CASE LAW

Crash Investigation

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104 S.Ct. 3138
Supreme Court of the United States

Harry J. BERKEMER, Sheriff of Franklin County, Ohio, Petitioner v. Richard N. McCARTY.

No. 83-710.
|
Argued April 18, 1984.
|
Decided July 2, 1984.

Synopsis
Motorist convicted of misdemeanor of operating a motor vehicle while under the influence of alcohol and/or drugs appealed from an order of the United States District Court for the Southern District of Ohio, Joseph P. Kinneary, J., denying his petition for habeas corpus. The Court of Appeals, 716 F.2d 361, reversed. Certiorari was granted. The Supreme Court, Justice Marshall, held that: (1) motorist's statements made at station house were inadmissible since, at least as of moment he was formally arrested following traffic stop and instructed to get into police car, he was "in custody" and since he had not been informed of his constitutional rights; (2) roadside questioning of motorist detained pursuant to routine traffic stop did not constitute "custodial interrogation" for purposes of Miranda rule, so that prearrest statements motorist made in answer to such questioning were admissible against motorist; and (3) determination of whether improper admission of motorist's postarrest statements constituted "harmless error" would not be made.

Affirmed.

Justice Stevens filed an opinion concurring in part and concurring in the judgment.

Syllabus[a1]

After observing respondent's car weaving in and out of a highway lane, an officer of the Ohio State Highway Patrol forced respondent to stop and asked him to get out of the car. Upon noticing that respondent was having difficulty standing, the officer concluded that respondent would be charged with a traffic offense and would not be allowed to leave the scene, but respondent was not told that he would be taken into custody. When respondent could not perform a field sobriety ****3140** test without falling, the officer asked him if he had been using intoxicants, and he replied that he had consumed two beers and had smoked marihuana a short time before. The officer then formally arrested respondent and drove him to a county jail, where a blood test failed to detect any alcohol in respondent's blood. Questioning was then resumed, and respondent again made incriminating statements, including an admission that he was "barely" under the influence of alcohol. At no point during this sequence was respondent given the warnings prescribed by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Respondent was charged with the misdemeanor under Ohio law of operating a motor vehicle while under the influence of alcohol and/or drugs, and when the state court denied his motion to exclude the various incriminating statements on the asserted ground that their admission into evidence would violate the Fifth Amendment because respondent had not been informed of his constitutional rights prior to his interrogation, he pleaded "no contest" and was convicted. After the conviction was affirmed on appeal by the Franklin County Court of Appeals and the Ohio Supreme Court denied review, respondent filed an action in Federal District Court for habeas corpus relief. The District Court dismissed the petition, but the Court of Appeals reversed, holding that Miranda warnings must be given to all individuals prior to custodial interrogation, whether the offense investigated is a felony or a misdemeanor traffic offense, and that respondent's postarrest statements, at least, were inadmissible.

Held:

1. A person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda, regardless of the nature or severity of the offense of which he is suspected or for which ***421** he was arrested. Thus, respondent's statements made at the station house were inadmissible since he was "in custody" at least as of the moment he was formally arrested and instructed to get into the police car, and since he was not informed of his constitutional rights at that time. To create an exception to the Miranda rule when the police arrest a person for allegedly committing a misdemeanor traffic offense and then question him without informing him of his constitutional rights would substantially undermine the rule's simplicity and clarity and would introduce doctrinal complexities, particularly with respect to situations where the police, in

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conducting custodial interrogations, do not know whether the person has committed a misdemeanor or a felony. The purposes of the Miranda safeguards as to ensuring that the police do not coerce or trick captive suspects into confessing, relieving the inherently compelling pressures generated by the custodial setting itself, and freeing courts from the task of scrutinizing individual cases to determine, after the fact, whether particular confessions were voluntary, are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies. Pp. 3144–3147.

2. The roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" for the purposes of the Miranda rule. Although an ordinary traffic stop curtails the "freedom of action" of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. A traffic stop is usually brief, and the motorist expects that, while he may be given a citation, in the end he most likely will be allowed to continue on his way. Moreover, the typical traffic stop is conducted in public, and the atmosphere surrounding it is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in Miranda and subsequent cases in which Miranda has been applied. However, if a motorist who has been detained ****3141** pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he is entitled to the full panoply of protections prescribed by Miranda. In this case, the initial stop of respondent's car, by itself, did not render him "in custody," and respondent has failed to demonstrate that, at any time between the stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Although the arresting officer apparently decided as soon as respondent stepped out of his car that he would be taken into custody and charged with a traffic offense, the officer never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the ***422** only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Since respondent was not taken into custody for the purposes of Miranda until he was formally arrested, his statements made prior to that point were admissible against him. Pp. 3147–3152.

3. A determination of whether the improper admission of respondent's postarrest statements constituted "harmless error" will not be made by this Court for the cumulative reasons that (i) the issue was not presented to the Ohio courts or to the federal courts below, (ii) respondent's admissions made at the scene of the traffic stop and the statements he made at the police station were not identical, and (iii) the procedural posture of the case makes the use of harmless-error analysis especially difficult because respondent, while preserving his objection to the denial of his pretrial motion to exclude the evidence, elected not to contest the prosecution's case against him and thus has not yet had an opportunity to try to impeach the State's evidence or to present evidence of his own. Pp. 3152–3153.

716 F.2d 361 (CA 6 1983) affirmed.

Attorneys and Law Firms

Alan C. Travis argued the cause for petitioner. With him on the briefs was *Stephen Michael Miller.*

R. William Meeks argued the cause for respondent. With him on the brief were *Paul D. Cassidy, Lawrence Herman,* and *Joel A. Rosenfeld.**

* *Anthony J. Celebrezze, Jr.,* Attorney General, and *Richard David Drake,* Assistant Attorney General, filed a brief for the State of Ohio as *amicus curiae* urging reversal.

Jacob D. Fuchsberg and *Charles S. Sims* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Opinion

Justice MARSHALL delivered the opinion of the Court.

This case presents two related questions: First, does our decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), govern the admissibility of statements made during custodial interrogation by a suspect accused of a misdemeanor traffic ***423** offense? Second, does the roadside questioning of a motorist detained pursuant to a traffic stop constitute custodial interrogation for the purposes of the doctrine enunciated in Miranda?

I

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A

The parties have stipulated to the essential facts. See App. to Pet. for Cert. A–1. On the evening of March 31, 1980, Trooper Williams of the Ohio State Highway Patrol observed respondent's car weaving in and out of a lane on Interstate Highway 270. After following the car for two miles, Williams forced respondent to stop and asked him to get out of the vehicle. When respondent complied, Williams noticed that he was having difficulty standing. At that point, "Williams concluded that [respondent] would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated." Id., at A–2. However, respondent was not told that he would be taken into custody. Williams then asked respondent to perform a field sobriety test, commonly known as a "balancing test." Respondent could not do so without falling.

While still at the scene of the traffic stop, Williams asked respondent whether he had been using intoxicants. Respondent replied that "he had consumed two beers and had smoked several joints of marijuana a short time before." Ibid. Respondent's speech was slurred, and Williams had difficulty understanding him. Williams thereupon formally placed respondent under arrest ****3142** and transported him in the patrol car to the Franklin County Jail.

