shut—because the items inside were gift wrapped and that he again expressed concern about the gift wrap when one of the agents offered to open the boxes. An agent opened the boxes and found packages of cocaine. The defendant argued that the search of the boxes exceeded the scope of his consent, but the Seventh Circuit determined that a reasonable person would have understood the defendant's consent for the search of his luggage to include permission to search any items inside his luggage which might reasonably contain drugs. In *U.S. v. Jones*,[25] a trooper opened a gift-wrapped package found in the trunk of a car, and the defendants argued that it exceeded their general consent to search the car for anything illegal. The court determined that the search was reasonable and within the scope of the consent to search, stating:

> The defendants were aware that [the trooper] was searching the trunk of the vehicle and that he was interested in the contents of the gift-wrapped package, as they were asked repeatedly about its contents. The defendants had ample opportunity to instruct [the trooper] not to search the trunk or the package. However, the defendants never objected to [the trooper's] search of the package or placed any limitation on the scope of the consent. Therefore, it was reasonable for [the trooper] to believe that the defendants' consent extended to the gift-wrapped package found in the trunk.[26]

[7,8] These cases guide our resolution of the instant case. Lewis asked Howell if there were drugs or weapons in the vehicle immediately prior to obtaining consent to search. Thus,

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[23] *U.S. v. Maldonado*, 38 F.3d 936 (7th Cir. 1994).

[24] *Id.* at 938.

[25] *U.S. v. Jones*, 501 F. Supp. 2d 1284 (D. Kan. 2007).

[26] *Id.* at 1301-02.

a reasonable person would have been on notice that Lewis was looking for drugs or weapons. The scope of a search is generally defined by its expressed object.[27] One could reasonably expect drugs to be hidden in a closed container such as the gift-wrapped box. "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search."[28] When Howell consented to a search of the vehicle, he did not place any limitation on the search. After Lewis observed the gift-wrapped box, he asked Howell to whom it belonged and whether it was "basically" Howell's. Despite Lewis' interest in the box, Howell did not revoke or limit his consent to search. The general rule is that when a suspect does not limit the scope of a search, and does not object when the search exceeds what he later claims was a more limited consent, an officer is justified in searching the entire vehicle.[29] In the instant case, Lewis used a knife to cut the tape on the gift wrap and created a tear in the box as he tried to peer inside. However, the box and gift wrap were not rendered useless by the search. The tear in the generic cardboard box could be fixed with a piece of tape, and the wrapping paper could be secured to the box with another piece of tape. Under the circumstances, we conclude that the search of the box was within the scope of Howell's consent. Thus, the district court did not err in overruling Howell's motion to suppress the evidence.

Plain Error on Drug Tax Stamp Conviction.

On appeal, Howell assigned that the court erred in finding him guilty of both crimes, but his argument was premised solely upon the court's failure to sustain his motion to suppress.

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[27] *Florida v. Jimeno, supra* note 4.

[28] *United States v. Ross*, 456 U.S. 798, 820-21, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).

[29] *U.S. v. Contreras*, 506 F.3d 1031 (10th Cir. 2007). Cf. *State v. Brown*, 294 S.W.3d 553 (Tenn. 2009) (stating that silence alone cannot expand scope of initial consent).

He did not argue that the evidence at trial—which included the evidence he had sought to suppress—nonetheless failed to establish that there was no drug tax stamp on the marijuana. However, our review of the record reveals no evidence regarding the absence of a drug tax stamp.

Because this aspect of the evidence was not argued on appeal, it may be considered only as a matter of plain error. After oral argument in this case, we issued an order directing the parties to address whether plain error exists on the record because of insufficient evidence to sustain the conviction for no drug tax stamp, and we specifically asked them to address the existence of evidence in the record sufficient to show the absence of a drug tax stamp.

