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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

for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Chad J. Wythers, of Berry Law Firm, for appellant.

Jon Bruning, Attorney General, George R. Love, and Dain J. Johnson, Senior Certified Law Student, for appellee.

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

CASSEL, J.

INTRODUCTION

Sherrie L. McCarthy was convicted of theft by shoplifting, $200 or less.[1] The district court relied on two prior county court convictions to enhance the crime for punishment as a Class IV felony.[2] In the second of these two prior proceedings, the county court had refused to enhance the conviction and had treated it as a first offense. McCarthy argues that the doctrine of collateral estoppel required the district court to treat the instant conviction as only a second offense and, thus, as a Class I misdemeanor.[3] Because we reject the statutory interpretation underlying McCarthy's argument, we affirm.

BACKGROUND

As the issue on appeal is limited to the matter of enhancement of the conviction, and thus the instant penalty, because of prior convictions, we omit unnecessary details regarding the underlying offense.

In the case before us, the State charged McCarthy with theft by shoplifting of goods having a value of $200 or less, but the information also alleged that the offense should be enhanced for punishment as a Class IV felony because of two prior convictions. In due course, McCarthy pled guilty to the

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[1] See Neb. Rev. Stat. §§ 28-511.01 and 28-518(4) (Cum. Supp. 2010).

[2] See § 28-518(6).

[3] See *id*.

underlying offense. The case proceeded to an enhancement hearing, and the State offered evidence of two prior convictions. McCarthy later offered additional evidence regarding the second conviction.

The first prior conviction was on October 23, 2003, in the county court for Lancaster County, Nebraska, in case No. CR03-17867 (the 2003 conviction). Exhibit 1, the record of the 2003 conviction, shows that McCarthy was convicted of theft by shoplifting, $200 or less. Exhibit 1 does not show that McCarthy either was represented by counsel or waived her right to counsel. Upon conviction of a Class II misdemeanor, McCarthy was sentenced to pay a fine of $200 and the costs of the proceeding.

The State also relied upon a prior conviction from November 17, 2006, in Lancaster County Court, case No. CR06-8811 (the 2006 conviction). Exhibit 2, the record of the 2006 conviction, shows that McCarthy was convicted pursuant to § 28-511.01 (Reissue 2008) of theft by shoplifting of property valued at $200 or less. Relying on the 2003 conviction, the 2006 complaint also alleged that the incident constituted a second offense. The record of the 2006 proceeding shows that, at all relevant times, McCarthy was represented by counsel. McCarthy pled no contest to the charge and was convicted of the underlying offense.

The record also shows that the county court judge in the 2006 proceeding declined to enhance the 2006 conviction for punishment as a second offense and instead determined that it would be considered a first offense. Exhibit 3, a verbatim transcript of the proceedings before the county court judge at the time of the plea and the enhancement hearing, was received by the district court in the instant proceeding. The transcript shows that after the county court had accepted McCarthy's plea to the 2006 underlying offense, the following colloquy occurred:

> THE COURT: . . . You've got yourself charged with a shoplift on September 18th, 2003, about, by golly, 7 o'clock in the morning, at HyVee, 2345 North 48th Street, on September 18th, 2003. You appeared in front of me on October 23, 2003, don't know what courtroom, but we

were probably going pretty fast, and you were without any counsel.

[Deputy county attorney], what do you think?

[Deputy county attorney]: The State's position is that it is a Constitutionally valid conviction, because she only received a fine, and there was no jail involved.

THE COURT: There was a jail potential, wasn't there? I mean, there [sic] a potential jail sentence?

[Deputy county attorney]: Yes.

THE COURT: [Defense counsel], what do you think?

[Defense counsel]: No additional comments, Your Honor.

THE COURT: I'm going to find her guilty of a first offense, but we're going to do — Is this the second time around?

[Deputy county attorney]: I'm sorry?

THE COURT: How many times has she been convicted of a theft?

[Deputy county attorney]: Oh, of a theft?

THE COURT: Yeah.

[Deputy county attorney]: Numerous.

THE COURT: We'll do a presentence investigation. I will find her guilty of a first offense.

After considering this evidence regarding the prior convictions, the district court found McCarthy guilty of the underlying offense and determined that both the 2003 conviction and the 2006 conviction were valid for purposes of enhancement. The court accordingly adjudged McCarthy guilty of theft by shoplifting—$200 or less, third or subsequent offense—and, pursuant to § 28-518(6), enhanced the offense for punishment as a Class IV felony. The court later sentenced McCarthy to 300 days in jail and to pay the costs of prosecution.