At the jail, respondent was given an intoxilyzer test to determine the concentration of alcohol in his blood.[1] The test did not detect any alcohol whatsoever in respondent's system. Williams then resumed questioning respondent ***424** in order to obtain information for inclusion in the State Highway Patrol Alcohol Influence Report. Respondent answered affirmatively a question whether he had been drinking. When then asked if he was under the influence of alcohol, he said, "I guess, barely." Ibid. Williams next asked respondent to indicate on the form whether the marihuana he had smoked had been treated with any chemicals. In the section of the report headed "Remarks," respondent wrote, "No ang[el] dust or PCP in the pot. Rick McCarty." App. 2.

At no point in this sequence of events did Williams or anyone else tell respondent that he had a right to remain silent, to consult with an attorney, and to have an attorney appointed for him if he could not afford one.

B

Respondent was charged with operating a motor vehicle while under the influence of alcohol and/or drugs in violation of Ohio Rev.Code Ann. § 4511.19 (Supp.1983). Under Ohio law, that offense is a first-degree misdemeanor and is punishable by fine or imprisonment for up to six months. § 2929.21 (1982). Incarceration for a minimum of three days is mandatory. § 4511.99 (Supp.1983).

Respondent moved to exclude the various incriminating statements he had made to Trooper Williams on the ground that introduction into evidence of those statements would violate the Fifth Amendment insofar as he had not been informed of his constitutional rights prior to his interrogation. When the trial court denied the motion, respondent pleaded "no contest" and was found guilty.[2] He was sentenced to 90 ***425** days in jail, 80 of which were suspended, and was fined $300, $100 of which were suspended.

On appeal to the Franklin County Court of Appeals, respondent renewed his constitutional claim. Relying on a prior decision by the Ohio Supreme Court, which held that the rule announced in Miranda "is not applicable to misdemeanors," State v. Pyle, 19 Ohio St.2d 64, 249 N.E.2d 826 (1969), cert. denied, 396 U.S. 1007 (1970), the Court of Appeals rejected respondent's argument and affirmed his conviction. State v. McCarty, No. 80AP–680 (Mar. 10, 1981). The Ohio Supreme Court dismissed respondent's appeal on the ground that it failed to present a "substantial constitutional question." State v. McCarty, No. 81–710 (July 1, 1981).

Respondent then filed an action for a writ of habeas corpus in the District Court for the Southern District of Ohio.[3] The District Court dismissed the petition, holding that "Miranda warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense." McCarty v. Herdman, No. C–2–81–1118 (Dec. 11, 1981).

A divided panel of the Court of Appeals for the Sixth Circuit reversed, holding that ****3143** "Miranda warnings must be given to all individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense." McCarty v. Herdman, 716 F.2d 361, 363 (1983) (emphasis in original). In applying this principle to the facts of the case, the Court of Appeals distinguished between the statements made by respondent before and after his formal arrest.[4] The postarrest statements, the court ruled, were ***426** plainly inadmissible; because respondent was not warned of his constitutional rights prior to or "[a]t the point that Trooper Williams took [him] to the police station," his

ensuing admissions could not be used against him. Id., at 364. The court's treatment of respondent's prearrest statements was less clear. It eschewed a holding that "the mere stopping of a motor vehicle triggers Miranda," ibid., but did not expressly rule that the statements made by respondent at the scene of the traffic stop could be used against him. In the penultimate paragraph of its opinion, the court asserted that "[t]he failure to advise [respondent] of his constitutional rights rendered at least some of his statements inadmissible," ibid. (emphasis added), suggesting that the court was uncertain as to the status of the prearrest confessions.[5] "Because [respondent] was convicted on inadmissible evidence," the court deemed it necessary to vacate his conviction and order the District Court to issue a writ of habeas corpus. Ibid.[6] However, the Court of Appeals did not specify which statements, if any, could be used against respondent in a retrial.

We granted certiorari to resolve confusion in the federal and state courts regarding the applicability of our ruling in ***427** Miranda to interrogations involving minor offenses[7] and to questioning of motorists ****3144** detained pursuant to traffic stops.[8] 464 U.S. 1038, 104 S.Ct. 697, 79 L.Ed.2d 163 (1984).

***428** II

The Fifth Amendment provides: "No person ... shall be compelled in any criminal case to be a witness against himself...." It is settled that this provision governs state as well as federal criminal proceedings. Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964).

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court addressed the problem of how the privilege against compelled self-incrimination guaranteed by the Fifth Amendment could be protected from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation. The Court held:

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the ***429** following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id., at 444, 86 S.Ct., at 1612 (footnote omitted).

In the years since the decision in Miranda, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt.[9] See, e.g., Estelle v. Smith, 451 U.S. 454, 466–467, 101 S.Ct. 1866, 1875, 68 L.Ed.2d 359 (1981); Rhode Island v. Innis, 446 U.S. 291, 297–298, 100 S.Ct. 1682, 1687–1688, 64 L.Ed.2d 297 (1980) (dictum); ****3145** Orozco v. Texas, 394 U.S. 324, 326–327, 89 S.Ct. 1095, 1096–1097, 22 L.Ed.2d 311 (1969); Mathis v. United States, 391 U.S. 1, 3–5, 88 S.Ct. 1503, 1504–1505, 20 L.Ed.2d 381 (1968).[10]

Petitioner asks us to carve an exception out of the foregoing principle. When the police arrest a person for allegedly committing a misdemeanor traffic offense and then ask him questions without telling him his constitutional rights, petitioner argues, his responses should be admissible against him.[11] We cannot agree.

***430** One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule.

"Miranda's holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in Miranda imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." Fare v. Michael C., 442 U.S. 707, 718, 99 S.Ct. 2560, 2568, 61 L.Ed.2d 197 (1979).

The exception to Miranda proposed by petitioner would substantially undermine this crucial advantage of the doctrine. The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony.

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Consider, for example, the reasonably common situation in which the driver of a car involved in an accident is taken into custody. Under Ohio law, both driving while under the influence of intoxicants and negligent vehicular homicide are misdemeanors, Ohio Rev.Code Ann. §§ 2903.07, 4511.99 (Supp.1983), while reckless vehicular homicide is a felony, § 2903.06 (Supp.1983). When arresting a person for causing a collision, the police may not know which of these offenses he may have committed. Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed ***431** a similar offense[12] or has a criminal record of some other kind. It may even turn upon events yet to happen, such as whether a victim of the accident dies. It would be unreasonable to expect the police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect.[13]

****3146** Equally importantly, the doctrinal complexities that would confront the courts if we accepted petitioner's proposal would be Byzantine. Difficult questions quickly spring to mind: For instance, investigations into seemingly minor offenses sometimes escalate gradually into investigations into more serious matters;[14] at what point in the evolution of an affair of this sort would the police be obliged to give Miranda warnings to a suspect in custody? What evidence would be necessary to establish that an arrest for a misdemeanor offense ***432** was merely a pretext to enable the police to interrogate the suspect (in hopes of obtaining information about a felony) without providing him the safeguards prescribed by Miranda?[15] The litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement. And the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations.[16] Neither the police nor criminal defendants would benefit from such a development.

