

LETTER OPINION
96-L-210

November 7, 1996

Mr. Bruce A. Romanick
Assistant State's Attorney
514 E Thayer Ave
Bismarck, ND 58501

Dear Mr. Romanick:

Thank you for your letter concerning the authority of a law enforcement officer to seize property from pawnshops. You state that officers are present in a pawnshop pursuant to a municipal ordinance allowing inspection of the pawnshop and its records. You specifically ask whether property may be seized from the pawnshop pursuant to the plain view warrantless search exception when the officer observes the property in plain view and has probable cause to believe the property has been stolen.

A seizure of property involves a meaningful interference with a person's possessory interest in an item of personal property. State v. Kesler, 396 N.W.2d 729 (N.D. 1986). The Fourth Amendment protects people and not places. Katz v. United States, 389 U.S. 347 (1967). The Fourth Amendment protects a person's reasonable expectation of privacy in the property to be searched or seized. In the Fourth Amendment context, a possessory interest would be insufficient to automatically confer standing to contest the search procedure but, rather, would require a showing of a legitimate expectation of privacy in the premises to be searched or the property to be seized. United States v. Salvucci, 448 U.S. 83 (1980).

The reasonableness of a seizure under the Fourth Amendment is often viewed as the balancing of governmental and private interests. As recognized by the court in State v. Kesler, 396 N.W.2d at 732:

In United States v. Place, 462 U.S. 696, 705, 103 S. Ct. 2637, 2643, 77 L.Ed.2d 110, 119-120 (1983), the Court stated:

"The intrusion on possessory interests occasioned by a seizure of one's personal

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effects can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or, as here, from the immediate custody and control of the owner."

The Court in Place went on to state that in determining the reasonableness of the seizure, the nature and quality of the police intrusion on the individual's Fourth Amendment interests must be balanced against the importance of the governmental interests which are alleged to justify the intrusion. The Court continued, "When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." 462 U.S. at 703, 103 S.Ct. at 2642, 77 L.Ed.2d at 118.

Although the pawnshop owner may have a possessory interest in the personal property in the pawnshop, I have not found any authority to support a conclusion that the constitution vests a pawnshop owner with greater constitutional protections than any other business or person whose property is seized or premises is searched.

It is important to note the distinction between a governmental seizure of an item of personal property from a pawnshop for a legitimate criminal investigative purpose as opposed to a seizure for the sole purpose of immediately returning the property to the true owner. These events may invoke different constitutional protections. In Zumbo v. City of Oakland, 1996 W.L. 53637 (N.D. Cal. 1996), which has not been reported in the Federal Supplement, the district court concluded that a plain view seizure of a victim's property from Zumbo, a pawnbroker, did not violate Zumbo's federal constitutional rights since the property was seized for investigatory purposes and not solely to return the property to its owner. The court also found that the inference that the police may have had some other motive in addition to the legitimate seizure for investigation was "simply not relevant."

The "plain view" doctrine is a well established exception to the basic search warrant requirement. State v. Kottenbroch, 319 N.W.2d 465 (N.D. 1982). Although seizure of an item of personal property would invade an owner's possessory interest, neither observation nor

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seizure of such an item would involve any invasion of privacy for Fourth Amendment purposes if the article is already in plain view. Horton v. California, 496 U.S. 128 (1990).

If a law enforcement officer is in a lawful position to observe the item of personal property in plain view, the officer has probable cause to believe that the item of personal property is evidence, is an instrumentality of a criminal offense, or is contraband, and other requirements of the "plain view" doctrine have been satisfied, it is my opinion that the item of personal property could be seized lawfully by the law enforcement officer. If the "plain view" doctrine requirements have been met, the law enforcement officer would be justified under the Fourth Amendment in seizing the item of personal property whether it was located within a pawnshop, on a city street, in a barn, or in another type of business establishment. The constitution does not grant special constitutional treatment or protection to pawnshops.

State and federal courts have found the "plain view" doctrine to be applicable to seizure of items in pawnshops where law enforcement officials had probable cause to believe that such items were evidence or were contraband. G & G Jewelry, Inc. v. City of Oakland, 989 F.2d 1093 (9th Cir. 1993); Loustalot v. Rice, 764 F.Supp. 1080 (M.D. La. 1991); Christians v. Chester, 267 Cal. Rptr. 124 (1990).

Although the 10th Circuit Court of Appeals in Wolfenbarger v. Williams, 826 F.2d 930 (10th Cir. 1987), concluded that the plain view exception to the search warrant requirement did not apply to a seizure of stolen items from a pawnshop, a review of that decision discloses that it was founded upon the "inadvertency" requirement which had been previously imposed in "plain view" doctrine cases. In Wolfenbarger, the court found no exigent circumstances to justify seizure of stolen stereo equipment without a search warrant. The stolen items were seized several weeks after the law enforcement officials had first discovered them at the pawnshop. The officers knew the items would still be at the pawnshop because they had placed a hold on those items which had been honored by the pawnshop owner. The court also noted that it was "unclear what purpose the seizure served other than facilitating an informal replevin action for Mr. Loggins without the benefit of judicial proceedings. There is no indication that the stereo equipment was needed or used as evidence in a criminal case." Wolfenbarger, at 936. Wolfenbarger may be factually distinguishable from the situations normally facing North Dakota municipal law enforcement officers upon discovery of items which officers have probable cause to believe have been stolen. In addition, subsequent to Wolfenbarger, the United States Supreme Court

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in Horton v. California, 496 U.S. 128 (1990), declared that "inadvertency" was no longer a condition precedent for application of the "plain view" doctrine justifying warrantless seizures of evidence under the Fourth Amendment.

If a purpose of the seizure of evidence in accordance with the requirements of the "plain view" doctrine is for a criminal investigatory purpose, such items may be seized by law enforcement official without a search warrant. If, however, the law enforcement officials have seized the items for the sole purpose of returning the items to their lawful owner, different issues may be presented.

In addition to the question whether property may be seized under the plain view doctrine, due process may require notice to a pawnshop owner and an opportunity to be heard prior to return of the property to the lawful owner of that property. As noted previously, the pawnshop owner does have a possessory interest in the property that the pawnshop owner received upon a pledge or out-right purchase. The pawnbroker, however, may be entitled only to post-deprivation notice and opportunity for hearing upon disposition of stolen property. Sanders v. City of San Diego, 93 F.3d 1423 (9th Cir. 1996). The purchaser of goods acquires all title which his transferor had or had power to transfer, except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with a voidable title has power to transfer good title to a good faith purchaser for value. It has been held that a pawnbroker who has acquired possession of stolen property from a thief has a void title and not a voidable title. In Re Two (2) Bose Speakers, 835 P.2d 1385 (Kan. Ct. App. 1992). The pawnshop owner has the responsibility to determine the identity and ownership rights of persons from whom personal property is purchased. Shaw's D. B. & L. Inc. v. Fletcher, 580 S.W.2d 91 (Tex. Ct. Civ. App. 1979). Since the pawnbroker is the one who deals with the thief, the pawnbroker should bear the risk of accepting stolen property. In Re Two (2) Bose Speakers, 835 P.2d at 1388.

In summary, if the requirements of the "plain view" doctrine are met, a law enforcement official may seize items of personal property from a pawnshop without a search warrant. The pawnshop owner, however, may be entitled to a post-deprivation notice and opportunity to be heard prior to the return of the stolen property to the lawful owner of that property. At that hearing, the pawnshop owner would be permitted to assert the legal basis for a finding that the pawnshop's interest in the stolen property would be paramount to that of the legal owner from which it had been stolen.

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Sincerely,

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ATTORNEY GENERAL

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