

SUPREME COURT OF NEBRASKA

State v. McGovern

311 Neb. 705 (2022) · No. No. S-21-144 · Decided June 10, 2022

SUMMARY

The Nebraska Supreme Court reviewed challenges to searches of a cell phone recovered near the scene of an alleged unlawful intrusion and to the admission of evidence concerning later sexual-assault offenses. The court addressed probable cause, warrant particularity, the plain view and independent source doctrines, and the good-faith exception to the exclusionary rule. It also considered whether probation for a Class II felony was excessively lenient and affirmed the district court’s judgment.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Per Curiam; Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Funke, J.; Papik, J.; Freudenberg, J.
JURISDICTION	Nebraska
DECIDED	June 10, 2022
DOCKET	No. S-21-144
DISPOSITION	affirmed
PROCEDURAL POSTURE	The State appealed the sentences as excessively lenient, and McGovern cross-appealed the denial of his motions to suppress evidence obtained from his cell phone. The Nebraska Supreme Court affirmed the district court's judgment.
STANDARD OF REVIEW	For a Fourth Amendment suppression ruling, historical facts are reviewed for clear error, while whether those facts trigger or violate Fourth Amendment protections is reviewed independently as a question of law. A sentence within statutory limits is reviewed for abuse of discretion, including whether it is excessively lenient.
PRECEDENTIAL VALUE	Published precedential opinion
PARTIES	State of Nebraska v. Jake J. McGovern

TOPICS

- search and seizure
- probable cause
- suppression of evidence
- criminal procedure
- sentencing

PRACTICE AREAS

criminal procedure

constitutional law

criminal evidence

sentencing

appellate procedure

QUESTIONS PRESENTED

1. Whether the initial cell-phone search warrant was supported by probable cause to search for photographs and videos of the alleged unlawful intrusion.
2. Whether the initial warrant satisfied the Fourth Amendment particularity and breadth requirements despite authorizing examination of broad categories of cell-phone data and lacking an express temporal limitation.
3. Whether investigators' viewing of videos depicting a different crime was within the scope of the initial warrant and permissible under the plain-view doctrine.
4. Whether evidence supporting the second warrant was unlawfully derived from the initial search or was admissible under an exclusionary-rule exception, including independent source.
5. Whether the sentences imposed, particularly probation for the Class II felony, were excessively lenient and constituted an abuse of discretion.

HOLDINGS

1. The initial warrant was supported by probable cause to search the cell phone for photographs and videos relating to the September 25, 2018, unlawful-intrusion incident.
2. The initial warrant satisfied the Fourth Amendment particularity requirement because it identified the specific offense, the categories of phone data to be examined, and, when read with the incorporated affidavit, the relevant date and time period.
3. Investigators lawfully viewed the videos depicting the sexual assault during execution of the initial warrant because viewing the videos was reasonably necessary to determine whether they contained evidence of unlawful intrusion, and the discovered evidence was within the warrant's authorized scope.
4. The district court properly denied the second motion to suppress because the evidence supporting the second warrant was lawfully observed during the initial search and therefore was not the product of an unlawful search requiring exclusion.
5. The sentences were not excessively lenient because they were within statutory limits and the district court did not abuse its discretion, particularly when the sentences were considered collectively.

KEY QUOTATIONS

“We have declared that a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search.”
(723)

“The most important constraint in preventing unconstitutional exploratory rummaging is that the warrant limit the search to evidence of a specific crime, ordinarily within a specific time period, rather than allowing a fishing expedition for all criminal activity.” (727-728)

“The ultimate touchstone of the Fourth Amendment is reasonableness.” (734)

“The standard is not what sentence we would have imposed.” (744)

FACTUAL BACKGROUND

Police recovered a cell phone along the flight path of a person observed looking through the bathroom window of an apartment where a woman was preparing to shower. A warrant authorized a search of the phone for evidence of unlawful intrusion, including photographs and videos. During that search, investigators viewed videos depicting a woman apparently unconscious and being sexually assaulted, identified the woman and the location as Hall County, and obtained a later warrant for evidence of first-degree sexual assault. McGovern was convicted of sexual-assault and recording-related offenses and received concurrent one-year prison terms for two offenses and 60 months of probation, including 90 days in jail, for the Class II felony.

PROCEDURAL HISTORY

After a cell phone found near the scene of an unlawful-intrusion investigation was searched pursuant to a warrant, investigators discovered videos depicting a possible sexual assault and obtained a later warrant concerning that offense. McGovern was charged in Hall County, convicted after a bench trial, and sentenced to imprisonment on two offenses and probation on a Class II felony. The district court initially granted one suppression motion, later denied a second motion to suppress, admitted the evidence at trial, and imposed the challenged sentences. Both parties appealed.

DISPOSITION

affirmed

CASES CITED

- State v. Short, 310 Neb. 81, 964 N.W.2d 272 (2021)
- State v. Gibson, 302 Neb. 833, 925 N.W.2d 678 (2019)
- State v. Said, 306 Neb. 314, 945 N.W.2d 152 (2020)
- State v. Hidalgo, 296 Neb. 912, 896 N.W.2d 148 (2017)
- District of Columbia v. Wesby, ___ U.S. ___, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018)
- State v. Kruse, 303 Neb. 799, 931 N.W.2d 148 (2019)
- State v. Jennings, 305 Neb. 809, 942 N.W.2d 753 (2020)
- Utah v. Strieff, 579 U.S. 232, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016)
- State v. Andera, 307 Neb. 686, 950 N.W.2d 102 (2020)
- Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)
- Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983)
- Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)
- State v. Oliveira-Coutinho, 291 Neb. 294, 865 N.W.2d 740 (2015)
- Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)

- Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)
- State v. Baxter, 295 Neb. 496, 888 N.W.2d 726 (2017)
- State v. Dyer, 298 Neb. 82, 902 N.W.2d 687 (2017)
- State v. Becker, 304 Neb. 693, 936 N.W.2d 505 (2019)
- State v. Morton, 310 Neb. 355, 966 N.W.2d 57 (2021)
- State v. Janis, 207 Neb. 491, 299 N.W.2d 447 (1980)
- State v. Parminter, 283 Neb. 754, 811 N.W.2d 694 (2012)
- State v. Decker, 261 Neb. 382, 622 N.W.2d 903 (2001)
- Tipp-It, Inc. v. Conboy, 257 Neb. 219, 596 N.W.2d 304 (1999)
- Riley v. California, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014)
- State v. Bock, 310 Or. App. 329, 485 P.3d 931 (2021)