Absent a compelling justification we surely would be unwilling so seriously to impair the simplicity and clarity of the holding of Miranda. Neither of the two arguments proffered by petitioner constitutes such a justification. Petitioner first contends that Miranda warnings are unnecessary when a suspect is questioned about a misdemeanor traffic offense, because the police have no reason to subject such a suspect to the sort of interrogation that most troubled the Court in Miranda. We cannot agree that the dangers of police abuse are so slight in this context. For example, the offense of driving while intoxicated is increasingly regarded in many jurisdictions as a very serious matter.[17] Especially when the intoxicant at issue is a narcotic drug rather than alcohol, the police sometimes have difficulty obtaining evidence of this crime. Under such circumstances, the incentive for the police to try to induce the defendant to incriminate ***433** himself may well be substantial. Similar incentives are likely to be present when a person is arrested for a minor offense but the police suspect that a more serious crime may have been committed. See supra, at 3146.

We do not suggest that there is any reason to think improper efforts were made in this case to induce respondent to make damaging admissions. More generally, we have no doubt that, in conducting most custodial interrogations of persons arrested for misdemeanor traffic offenses, the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will. But the same might be said of custodial interrogations of persons arrested for felonies. The purposes of the safeguards prescribed by Miranda are to ensure that the police do not coerce or trick captive suspects into ****3147** confessing,[18] to relieve the " 'inherently compelling pressures' " generated by the custodial setting itself, " 'which work to undermine the individual's will to resist,' "[19] and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.[20] Those purposes are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies.

***434** Petitioner's second argument is that law enforcement would be more expeditious and effective in the absence of a requirement that persons arrested for traffic offenses be informed of their rights. Again, we are unpersuaded. The occasions on which the police arrest and then interrogate someone suspected only of a misdemeanor traffic offense are rare. The police are already well accustomed to giving Miranda warnings to persons taken into custody. Adherence to the principle that all suspects must be given such warnings will not significantly hamper the efforts of the police to investigate crimes.

We hold therefore that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda,[21] regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.

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The implication of this holding is that the Court of Appeals was correct in ruling that the statements made by respondent at the County Jail were inadmissible. There can be no question that respondent was "in custody" at least as of the moment he was formally placed under arrest and instructed to get into the police car. Because he was not informed of ***435** his constitutional rights at that juncture, respondent's subsequent admissions should not have been used against him.

III

To assess the admissibility of the self-incriminating statements made by respondent prior to his formal arrest, we are obliged to address a second issue concerning the scope of our decision in Miranda: whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered "custodial interrogation." ****3148** Respondent urges that it should,[22] on the ground that Miranda by its terms applies whenever "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," 384 U.S., at 444, 86 S.Ct., at 1612 (emphasis added); see id., at 467, 86 S.Ct., at 1624.[23] ***436** Petitioner contends that a holding that every detained motorist must be advised of his rights before being questioned would constitute an unwarranted extension of the Miranda doctrine.

It must be acknowledged at the outset that a traffic stop significantly curtails the "freedom of action" of the driver and the passengers, if any, of the detained vehicle. Under the law of most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission. E.g., Ohio Rev.Code Ann. § 4511.02 (1982).[24] Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.[25] Partly for these reasons, we have long acknowledged that "stopping an automobile and detaining its occupants constitute a 'seizure' ***437** within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief." Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979) (citations omitted).

However, we decline to accord talismanic power to the phrase in the Miranda opinion emphasized by respondent. Fidelity to the doctrine announced in Miranda requires that it be enforced strictly, but only ****3149** in those types of situations in which the concerns that powered the decision are implicated. Thus, we must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced "to speak where he would not otherwise do so freely," Miranda v. Arizona, 384 U.S., at 467, 86 S.Ct., at 1624. First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.[26] In this respect, ***438** questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek. See id., at 451, 86 S.Ct., at 1615.[27]

Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmosphere ***439** surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in Miranda itself, see 384 U.S., at 445, 491–498, 86 S.Ct., at 1612, 1636–1640, ****3150** and in the subsequent cases in which we have applied Miranda.[28]

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In both of these respects, the usual traffic stop is more analogous to a so-called "Terry stop," see Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), than to a formal arrest.[29] Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly[30] in order to "investigate the circumstances that provoke suspicion." United States v. Brignoni–Ponce, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975). "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' " Ibid. (quoting Terry v. Ohio, supra, 392 U.S., at 29, 88 S.Ct., at 1884.) Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him,[31] he must then be ***440** released.[32] The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of Miranda.

Respondent contends that to "exempt" traffic stops from the coverage of Miranda will open the way to widespread abuse. Policemen will simply delay formally arresting detained motorists, and will subject them to sustained and intimidating interrogation at the scene of their initial detention. Cf. State v. Roberti, 293 Or. 59, 95, 644 P.2d 1104, 1125 (1982) (Linde, J., dissenting) (predicting the emergence of a rule that "a person has not been significantly deprived of freedom of action for Miranda purposes as long as he is in his own car, even if it is surrounded by several patrol cars and officers with drawn weapons"), withdrawn on rehearing, 293 Or. 236, 646 P.2d 1341 (1982), cert. pending, No. 82–315. The net result, respondent contends, will be a serious threat to the rights that the Miranda doctrine is designed to protect.

We are confident that the state of affairs projected by respondent will not come to pass. It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam). If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda. See Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977) (per curiam).

****3151** ***441** Admittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that Miranda applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede the enforcement of the Nation's traffic laws—by compelling the police either to take the time to warn all detained motorists of their constitutional rights or to forgo use of self-incriminating statements made by those motorists—while doing little to protect citizens' Fifth Amendment rights.[33] The second would enable the police to circumvent the constraints on custodial interrogations established by Miranda.

Turning to the case before us, we find nothing in the record that indicates that respondent should have been given Miranda warnings at any point prior to the time Trooper Williams placed him under arrest. For the reasons indicated above, we reject the contention that the initial stop of respondent's car, by itself, rendered him "in custody." And respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Only a short period of time elapsed between the stop and the arrest.[34] At no point during that interval was respondent ***442** informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.[35] Nor do other aspects of the interaction of Williams and respondent support the contention that respondent was exposed to "custodial interrogation" at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him

to perform a simple balancing test at a location visible to passing motorists.[36] Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.

We conclude, in short, that respondent was not taken into custody for the purposes of Miranda until Williams arrested ****3152** him. Consequently, the statements respondent made prior to that point were admissible against him.

IV

We are left with the question of the appropriate remedy. In his brief, petitioner contends that, if we agree with the ***443** Court of Appeals that respondent's post-arrest statements should have been suppressed but conclude that respondent's pre-arrest statements were admissible, we should reverse the Court of Appeals' judgment on the ground that the state trial court's erroneous refusal to exclude the postarrest admissions constituted “harmless error” within the meaning of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Relying on Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972), petitioner argues that the statements made by respondent at the police station “were merely recitations of what respondent had already admitted at the scene of the traffic arrest” and therefore were unnecessary to his conviction. Brief for Petitioner 25. We reject this proposed disposition of the case for three cumulative reasons. First, the issue of harmless error was not presented to any of the Ohio courts, to the District Court, or to the Court of Appeals.[37] Though, when reviewing a judgment of a federal court, we have jurisdiction to consider an issue not raised below, see Carlson v. Green, 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 1470 n. 2, 64 L.Ed.2d 15 (1980), we are generally reluctant to do so, Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n. 2, 90 S.Ct. 1598, 1603 n. 2, 26 L.Ed.2d 142 (1970).[38]

Second, the admissions respondent made at the scene of the traffic stop and the statements he made at the police station were not identical. Most importantly, though respondent at the scene admitted having recently drunk beer and smoked marihuana, not until questioned at the station did he ***444** acknowledge being under the influence of intoxicants, an essential element of the crime for which he was convicted.[39] This fact assumes significance in view of the failure of the intoxilyzer test to discern any alcohol in his blood.

