No. A-17-675

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

STEVEN F. SHIFFERMILLER,

Appellant.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Honorable Robert Otte, District Court Judge

Reply Brief of Appellant

Respectfully submitted:

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Cases

PROPOSITIONS OF LAW

1) The Fourth Amendment to the U.S. Constitution and article I, Section 7 of the Nebraska Constitution govern the questions present in this case. Both provisions protect individuals against unreasonable searches and seizures by the government. *State v. Doman*, No. A-14-776, 7, 2015 Neb. App. LEXIS 56 (Ct. App. Mar. 24, 2015).

2) The Fourth Amendment requires that any search or seizure conducted by the government must be done so with a warrant supported by probable cause. *State v. Baker*, 298 Neb. 216, 227-8 (2017).

3) The government has the burden of establishing that an exception to the warrant requirement applies. See, e.g., *Chimel v. California*, 89 S. Ct. 2034 (1969); *Coolidge v. New Hampshire*, 91 S. Ct. 2022 (1971).

4) The Supreme Court of the United States has stated that search and seizure is reasonable under the community caretaking exception due to "the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

5) In adopting the community caretaking exception, the Nebraska Supreme Court emphasized "the narrow applicability of [the] exception…[it] should be narrowly and carefully applied in order to prevent its abuse." *State v. Bakewell*, 273 Neb. 372, 377, 730 N.W.2d 335 (2007).

ARGUMENT

As argued in Appellant's original brief, the lower court erred in denying Appellant's motion to suppress. The Fourth Amendment to the U.S. Constitution and article I, Section 7 of the Nebraska Constitution govern the questions present in this case. Both provisions protect individuals against unreasonable searches and seizures by the government. *State v. Doman*, No. A-14-776, 7, 2015 Neb. App. LEXIS 56 (Ct. App. Mar. 24, 2015). Generally, the Fourth Amendment requires that any search or seizure conducted by the government must be done so with a warrant supported by probable cause. *State v. Baker*, 298 Neb. 216, 227-8 (2017).

However, there are well delineated exceptions to the warrant requirement and in the event that the government does not procure a warrant, as it did in this case, it has the burden of arguing that an exception applies. See, e.g., *Chimel v. California*, 89 S. Ct. 2034 (1969); *Coolidge v. New Hampshire*, 91 S. Ct. 2022 (1971). In the absence of compliance or an exception to the warrant requirement, a court must suppress evidence to rectify illegal police conduct. The lower court has failed to suppress such evidence and this court should reverse to remedy the incorrect determination.

The State asserts that the detention, arrest, and searches of Appellant are in compliance with the Fourth Amendment. However, the State overlooks compelling recent caselaw and fails to fully explain the validity of the so called 'community caretaking' exception in Nebraska. All

arguments have no merit and therefore the search and seizure of the Appellant was unlawful under the fourth amendment. As will be more fully argued below, Appellant reiterates and respectfully requests that this court reverse and remand the lower court's denial of the motion to suppress for further proceedings.

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPRESS.

Whether an individual has been seized for purposes of the Fourth Amendment, depends on the level of contact between and citizen and police. As outlined in Appellant's original brief, there are three tiers of police citizen contact. Brief of Appellant, 11. The State argues that initial detention of Appellant was a lawful second tier *Terry* stop and "the remaining portion of the detention was lawful under the community caretaking exception to the Fourth Amendment." Brief of Appellee, 11; see *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). The State's argument that the second portion of the stop was not a violation of the Fourth Amendment rests solely on an exception that has not been adopted to the extent argued by the Appellee in Nebraska.

The State relies on the community caretaking exception announced by the Supreme Court of the United States in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) and narrowly adopted by the Nebraska Supreme Court in *State v. Bakewell*, 273 Neb. 372, 376-7, 730 N.W.2d 335 (2007). In both *Cady* and *Bakewell*, the Defendants were inside of vehicles which were driven erratically and dangerously. *Id.* Law enforcement in both cases seized or searched the vehicle to conduct a "safety check of the vehicle." *Bakewell* at 374. The court, specifically in *Cady*, stated that such search and seizure is reasonable under the community caretaking exception due to "the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways." *Cady* at 441.

Appellee argues that this exception should extend far beyond the context of a vehicle stop and search as accepted by the Nebraska Supreme Court. Specifically, Appellee cites to federal and sister state caselaw that is not controlling precedent in Nebraska, Brief of Appellee, 15-17. Using this law, the Appellee makes the argument that this exception applies to intoxicated individuals and mentally impaired individuals in the public. Namely, that an officer may seize any individual for an apparently indefinite amount of time when that officer reasonably believes that a person is a danger to himself or the community. Appellee fails to cite to a single Nebraska case in which this exception has been extended as broadly as the Appellee's argument. In fact, in all of the cases citing *Cady* and mentioning the term 'community caretaking' in Nebraska, the courts have consistently construed this exception **only** in the context of a vehicle stop. See, *Bakewell*, 273 Neb. 372; *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999); *State v. Rivera*, No. A-16-255, 2017 Neb. App. LEXIS 57 (Ct. App. Mar. 14, 2017); *State v. Rohde*, 22 Neb. App. 926, 864 N.W.2d 704 (2015); *State v. Moser*, 20 Neb. App. 209, 822 N.W.2d 424 (2012); *State v. Scovill*, 9 Neb. App. 118, 608 N.W.2d 623 (2000); *State v. Smith*, 4 Neb. App. 219, 540 N.W.2d 374 (1995); *State v. Butler*, 238 Neb. 560, 471 N.W.2d 447 (1991); *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986) (cited in concurring opinion); *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975).