The parties arrive at opposite conclusions regarding the sufficiency of the evidence. Howell asserts that the State failed to present evidence with respect to whether a drug tax stamp was affixed to the marijuana. The State, on the other hand, admits that the record does not contain any testimony about the presence or absence of a drug tax stamp, but contends that it met its burden of proof through circumstantial evidence. The State directs our attention to the patrol car's video recording of the stop and search and to two photographs of the box—one showing the box in wrapping paper and the other showing part of the unwrapped box. The State points to a regulation from the Nebraska Department of Revenue which provides that "drug tax stamps must be physically affixed, using their adhesive backing, to a container holding the taxable drugs."[30] Relying on the regulation, the State argues that the evidence does not show any sign of a tax stamp affixed to the box or wrapping paper or any remark by Lewis on the presence of a tax stamp. Further, the State asserts that the presence of a drug tax stamp would have eliminated the need for caution exercised by Lewis in opening the package because the presence of the drug tax stamp would have declared the contents of the box. The State suggests that Lewis' carefully cutting off part of the gift wrap

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[30] 316 Neb. Admin. Code, ch. 94, § 005.01 (1992). See, also, 316 Neb. Admin. Code, ch. 94, § 003.02A (1992) ("[d]rug stamps must be affixed to a container holding threshold amounts of marijuana").

"is an unequivocal inference that there was no drug tax stamp which would have readily and openly identified the contents as contraband."[31]

The fundamental problem with the State's argument is that the evidence from which it seeks to draw these inferences was not offered or received at the trial. At trial, the court received only a single exhibit combining a copy of Lewis' written report with a copy of the laboratory report. There was no testimony or any other physical or documentary evidence. The sole exhibit did not memorialize any observations regarding the absence of a drug tax stamp. The evidence from the suppression hearing was not offered at trial, nor was the court requested to judicially notice the evidence from the suppression hearing. Thus, the only evidence actually received at trial failed to show the absence of the drug tax stamp. There was simply a total failure of evidence at trial on this element of the offense.

[9-11] Thus, we note plain error. Consideration of plain error occurs at the discretion of an appellate court.[32] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[33] Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[34] No drug tax stamp is a Class IV felony.[35] The crime is committed when a "dealer distribut[es] or possess[es] marijuana or a controlled substance without affixing the official stamp, label, or other indicium."[36] Thus, an essential element of the crime is the failure to affix the official stamp or label. Because there was no evidence to show the absence of a drug

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[31] Supplemental brief for appellee at 4.

[32] *State v. Britt*, 283 Neb. 600, 813 N.W.2d 434 (2012).

[33] *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[34] *State v. Ross, supra* note 3.

[35] Neb. Rev. Stat. § 77-4309 (Reissue 2009).

[36] *Id.*

tax stamp, we cannot allow Howell's conviction for that charge to stand.

CONCLUSION

We conclude that Howell's general consent to search his vehicle extended to the gift-wrapped box. Howell did not withdraw or otherwise limit his consent when Lewis inquired about the box, and the search of the box caused only minimal, cosmetic damage to it. We therefore affirm the conviction and sentence for possession of a controlled substance with intent to distribute.

Because the record contained no evidence regarding the absence of a drug tax stamp, we reverse the judgment of conviction and sentence for that charge and remand the cause with direction to dismiss the charge for no drug tax stamp.

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

STATE OF NEBRASKA, APPELLEE, V.
SHERRIE L. MCCARTHY, APPELLANT.
822 N.W.2d 386

Filed October 26, 2012. No. S-12-478.

1. **Collateral Estoppel: Appeal and Error.** The applicability of the doctrine of collateral estoppel constitutes a question of law. With regard to such a question, an appellate court is obligated to reach a conclusion independent from the lower court's conclusion.
2. **Statutes.** The interpretation of a statute presents a question of law.
3. **Collateral Estoppel: Words and Phrases.** "Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.
4. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
5. **Criminal Law: Statutes: Words and Phrases.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not