Third, the case arises in a procedural posture that makes the use of harmless-error analysis especially difficult.[40] This is not a case in which a defendant, after denial of a suppression motion, is given a full trial resulting in his conviction. Rather, after the trial court ruled that all of respondent's self-incriminating statements were admissible, respondent elected not to contest the prosecution's case against him, while preserving his objection to the denial of his pretrial motion.[41] As a result, respondent has not yet had an opportunity to try to impeach the State's evidence or to present evidence of his own. For example, respondent alleges that, at the time of his arrest, he had an injured back and a limp[42] and that those ailments ****3153** accounted for his difficulty getting out of the car and performing the balancing test; because he pleaded “no contest,” he never had a chance to make that argument to a jury. It is difficult enough, on the basis of a complete record of a trial and the parties' contentions regarding the relative importance of each portion of the evidence presented, to determine whether the erroneous admission of particular material affected the outcome. Without the benefit of such a record in this case, we decline to rule that ***445** the trial court's refusal to suppress respondent's postarrest statements “was harmless beyond a reasonable doubt.” See Chapman v. California, 386 U.S., at 24, 87 S.Ct., at 828.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice STEVENS, concurring in part and concurring in the judgment.

The only question presented by the petition for certiorari reads as follows:
“Whether law enforcement officers must give ‘Miranda warnings' to individuals arrested for misdemeanor traffic offenses.”

In Parts I, II, and IV of its opinion, the Court answers that question in the affirmative and explains why that answer requires that the judgment of the Court of Appeals be affirmed. Part III of the Court's opinion is written for the purpose of discussing the admissibility of statements made by respondent “prior to his formal arrest,” see ante, at 3147. That discussion is not necessary to the disposition of the case, nor necessary to answer the only question presented by the certiorari petition. Indeed, the Court of Appeals quite properly did not pass on the question answered in Part III since it was entirely unnecessary to the judgment in this case.

It thus wisely followed the cardinal rule that a court should not pass on a constitutional question in advance of the necessity of deciding it. See, e.g., Ashwander v. TVA, 297 U.S. 288, 346, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

Lamentably, this Court fails to follow the course of judicial restraint that we have set for the entire federal judiciary. In this case, it appears the reason for reaching out to decide a question not passed upon below and unnecessary to the judgment is that the answer to the question upon which we granted review is so clear under our settled precedents that the majority—its appetite for deciding constitutional questions ***446** only whetted—is driven to serve up a more delectable issue to satiate it. I had thought it clear, however, that no matter how interesting or potentially important a determination on a question of constitutional law may be, "broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court." Barr v. Matteo, 355 U.S. 171, 172, 78 S.Ct. 204, 205, 2 L.Ed.2d 179 (1957) (per curiam). Indeed, this principle of restraint grows in importance the more problematic the constitutional issue is. See New York v. Uplinger, 467 U.S. 246, 251, 104 S.Ct. 2332, 2334, 81 L.Ed.2d 201 (1984) (STEVENS, J., concurring).

Because I remain convinced that the Court should abjure the practice of reaching out to decide cases on the broadest grounds possible, e.g., United States v. Doe, 465 U.S. 605, 619–620, 104 S.Ct. 1237, 1246, 79 L.Ed.2d 552 (STEVENS, J., concurring in part and dissenting in part); Grove City College v. Bell, 465 U.S. 555, 579, 104 S.Ct. 1211, 1225, 79 L.Ed.2d 516 (STEVENS, J., concurring in part and concurring in result); Colorado v. Nunez, 465 U.S. 324, 327–328, 104 S.Ct. 1257, 1259, 79 L.Ed.2d 338 (1984) (STEVENS, J., concurring); United States v. Gouveia, 467 U.S. 180, 193, 104 S.Ct. 2292, 2300, 81 L.Ed.2d 146 (1984) (STEVENS, J., concurring in judgment); Firefighters v. Stotts, 467 U.S. 561, 590–591, 104 S.Ct. 2576, 2594, 81 L.Ed.2d 483 (1984) (STEVENS, J., concurring in judgment); see also, ****3154** University of California Regents v. Bakke, 438 U.S. 265, 411–412, 98 S.Ct. 2733, 2809–2810, 57 L.Ed.2d 750 (1978) (STEVENS, J., concurring in judgment in part and dissenting in part); Monell v. New York City Dept. of Social Services, 436 U.S. 658, 714, 98 S.Ct. 2018, 2047, 56 L.Ed.2d 611 (1978) (STEVENS, J., concurring in part); cf. Snepp v. United States, 444 U.S. 507, 524–525, 100 S.Ct. 763, 773–774, 62 L.Ed.2d 704 (1980) (STEVENS, J., dissenting), I do not join Part III of the Court's opinion.

All Citations

468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317

Footnotes

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 For a description of the technology associated with the intoxilyzer test, see California v. Trombetta, 467 U.S. 479, 481–482, 104 S.Ct. 2528, 2530–2531, 81 L.Ed.2d 413 (1984).

2 Ohio Rev.Code Ann. § 2937.07 (1982) provides, in pertinent part: "If the plea be 'no contest' or words of similar import in pleading to a misdemeanor, it shall constitute a stipulation that the judge or magistrate may make [a] finding of guilty or not guilty from the explanation of circumstances, and if guilt be found, impose or continue for sentence accordingly."

Ohio Rule of Criminal Procedure 12(H) provides: "The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

3 On respondent's motion, the state trial court stayed execution of respondent's sentence pending the outcome of his application for a writ of habeas corpus. State v. McCarty, No. 80–TF–C–123915 (Franklin County Mun.Ct., July 28, 1981).

4 In differentiating respondent's various admissions, the Court of Appeals accorded no significance to the parties' stipulation that respondent's "freedom to leave the scene was terminated" at the moment Trooper Williams formed an intent to arrest respondent. The court reasoned that a " 'reasonable man' test," not a subjective standard, should control the

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determination of when a suspect is taken into custody for the purposes of Miranda. McCarty v. Herdman, 716 F.2d, at 362, n. 1 (quoting Lowe v. United States, 407 F.2d 1391, 1397 (CA9 1969)).

5 Judge Wellford, dissenting, observed: “As I read the opinion, the majority finds that McCarty was not in custody until he was formally placed under arrest.” 716 F.2d, at 364. The majority neither accepted nor disavowed this interpretation of its ruling.