McCarthy timely appeals. Pursuant to statutory authority,[4] we moved this case to our docket. Because McCarthy pled guilty to the offense, the appeal was automatically submitted without oral argument.[5]

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

[5] See Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008).

ASSIGNMENT OF ERROR

McCarthy assigns that the district court erred by holding that her 2006 conviction was a "second offense despite [a] prior finding by the [c]ounty [c]ourt that the 2006 offense was a first offense."

STANDARD OF REVIEW

[1] 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.[6]

[2] The interpretation of a statute presents a question of law.[7]

ANALYSIS

[3,4] McCarthy's argument relies upon the legal doctrine of collateral estoppel. "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.[8] 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.[9]

McCarthy asserts that all four conditions were satisfied in regard to the 2006 conviction and relies on the decision in *State v. Keen*[10] to support her argument that collateral estoppel barred the district court from treating the 2006 conviction as a second offense. In *Keen*, this court held that the defendant

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[6] *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994), *overruled in part on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[7] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[8] *State v. Secret, supra* note 6.

[9] *Id.*

[10] *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006).

could not collaterally attack his prior conviction for driving under the influence. The defendant claimed that the prior conviction could not be used for enhancement because it was obtained pursuant to a municipal ordinance which was later declared to be unenforceable as inconsistent with a state statute. We reasoned that collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter and that although the defendant's prior conviction may have been voidable and subject to reversal upon appeal, it was not void. In the case before us, McCarthy argues that because of the earlier county court determination, she had two prior convictions for first offense, and that those convictions did not satisfy the requirement of § 28-518(6) for enhancement of the instant conviction as a third offense.

The State responds that McCarthy's argument is based on a faulty premise—that a person must be progressively convicted from first offense to second offense before he or she can be found guilty of an enhanced third or subsequent offense. The correct rule for a third or subsequent offense, the State urges, requires only that the person have at least two prior valid convictions for theft by shoplifting, $200 or less. We agree with the State.

[5] The plain language of § 28-518 supports the State's argument. The statute initially declares that "[t]heft constitutes a Class II misdemeanor when the value of the thing involved is two hundred dollars or less."[11] It then states: "For any second conviction under subsection (4) of this section, any person so offending shall be guilty of a Class I misdemeanor, and for any third or subsequent conviction under subsection (4) of this section, the person so offending shall be guilty of a Class IV felony."[12] It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not

[11] § 28-518(4).

[12] § 28-518(6).

there.[13] The statute does not say, as McCarthy would have us read it, that a person who has previously been convicted of a second offense shall, upon another conviction, be guilty of a third offense.

The Nebraska Court of Appeals has previously stated that the meaning of § 28-518(6) is plain and unambiguous and that it specifically provides that if an individual has two or more Class II misdemeanor convictions under subsection (4), then a third or subsequent conviction pursuant to subsection (4) will be enhanced to a Class IV felony.[14] We agree with the Court of Appeals' reading of § 28-518.

This reading is consistent with the analogous situation of enhancement in cases involving driving under the influence of alcohol or drugs. We have adhered to this interpretation in two instances. First, we held that for a defendant to be punished as a third offender, it is necessary only that the defendant be charged and found to have been twice previously convicted of driving while under the influence of intoxicating liquor.[15] In the second case, we stated that to constitute a third-offense violation of the then-existing statute, it was necessary only that a violator be properly convicted of two previous violations of the statute, whether the earlier convictions be called first offense or second offense.[16] McCarthy has not cited any authority that persuades us that this reading is not correct or that it should not be applied in the present context.

CONCLUSION

We adhere to the principles of statutory interpretation and conclude that for enhancement as a third or subsequent offense, the plain language of the statute requires only that McCarthy have been previously convicted of two instances of theft by shoplifting under § 28-518(4), whether the earlier convictions

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[13] *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996*), overruled on other grounds, State v. Burlison, supra* note 6.

[14] *State v. Long*, 4 Neb. App. 126, 539 N.W.2d 443 (1995).

[15] *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), *overruled on other grounds, State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983).

[16] *State v. Donaldson*, 234 Neb. 683, 452 N.W.2d 531 (1990).

were called first offense or second offense. Because McCarthy's two prior convictions clearly satisfy this requirement and because she makes no other challenge to the use of these convictions for purposes of enhancement, we affirm the judgment of the district court.

AFFIRMED.