

NEBRASKA SUPREME COURT

Scalise v. Davis

312 Neb. 518 (2022) · No. S-21-031 · Decided September 30, 2022

SUMMARY

The Nebraska Supreme Court affirmed the district court’s judgment upholding the denial of Nicholas N. Scalise’s application for a handgun certificate. The court held that his Nebraska third-degree assault conviction could qualify as a federal misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9), applying a circumstance-specific approach to the domestic-relationship requirement and a modified categorical approach to the use-of-force requirement. The court also rejected or declined to address Scalise’s notice and constitutional arguments.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Funke, J.; Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Papik, J.; Freudenberg, J.
JURISDICTION	Nebraska
DECIDED	September 30, 2022
DOCKET	S-21-031
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the district court's affirmance of the county court's denial of a handgun certificate appeal.
STANDARD OF REVIEW	For errors appearing on the record; questions of law reviewed independently.
PRECEDENTIAL VALUE	Published
PARTIES	Nicholas N. Scalise v. Jeffrey L. Davis and the Sarpy County Sheriff's Office

TOPICS

- statutory interpretation
- appellate procedure
- constitutional law
- criminal procedure

PRACTICE AREAS

- Criminal law
- Firearms
- Domestic violence

QUESTIONS PRESENTED

1. Whether Scalise's third degree assault conviction qualifies as a 'misdemeanor crime of domestic violence' under 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 921(a)(33)(A).
2. Whether the county court failed to give Scalise notice that his conviction could affect his right to possess firearms under Neb. Rev. Stat. § 29-2291.

HOLDINGS

1. A conviction for third degree assault under Neb. Rev. Stat. § 28-310 can qualify as a misdemeanor crime of domestic violence if the conviction was for causing bodily injury (alternative (a)) and the offender had a specified domestic relationship with the victim. Courts should employ the circumstance-specific approach to the domestic relationship requirement and the modified categorical approach to the use of force requirement.
2. The record shows the county court gave Scalise the requisite advisement, so the argument is meritless.

KEY QUOTATIONS

"'misdemeanor crime of domestic violence' means an offense that (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, . . . by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." (312 Neb. 518, 522)

"'For purposes of this section, intimate partner means a spouse; a former spouse; persons who have a child in common whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship. For purposes of this subsection, dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context.'" (312 Neb. 518, 529)

"'When sentencing a person convicted of a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921(a)(33), as such section existed on July 18, 2008, the court shall provide written or oral notification to the defendant that it may be a violation of federal law for the individual: To ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.'" (312 Neb. 518, 531)

FACTUAL BACKGROUND

In 2018, Scalise was arrested and charged with strangulation stemming from an argument with the victim. Pursuant to a plea agreement, he was charged with third degree assault, a Class I misdemeanor, and pleaded guilty. After completing probation, he attempted to purchase a handgun, but the Sarpy County Sheriff's Office denied his application under 18 U.S.C. § 922(g)(9) and Neb. Rev. Stat. § 69-2404, concluding his third degree assault conviction qualified as a misdemeanor crime of domestic violence. The underlying evidence showed Scalise and the victim had a dating relationship for approximately five years, including cohabitation.

PROCEDURAL HISTORY

Scalise's application for a handgun certificate was denied by the Sarpy County Sheriff's Office. He appealed to the county court, which denied relief. He then appealed to the district court, which affirmed. He then appealed to the Nebraska Supreme Court.

DISPOSITION

affirmed

CASES CITED

- United States v. Hayes, 555 U.S. 415 (2009)
- United States v. Castleman, 572 U.S. 157 (2014)
- Voisine v. United States, 579 U.S. 686 (2016)
- Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007)
- Taylor v. United States, 495 U.S. 575 (1990)
- Orellana v. Mayorkas, 6 F.4th 1034 (9th Cir. 2021)
- Descamps v. United States, 570 U.S. 254 (2013)
- Shepard v. United States, 544 U.S. 13 (2005)
- Nijhawan v. Holder, 557 U.S. 29 (2009)
- U.S. v. White, 782 F.3d 1118 (10th Cir. 2015)
- Bogle v. Garland, 21 F.4th 637 (9th Cir. 2021)
- U.S. v. Doss, 630 F.3d 1181 (9th Cir. 2011)
- U.S. v. Price, 777 F.3d 700 (4th Cir. 2015)
- U.S. v. Gonzalez-Medina, 757 F.3d 425 (5th Cir. 2014)
- Lindo v. Secretary, U.S. Department of Homeland Security, 766 Fed. Appx. 897 (11th Cir. 2019)
- Humphrey v. Smith, 311 Neb. 632, 974 N.W.2d 293 (2022)
- State v. Boche, 294 Neb. 912, 885 N.W.2d 523 (2016)
- State v. Avey, 288 Neb. 233, 846 N.W.2d 662 (2014)
- State v. Beitel, 296 Neb. 781, 895 N.W.2d 710 (2017)
- In re Conservatorship of Mosel, 234 Neb. 86, 449 N.W.2d 220 (1989)