6 Judge Wellford's dissent was premised on his view that the incriminating statements made by respondent after he was formally taken into custody were “essentially repetitious” of the statements he made before his arrest. Reasoning that the prearrest statements were admissible, Judge Wellford argued that the trial court's failure to suppress the postarrest statements was “harmless error.” Id., at 365.

7 In Clay v. Riddle, 541 F.2d 456 (1976), the Court of Appeals for the Fourth Circuit held that persons arrested for traffic offenses need not be given Miranda warnings. Id., at 457. Several state courts have taken similar positions. See State v. Bliss, 238 A.2d 848, 850 (Del.1968); County of Dade v. Callahan, 259 So.2d 504, 507 (Fla.App.1971), cert. denied, 265 So.2d 50 (Fla.1972); State v. Gabrielson, 192 N.W.2d 792, 796 (Iowa 1971), cert. denied, 409 U.S. 912, 93 S.Ct. 239, 34 L.Ed.2d 173 (1972); State v. Angelo, 251 La. 250, 254–255, 203 So.2d 710, 711–717 (1967); State v. Neal, 476 S.W.2d 547, 553 (Mo.1972); State v. Macuk, 57 N.J. 1, 15–16, 268 A.2d 1, 9 (1970). Other state courts have refused to limit in this fashion the reach of Miranda. See Campbell v. Superior Court, 106 Ariz. 542, 552, 479 P.2d 685, 695 (1971); Commonwealth v. Brennan, 386 Mass. 772, 775, 438 N.E.2d 60, 63 (1982); State v. Kinn, 288 Minn. 31, 35, 178 N.W.2d 888, 891 (1970); State v. Lawson, 285 N.C. 320, 327–328, 204 S.E.2d 843, 848 (1974); State v. Fields, 294 N.W.2d 404, 409 (N.D.1980) (Miranda applicable at least to “more serious [traffic] offense[s] such as driving while intoxicated”); State v. Buchholz, 11 Ohio St.3d 24, 28, 462 N.E.2d 1222, 1226 (1984) (overruling State v. Pyle, 19 Ohio St.2d 64, 249 N.E.2d 826 (1969), cert. denied, 396 U.S. 1007, 90 S.Ct. 560, 24 L.Ed.2d 498 (1970), and holding that “Miranda warnings must be given prior to any custodial interrogation regardless of whether the individual is suspected of committing a felony or misdemeanor”); State v. Roberti, 293 Or. 59, 644 P.2d 1104, on rehearing, 293 Ore. 236, 646 P.2d 1341 (1982), cert. pending, No. 82–315; Commonwealth v. Meyer, 488 Pa. 297, 305–306, 412 A.2d 517, 521 (1980); Holman v. Cox, 598 P.2d 1331, 1333 (Utah 1979); State v. Darnell, 8 Wash.App. 627, 628, 508 P.2d 613, 615, cert. denied, 414 U.S. 1112, 94 S.Ct. 842, 38 L.Ed.2d 739 (1973).

8 The lower courts have dealt with the problem of roadside questioning in a wide variety of ways. For a spectrum of positions, see State v. Tellez, 6 Ariz.App. 251, 256, 431 P.2d 691, 696 (1967) (Miranda warnings must be given as soon as the policeman has “reasonable grounds” to believe the detained motorist has committed an offense); Newberry v. State, 552 S.W.2d 457, 461 (Tex.Crim.App.1977) (Miranda applies when there is probable cause to arrest the driver and the policeman “consider[s the driver] to be in custody and would not ... let him leave”); State v. Roberti, 293 Or., at 236, 646 P.2d, at 1341 (Miranda applies as soon as the officer forms an intention to arrest the motorist); People v. Ramirez, 199 Colo. 367, 372, n. 5, 609 P.2d 616, 618, n. 5 (1980) (en banc); State v. Darnell, supra, 8 Wash.App. at 629–630, 508 P.2d, at 615 (driver is “in custody” for Miranda purposes at least by the time he is asked to take a field sobriety test); Commonwealth v. Meyer, supra, 488 Pa. at 307, 412 A.2d, at 521–522 (warnings are required as soon as the motorist “reasonably believes his freedom of action is being restricted”); Lowe v. United States, supra, at 1394, 1396; State v. Sykes, 285 N.C. 202, 205–206, 203 S.E.2d 849, 850 (1974) (Miranda is inapplicable to a traffic stop until the motorist is subjected to formal arrest or the functional equivalent thereof); Allen v. United States, 129 U.S.App.D.C. 61, 63–64, 390 F.2d 476, 478–479 (“[S] ome inquiry can be made [without giving Miranda warnings] as part of an investigation notwithstanding limited and brief restraints by the police in their effort to screen crimes from relatively routine mishaps”), modified, 131 U.S.App.D.C. 358, 404 F.2d 1335 (1968); Holman v. Cox, supra, at 1333 (Miranda applies upon formal arrest).

9 In Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the Court did sanction use of statements obtained in violation of Miranda to impeach the defendant who had made them. The Court was careful to note, however, that the jury had been instructed to consider the statements “only in passing on [the defendant's] credibility and not as evidence of guilt.” 401 U.S., at 223, 91 S.Ct., at 644.

10 The one exception to this consistent line of decisions is New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984). The Court held in that case that, when the police arrest a suspect under circumstances presenting an imminent

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danger to the public safety, they may without informing him of his constitutional rights ask questions essential to elicit information necessary to neutralize the threat to the public. Once such information has been obtained, the suspect must be given the standard warnings.

11 Not all of petitioner's formulations of his proposal are consistent. At some points in his brief and at oral argument, petitioner appeared to advocate an exception solely for drunken-driving charges; at other points, he seemed to favor a line between felonies and misdemeanors. Because all of these suggestions suffer from similar infirmities, we do not differentiate among them in the ensuing discussion.

12 Thus, under Ohio law, while a first offense of negligent vehicular homicide is a misdemeanor, a second offense is a felony. Ohio Rev.Code Ann. § 2903.07 (Supp.1983). In some jurisdictions, a certain number of convictions for drunken driving triggers a quantum jump in the status of the crime. In South Dakota, for instance, first and second offenses for driving while intoxicated are misdemeanors, but a third offense is a felony. See Solem v. Helm, 463 U.S. 277, 280, n. 4, 103 S.Ct. 3001, 3005, n. 4, 77 L.Ed.2d 637 (1983).

13 Cf. Welsh v. Wisconsin, 466 U.S. 740, 761, 104 S.Ct. 2091, 2103, 80 L.Ed.2d 732 (1984) (WHITE, J., dissenting) (observing that officers in the field frequently "have neither the time nor the competence to determine" the severity of the offense for which they are considering arresting a person).

It might be argued that the police would not need to make such guesses; whenever in doubt, they could ensure compliance with the law by giving the full Miranda warnings. It cannot be doubted, however, that in some cases a desire to induce a suspect to reveal information he might withhold if informed of his rights would induce the police not to take the cautious course.

14 See, e.g., United States v. Schultz, 442 F.Supp. 176 (Md.1977) (investigation of erratic driving developed into inquiry into narcotics offenses and terminated in a charge of possession of a sawed-off shotgun); United States v. Hatchel, 329 F.Supp. 113 (Mass.1971) (investigation into offense of driving the wrong way on a one-way street yielded a charge of possession of a stolen car).