There is no Nebraska case, to Appellant's knowledge, which applies the community caretaking exception so broadly. This is likely due to the Nebraska Supreme Court's statement that in accepting the exception it will apply it narrowly in Nebraska. Specifically, in adopting the exception, the court emphasized "the narrow applicability of this exception…[it] should be narrowly and carefully applied in order to prevent its abuse." *Bakewell* at 377. The State is

attempting to do exactly what the Supreme Court has cautioned against and abuse this narrow exception to justify their otherwise unlawful acts against the Appellant.

Further, Appellee fails to mention a factually similar Nebraska case where the Court of Appeals found that denial of a motion to suppress was unlawful. In *State v. Botts*, 25 Neb. App. 372 (Ct. App. Dec. 19, 2017), the defendant was believed to be intoxicated and in a roadway. *Id.* at 375. Officers stopped and observed the defendant to ensure that he was okay. *Id.* As a second officer arrived upon the scene, he informed the first officer that the defendant had been stopped earlier that night due to suspected driving under the influence. *Id.* 375-6. No officer asked whether the defendant was intoxicated or conducted field sobriety tests to determine whether he was under the influence. *Id.* Nevertheless, four (4) officers surrounded the defendant as the defendant became increasingly agitated. *Id.* Officers handcuffed the defendant and placed him in the back of a police cruiser. *Id.* Officer's then searched the defendant's car and found a machete. *Id.* The defendant was placed under arrest for possession of a concealed weapon. *Id.* The trial court determined under these facts that the defendant's motion to suppress was without merit. However, this court reversed and remanded the trial court's determination.

Similarly, in this case, Appellant was in the street at the time officers came upon him. He, according to officers, appeared to be intoxicated and was agitated at officer's questioning of him. Likewise, shortly after officers stopped the Appellant he was immediately placed in handcuffs for safety reasons. Brief of Appellant, 7; *Botts* at 376 (quoting officers placed the defendant in handcuffs for officer "safety and [the defendant's] safety). Appellant's effects were subsequently illegally searched with no probable cause to believe that a crime had been committed.

Given the similarity in facts between this case and *Botts*, and the Appellee's misapplication of the community caretaking exception in Nebraska this court should decide this case in a similar manner and determine that the Appellant's Fourth Amendment rights were violated at the point that law enforcement could not locate the other individual involved in the alleged altercation. At that point, there was no longer reasonable suspicion or probable cause to believe that a crime had been committed and as such any further intrusion upon the Appellant was unlawful. Specifically, the subsequent search of the Appellant was unlawful under the doctrine of fruit of the poisonous tree and therefore the lower court erred in its denial of the Appellant's motion to suppress.

CONCLUSION

The State's argument that the detention, arrest, and searches of Appellant was lawful has no basis in Nebraska law. By overlooking compelling recent caselaw and failing to establish that the community caretaking exception is applied so broadly in Nebraska, appellee fails to give this court an appropriate analysis of the law. Thus, the search and seizure of the Appellant was unlawful under the Fourth Amendment and this court should reverse and remand for further proceedings consistent with that determination.

Respectfully submitted,
Steven F. Shiffermiller, Appellant

By _____

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IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,	)	CASE NO. **A-17-695**
	)	
APPELLEE,	)	
	)	
v.	)	**APPELLANT'S PROOF OF SERVICE**
	)	
STEVEN SHIFFERMILLER,	)	
	)	
APPELLANT.	)	
	)	

STATE OF NEBRASKA)
) S.S.
LANCASTER COUNTY)

I, Matthew K. Kosmicki, being first duly sworn, depose and state that a copy of Reply Brief of Appellant was electronically served to the Appellee at the office of the Nebraska Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509-4906 on 1-2-18.

Matthew K. Kosmicki, #21875

Subscribed in my presence and sworn before me this January 2, 2018.

GENERAL NOTARY - State of Nebraska
KC M. FROHMAN
My Comm. Exp. March 22, 2020

Notary Public

CERTIFICATION OF SERVICE

The undersigned hereby certifies that a copy of this Proof of Service was electronically served on the Nebraska Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509-4906 on 1-2-18.

Matthew K. Kosmicki, #21875

Certificate of Service

I hereby certify that on Tuesday, January 02, 2018 I provided a true and correct copy of this *Reply Brief* to the following:

State of Nebraska represented by Nathan Andrew Liss (23730) service method: Electronic Service to **nathan.liss@nebraska.gov**

Signature: /s/ Matthew Kosmicki (21875)