

SUPREME COURT OF NEBRASKA

State v. Schwaderer

296 Neb. 932 (2017) · No. No. S-16-501 · Decided June 16, 2017

SUMMARY

The Nebraska Supreme Court affirmed Robert L. Schwaderer’s convictions and sentences for possession with intent to deliver methamphetamine, possession of drug money, and false reporting. The court held that the State sufficiently established the accuracy of the weighing equipment and properly authenticated notebooks and notepads offered as circumstantial evidence of drug distribution. The court also rejected challenges to the jury instructions and resolved or declined to reach several claims of ineffective assistance of trial counsel.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Cassel, J.; Heavican, C.J.; Wright, J.; Miller-Lerman, J.; Stacy, J.; Kelch, J.; Funke, J.
JURISDICTION	Nebraska
DECIDED	June 16, 2017
DOCKET	No. S-16-501
DISPOSITION	affirmed
PROCEDURAL POSTURE	Direct appeal from convictions and sentences for possession with intent to deliver methamphetamine, possession of money to be used in violation of Neb. Rev. Stat. § 28-416(1), and false reporting.
STANDARD OF REVIEW	Evidentiary foundation and witness qualification are reviewed for abuse of discretion; factual findings underlying hearsay rulings are reviewed for clear error and the ultimate hearsay determination de novo; jury instructions are reviewed independently as questions of law; whether ineffective-assistance claims can be resolved on direct appeal is reviewed as a question of law; sufficiency claims are reviewed without reweighing evidence or resolving credibility; and sentences within statutory limits are reviewed for abuse of discretion.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential.
PARTIES	Robert L. Schwaderer v. State of Nebraska

TOPICS

criminal procedure evidence authentication hearsay ineffective assistance

PRACTICE AREAS

criminal law criminal procedure evidence appellate practice post-conviction relief

QUESTIONS PRESENTED

1. Whether the State established an adequate foundation for testimony concerning the weight of the methamphetamine and the accuracy of the measuring scales.
2. Whether the notebooks and notepads were inadmissible hearsay or insufficiently authenticated.
3. Whether the district court's cautionary and final jury instructions concerning the notebooks and notepads were erroneous or prejudicial.
4. Whether the defendant preserved a challenge to the qualification and admissibility of the State's expert testimony.
5. Whether trial counsel was ineffective for failing to renew a suppression motion, obtain independent testing and weighing, challenge the expert's qualifications, and object to the State's closing argument.
6. Whether the evidence was sufficient to support the convictions.
7. Whether the sentences were excessive.

HOLDINGS

1. Evidence derived from an electronic or mechanical measuring device is admissible to support a conviction when there is reasonable proof that the device was accurate and functioning properly. The forensic scientist's testimony about testing the scales with known weights provided sufficient foundation, and any assumed error concerning an outside company's calibration testimony was harmless.
2. The notebooks and notepads were not hearsay because they were offered as circumstantial evidence that Schwaderer possessed methamphetamine for sale and distribution, not to prove the truth of the statements contained in them.
3. Authentication is satisfied when evidence is sufficient to support a finding that the evidence is what its proponent claims; conclusive proof of genuineness is unnecessary. The notebooks and notepads were properly authenticated through testimony identifying them as the items seized from Schwaderer's vehicle and testimony that their contents were consistent with drug-transaction records.
4. The challenged jury instructions were not erroneous or prejudicial, and the defendant could not assert on appeal a different objection ground from the one offered at trial. The instructions, read together, correctly limited consideration of the notebooks and notepads to nonhearsay purposes.
5. Three ineffective-assistance claims could be resolved against Schwaderer on the existing record, but the claim concerning independent testing and weighing of the methamphetamine could not be resolved because the record was insufficient. Counsel was not ineffective for failing to pursue meritless

arguments, and no prejudice resulted from failing to challenge the expert's qualifications or the State's closing argument.

KEY QUOTATIONS

“A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.” (at 942)

“The district court’s instructions to the jury, read together and taken as a whole, correctly advised the jury that the notebooks and notepads were not to be considered for the truth of the matters asserted.” (at 944)

“Because the contraband discovered during a lawful search incident to an arrest provided the probable cause for the further warrantless search of the vehicle, the subsequent search did not violate the Fourth Amendment.” (at 948)

FACTUAL BACKGROUND

After Schwaderer was arrested for driving under suspension and false reporting, a search incident to arrest yielded packaged methamphetamine, cash, a digital scale, empty baggies, and notebooks and notepads containing writings the State characterized as drug-sale records. A later search at the county jail produced a smaller separately packaged amount of methamphetamine. At trial, Schwaderer admitted possession but argued that he was only a user and lacked intent to deliver; forensic testimony established the weight and purity of the methamphetamine, and an experienced narcotics-unit witness interpreted the notebooks and notepads as consistent with drug-sale ledgers.

PROCEDURAL HISTORY

Following a jury trial in the Lancaster County District Court, Schwaderer was convicted and sentenced to concurrent terms of imprisonment. He timely appealed, and the Nebraska Supreme Court moved the appeal to its docket. The Supreme Court affirmed, rejecting his evidentiary, jury-instruction, sufficiency-of-the-evidence, sentencing, and ineffective-assistance claims, while declining to resolve one ineffective-assistance claim because the record was insufficient on direct appeal.

DISPOSITION

affirmed

CASES CITED

- State v. Richardson, 285 Neb. 847, 830 N.W.2d 183 (2013)
- State v. Hale, 290 Neb. 70, 858 N.W.2d 543 (2015)
- State v. Custer, 292 Neb. 88, 871 N.W.2d 243 (2015)
- State v. Parnell, 294 Neb. 551, 883 N.W.2d 652 (2016)
- State v. Draper, 295 Neb. 88, 886 N.W.2d 266 (2016)
- Strickland v. Washington, 466 U.S. 668 (1984)

- State v. Casterline, 293 Neb. 41, 878 N.W.2d 38 (2016)
- State v. Elseman, 287 Neb. 134, 841 N.W.2d 225 (2014)
- State v. Samayoa, 292 Neb. 334, 873 N.W.2d 449 (2015)
- State v. Baker, 280 Neb. 752, 789 N.W.2d 702 (2010)
- State v. Smith, 292 Neb. 434, 873 N.W.2d 169 (2016)
- State v. Loding, ante p. 670, ____ N.W.2d ____ (2017)
- State v. Ely, 295 Neb. 607, 889 N.W.2d 377 (2017)
- United States v. Southard, 700 F.2d 1 (1st Cir. 1983)
- United States v. Wilson, 532 F.2d 641 (8th Cir. 1976)
- Collins v. State, 977 P.2d 741 (Ala. App. 1999)
- Guerra v. State, 897 P.2d 447 (Wyo. 1995)
- State v. Russell, 292 Neb. 501, 874 N.W.2d 8 (2016)