15 Cf. United States v. Robinson, 414 U.S. 218, 221, n. 1, 94 S.Ct. 467, 470, n. 1, 38 L.Ed.2d 427 (1973); id., at 238, n. 2, 94 S.Ct., at 494, n. 2 (POWELL, J., concurring) (discussing the problem of determining if a traffic arrest was used as a pretext to legitimate a warrantless search for narcotics).

16 Cf. New York v. Quarles, 467 U.S., at 663–664, 104 S.Ct., at 2636 (O'CONNOR, J., concurring in judgment in part and dissenting in part).

17 See Brief for State of Ohio as Amicus Curiae 18–21 (discussing the "National Epidemic Of Impaired Drivers" and the importance of stemming it); cf. South Dakota v. Neville, 459 U.S. 553, 558–559, 103 S.Ct. 916, 920–921, 74 L.Ed.2d 748 (1983); Perez v. Campbell, 402 U.S. 637, 657, 672, 91 S.Ct. 1704, 1715–1722, 29 L.Ed.2d 233 (1971) (BLACKMUN, J., concurring in part and dissenting in part).

18 See Rhode Island v. Innis, 446 U.S. 291, 299, 301, 100 S.Ct. 1682, 1688–1689, 64 L.Ed.2d 297 (1980); Miranda v. Arizona, 384 U.S. 436, 445–458, 86 S.Ct. 1602, 1612–1619, 16 L.Ed.2d 694 (1966).

19 Minnesota v. Murphy, 465 U.S. 420, 430, 104 S.Ct. 1136, 1143, 79 L.Ed.2d 409 (1984) (quoting Miranda v. Arizona, supra, 384 U.S., at 467, 86 S.Ct., at 1624); see Estelle v. Smith, 451 U.S. 454, 467, 101 S.Ct. 1866, 1875, 68 L.Ed.2d 359 (1981); United States v. Washington, 431 U.S. 181, 187, n. 5, 97 S.Ct. 1814, 1819, n. 5, 52 L.Ed.2d 238 (1977).

20 Cf. Developments in the Law—Confessions, 79 Harv.L.Rev. 935, 954–984 (1966) (describing the difficulties encountered by state and federal courts, during the period preceding the decision in Miranda, in trying to distinguish voluntary from involuntary confessions).

We do not suggest that compliance with Miranda conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was "compelled" despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.

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21 The parties urge us to answer two questions concerning the precise scope of the safeguards required in circumstances of the sort involved in this case. First, we are asked to consider what a State must do in order to demonstrate that a suspect who might have been under the influence of drugs or alcohol when subjected to custodial interrogation nevertheless understood and freely waived his constitutional rights. Second, it is suggested that we decide whether an indigent suspect has a right, under the Fifth Amendment, to have an attorney appointed to advise him regarding his responses to custodial interrogation when the alleged offense about which he is being questioned is sufficiently minor that he would not have a right, under the Sixth Amendment, to the assistance of appointed counsel at trial, see Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). We prefer to defer resolution of such matters to a case in which law enforcement authorities have at least attempted to inform the suspect of rights to which he is indisputably entitled.

22 In his brief, respondent hesitates to embrace this proposition fully, advocating instead a more limited rule under which questioning of a suspect detained pursuant to a traffic stop would be deemed "custodial interrogation" if and only if the police officer had probable cause to arrest the motorist for a crime. See Brief for Respondent 39–40, 46. This ostensibly more modest proposal has little to recommend it. The threat to a citizen's Fifth Amendment rights that Miranda was designed to neutralize has little to do with the strength of an interrogating officer's suspicions. And, by requiring a policeman conversing with a motorist constantly to monitor the information available to him to determine when it becomes sufficient to establish probable cause, the rule proposed by respondent would be extremely difficult to administer. Accordingly, we confine our attention below to respondent's stronger argument: that all traffic stops are subject to the dictates of Miranda.

23 It might be argued that, insofar as the Court of Appeals expressly held inadmissible only the statements made by respondent after his formal arrest, and respondent has not filed a cross-petition, respondent is disentitled at this juncture to assert that Miranda warnings must be given to a detained motorist who has not been arrested. See, e.g., United States v. Reliable Transfer Co., 421 U.S. 397, 401, n. 2, 95 S.Ct. 1708, 1711 n. 2, 44 L.Ed.2d 251 (1975). However, three considerations, in combination, prompt us to consider the question highlighted by respondent. First, as indicated above, the Court of Appeals' judgment regarding the time at which Miranda became applicable is ambiguous; some of the court's statements cast doubt upon the admissibility of respondent's prearrest statements. See supra, at 3142–3143. Without undue strain, the position taken by respondent before this Court thus might be characterized as an argument in support of the judgment below, which respondent is entitled to make. Second, the relevance of Miranda to the questioning of a motorist detained pursuant to a traffic stop is an issue that plainly warrants our attention, and with regard to which the lower courts are in need of guidance. Third and perhaps most importantly, both parties have briefed and argued the question. Under these circumstances, we decline to interpret and apply strictly the rule that we will not address an argument advanced by a respondent that would enlarge his rights under a judgment, unless he has filed a cross-petition for certiorari.

24 Examples of similar provisions in other States are: Ariz.Rev.Stat.Ann. §§ 28–622, 28–622.01 (1976 and Supp.1983–1984); Cal.Veh.Code Ann. §§ 2800, 2800.1 (West Supp.1984); Del.Code Ann., Tit. 21, § 4103 (1979); Fla.Stat. § 316.1935 (Supp.1984); Ill.Rev.Stat., ch. 95 ½, ¶ 11–204 (1983); N.Y.Veh. & Traf.Law § 1102 (McKinney Supp.1983–1984); Nev.Rev.Stat. § 484.348(1) (1983); 75 Pa.Cons.Stat. § 3733(a) (1977); Wash.Rev.Code § 46.61.020 (1983).

25 Indeed, petitioner frankly admits that "[n]o reasonable person would feel that he was free to ignore the visible and audible signal of a traffic safety enforcement officer.... Moreover, it is nothing short of sophistic to state that a motorist ordered by a police officer to step out of his vehicle would reasonabl[y] or prudently believe that he was at liberty to ignore that command." Brief for Petitioner 16–17.

26 State laws governing when a motorist detained pursuant to a traffic stop may or must be issued a citation instead of taken into custody vary significantly, see Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 402, n. a (5th ed. 1980), but no State requires that a detained motorist be arrested unless he is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate. For a representative sample of these provisions, see Ariz.Rev.Stat.Ann. §§ 28–1053, 28–1054 (1976); Ga.Code Ann. § 40–13–53 (Supp.1983); Kan.Stat.Ann. §§ 8–2105, 8–2106 (1982); Nev.Rev.Stat. §§ 484.793, 484.795, 484.797, 484.799, 484.805 (1983); Ore.Rev.Stat. § 484.353 (1983); S.D. Codified Laws § 32–33–2 (Supp.1983); Tex.Rev.Civ.Stat.Ann., Art. 6701d, §§ 147, 148 (Vernon 1977); Va.Code § 46.1–178 (Supp.1983). Cf. National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code and Model Traffic Ordinance §§ 16–203–16–206 (Supp.1979) (advocating mandatory release on citation of all drivers except

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those charged with specified offenses, those who fail to furnish satisfactory self-identification, and those as to whom the officer has "reasonable and probable grounds to believe ... will disregard a written promise to appear in court").

27 The brevity and spontaneity of an ordinary traffic stop also reduces the danger that the driver through subterfuge will be made to incriminate himself. One of the investigative techniques that Miranda was designed to guard against was the use by police of various kinds of trickery—such as "Mutt and Jeff" routines—to elicit confessions from suspects. See 384 U.S., at 448–455, 86 S.Ct., at 1614–1617. A police officer who stops a suspect on the highway has little chance to develop or implement a plan of this sort. Cf. LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich.L.Rev. 39, 99 (1968).

28 See Orozco v. Texas, 394 U.S. 324, 325, 89 S.Ct. 1095, 1096, 22 L.Ed.2d 311 (1969) (suspect arrested and questioned in his bedroom by four police officers); Mathis v. United States, 391 U.S. 1, 2–3, 88 S.Ct. 1503, 1503–1504, 20 L.Ed.2d 381 (1968) (defendant questioned by a Government agent while in jail).

29 No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in Terry. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a Terry stop.

30 Nothing in this opinion is intended to refine the constraints imposed by the Fourth Amendment on the duration of such detentions. Cf. Sharpe v. United States, 712 F.2d 65 (CA4 1983), cert. granted, 467 U.S. 1250, 104 S.Ct. 3531, 82 L.Ed.2d 837 (1984).

31 Cf. Adams v. Williams, 407 U.S. 143, 148, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612 (1972).

32 Cf. Terry v. Ohio, 392 U.S., at 34, 88 S.Ct., at 1886 (WHITE, J., concurring).

33 Contrast the minor burdens on law enforcement and significant protection of citizens' rights effected by our holding that Miranda governs custodial interrogation of persons accused of misdemeanor traffic offenses. See supra, at 3147–3148.

34 Cf. Commonwealth v. Meyer, 488 Pa., at 301, 307, 412 A.2d, at 518–519, 522 (driver who was detained for over one-half hour, part of the time in a patrol car, held to have been in custody for the purposes of Miranda by the time he was questioned concerning the circumstances of an accident).

35 Cf. Beckwith v. United States, 425 U.S. 341, 346–347, 96 S.Ct. 1612, 1616–1617, 48 L.Ed.2d 1 (1976) (" 'It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the Miranda requirements with regard to custodial questioning' ") (quoting United States v. Caiello, 420 F.2d 471, 473 (CA2 1969)); People v. P., 21 N.Y.2d 1, 9–10, 286 N.Y.S.2d 225, 232, 233 N.E.2d 255, 260 (1967) (an objective, reasonable-man test is appropriate because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question").

36 Cf. United States v. Schultz, 442 F.Supp., at 180 (suspect who was stopped for erratic driving, subjected to persistent questioning in the squad car about drinking alcohol and smoking marihuana, and denied permission to contact his mother held to have been in custody for the purposes of Miranda by the time he confessed to possession of a sawed-off shotgun).

37 Judge Wellford, dissenting in the Court of Appeals, did address the issue of harmless error, see n. 6, supra, but without the benefit of briefing by the parties. The majority of the panel of the Court of Appeals did not consider the question.

38 Nor did petitioner mention harmless error in his petition to this Court. Absent unusual circumstances, cf. n. 23, supra, we are chary of considering issues not presented in petitions for certiorari. See this Court's Rule 21.1(a) ("Only the questions set forth in the petition or fairly included therein will be considered by the Court").

39 This case is thus not comparable to Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972), in which a confession presumed to be inadmissible contained no information not already provided by three admissible confessions. See id., at 375–376, 92 S.Ct., at 2177.

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40 Because we do not rule that the trial court's error was harmless, we need not decide whether harmless-error analysis is even applicable to a case of this sort.

41 Under Ohio law, respondent had a right to pursue such a course. See n. 2, supra.

42 Indeed, respondent points out that he told Trooper Williams of these ailments at the time of his arrest, and their existence was duly noted in the Alcohol Influence Report. See App. 2.

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333 Pa.Super. 382
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania
v.
Gerald LANDAMUS, Appellant.

Submitted May 4, 1984.
|
Filed Sept. 28, 1984.

Synopsis

Defendant was convicted in the Court of Common Pleas of Luzerne County, Criminal Division, at No. 150, 1981, Dalessandro, J., of burglary, and defendant appealed. The Superior Court, No. 1350 Philadelphia, 1983, Del Sole, J., held that since there was no probable cause to believe that defendant's car, which had been parked at curb adjacent to his property for approximately 14 days subsequent to the burglary, would yield evidence of the crime, no exigent circumstances, and no lawful inventory search or search pursuant to valid warrant, jewels seized from car without a search warrant should have been suppressed at trial.

Vacated and remanded.

Attorneys and Law Firms

****621** ***386** Philip T. Medico, Jr., Asst. Public Defender, Wilkes-Barre, for appellant.

Joseph Giebus, Asst. Dist. Atty., Wilkes-Barre, for Commonwealth, appellee.

Before CIRILLO, DEL SOLE and POPOVICH, JJ.

Opinion

DEL SOLE, Judge:

This appeal was taken from the Judgment of Sentence from a burglary conviction. The issue raised is whether physical evidence found from the search of Appellant's vehicle was properly admitted into trial.

The crucial facts are that on January 2, 1981, the Stella residence in Plains Township was burglarized and several pieces of jewelry were taken. Two weeks later on January 16, 1981, Dominick Augustine, a neighbor of the Stella's, accompanied police to Wilkes-Barre where he identified Appellant's automobile as being the same as the one he had seen near the Stella home on the night of the burglary. The original description he gave police was that the car was a blue Dodge, Pennsylvania license No. DDU 660, 760 or 670, and the car identified was a blue Dodge No. BBU–670. Appellant's car, which was parked at the curb adjacent to his property, was impounded. The car was reported by Whitney Klein, a neighbor and friend of Landamus', to have not been driven for two weeks (which would have been the night of the robbery). It is not clear from the record whether Appellant was arrested and charged with the burglary and theft prior to the impoundment of his vehicle. Both events, however, occurred within a short time of each other on January 16, 1981. Appellant was arrested in his home. Prior to applying to a magistrate on January 19 for ***387** a warrant to search the car, police made an inventory search. A diamond pin, a pair of earrings initialed with an "A" and an aqua-colored earring were found on and under the seats. Mrs. Stella identified them as her missing jewelry. The warrant was granted on the 19th, and a second search produced no new items.

The search warrant used to inventory the car was found to be invalidly executed by the Common Pleas Court under ****622** *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. U.S.,* 393 U.S. 410, 80 S.Ct. 584, 21 L.Ed.2d 637 (1969).

We must decide whether the impounding and inventorying of Appellant's vehicle without a warrant was lawful.

The Commonwealth claims that the items were properly discovered and admitted into trial based on a lawful, though warrantless, inventory search. There is no assertion that the items discovered were in "plain view" or that the seizure of the car was incident to a lawful arrest.

The Fourth Amendment, which was made applicable to the States through the Due Process Clause of the Fourteenth Amendment in *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), mandates that government searches be "reasonable". A true inventory search:

> (T)akes place when it is not coupled with the intent of discovering evidence of a crime. The inventory is conducted not for the purpose of uncovering incriminating evidence, but for the purpose of safeguarding the contents of the vehicle for the benefit of both the owner and the

police. *Commonwealth v. Brandt,* 244 Pa.Super. 154, 160, 366 A.2d 1238, 1241 (1976).

Although automobiles have been given less constitutional protection by the courts because of their mobility and the increased governmental interest in the efficient and unimpeded use of public highways, "it is clear that there is no 'automobile exception' as such and that constitutional protections are applicable to searches and seizures of a person's car." ***388** *Commonwealth v. Holzer,* 480 Pa. 93, 389 A.2d 101 (1978). Instead of determining whether probable cause existed to justify the search and seizure, courts have analyzed such protective inventorying of automobiles using a standard of reasonableness, *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), thus encompassing the idea that these procedures are "searches" to be governed by the Fourth Amendment.

The U.S. Supreme Court wrote:

> The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts. *Coolidge v. New Hampshire,* 403 U.S. [443] at 509–510, 91 S.Ct. [2022 at] 2059, 29 L.Ed.2d 564 (Justice Black, concurring and dissenting).

It was determined in this case that Appellant had no access to his vehicle once he was arrested. Following *Commonwealth v. Brandt,* 244 Pa.Super. 154, 366 A.2d 1238 (1976), where there is no clear probable cause to justify such a search and seizure, the elements that the Commonwealth must show in order to legitimize such a search are: "First, the Commonwealth must show that the vehicle was lawfully in the custody of police. Secondly, the Commonwealth must show that the search was in fact an inventory search." *Brandt,* 244 Pa.Super. at 162, 366 A.2d at 1242. Because this Court has defined a determination of an inventory search as a legal conclusion based on underlying facts rather than a factual conclusion, we are able to review the common pleas court's holding that what occurred here was indeed an inventory search. *Commonwealth v. Burgwin,* 254 Pa.Super. 417, 386 A.2d 19 (1978).

In determining whether the car was lawfully in the custody of police, we note that Appellant's vehicle was parked at the curb near his home, there was no obstruction of traffic, two weeks had passed since the robbery occurred, and reports indicated that the car had not been driven since that time. The common pleas court cited *Commonwealth v.* ***389** *Holzer,* 480 Pa. 93, 389 A.2d 101 (1978), as controlling in the determination that the seizure was lawful.

The Court in *Holzer* found that:

> It is reasonable, therefore, for constitutional purposes for police to seize and ****623** hold a car until a search warrant can be obtained, where the seizure occurs after the user or owner has been placed into custody, where the vehicle is located on public property, and where there exists probable cause to believe that evidence of the commission of the crime will be obtained from the vehicle. *Commonwealth v. Holzer,* 480 Pa. 93, 96, 389 A.2d 101, 106 (1978).

In *Holzer,* the police were concerned with losing evidence thought to be inside the vehicle because, even though defendant was incarcerated, a co-conspirator to the murder was unapprehended and defendant's girlfriend and family lived near where the car was located. The homicide was reported to have occurred in the car, and police seized it only two days after the crime. Given those facts, the Court found that police fears of losing valuable evidence were reasonable. The passage of time in this case, along with the fact that no testimony was offered to indicate concern that the car would be moved (since it had not been moved for two weeks), or that the car would yield valuable evidence of the crime, as in *Holzer,* leads to the conclusion that the seizure of the car without a warrant was not supported by the facts. More importantly, in *Holzer,* the Court took note that even after the car was impounded, no subsequent search of the car's interior was made until police had secured a warrant.

Under the second prong of the analysis, i.e. whether the search was in fact for inventorying purposes, the Court must be convinced that the procedure was meant to protect the car's contents for the owner and to insure the safety of police. *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). The Court paid specific attention to the fact that the seizure and inventorying of the car was done according to routine procedure and unlikely to be motivated by a desire to search for evidence. The ***390** car, which was illegally parked and ticketed several times, was impounded by police pursuant to motor vehicle laws. Marijuana was discovered during the inventorying of the car's contents, leading to charges of possession against the owner. In contrast, Appellant's car was not seized because it was obstructing traffic. The officers admitted that the purpose of impounding the vehicle was:

> Q: And, when you seized the car, what was your purpose?
>
> A: That car was used in the commission of a crime. I seized it as evidence. (Stenographic Record of May 6, 1981, p. 35).

We can draw no other conclusion than police had a motive to search for evidence when they seized the car. The major obstacle to the success of the Commonwealth's argument that this was a valid inventory search is that the officers applied for a warrant to search the vehicle for evidence after they discovered the jewelry in the car. This strongly indicates that the motive behind their actions was to secure evidence against the Appellant.

The Commonwealth, in justifying the police action, makes reference to what has become a separate class of exceptions to Fourth Amendment protection. First articulated in *Coolidge v. New Hampshire,* 403 U.S. 443, 454, 91 S.Ct. 2022, 2031, 29 L.Ed.2d 564 (1971). The U.S. Supreme Court held:

> The warrant requirement, however, is excused where exigent circumstances exist .. Exceptions arise where the need for prompt police action is imperative, either because evidence sought to be preserved is likely to be destroyed or secreted from investigation, or because the officer must protect himself from danger to his person by checking for concealed weapons.

This Court has further provided a two-part analysis: “The general rule dealing with warrantless automobile searches allows that a car may be searched or seized without a warrant if there are both exigent circumstances and probable cause to believe that the car will yield ****624** contraband or useful evidence for the prosecution of a crime.” ***391** *Commonwealth v. Cooper,* 268 Pa.Super. 99, 407 A.2d 456 (1979). Such exigent circumstances were present in *Commonwealth v. Brandt,* 244 Pa.Super. 154, 366 A.2d 1238, 1242 (1976), where defendant's vehicle had struck a pole and he was physically fighting police in their attempts to help him; in *Opperman,* where the car was illegally parked and ticketed; in *Commonwealth v. Scott,* 469 Pa. 258, 356 A.2d 140 (1976), where the car was in a high crime area and stereo equipment was on the seat in “plain view”; and in *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), where defendant's automobile was disabled following an accident and the police observed that defendant was intoxicated and unable to provide for the towing of his vehicle. After he told police he was also an officer and was taken to the hospital, the police searched the trunk looking for his regulation revolver. The search was upheld, supported by the exigencies. Appellant's vehicle, in this case, was not illegally parked, nor was it in his control at the time of arrest to make it necessary to have the car towed. No jewels were seen in “plain view”. There are simply no facts supporting an exigent circumstance. In *Commonwealth v. Burgwin,* 254 Pa.Super. 417, 386 A.2d 19 (1978), the warrantless search of a car trunk after defendant was in custody was struck down for lack of any exigency and for not being evidence of standard police procedure. The routine nature of this action is likewise absent under the present facts. We are also not persuaded that there was probable cause to believe evidence or the fruits of the crime would be found in the car. To quote the dissenting opinion of Judge Toole from the common pleas court decision below:

> In the instant case, the vehicle was impounded not because there was probable cause to believe that evidence of the commission of the crime could be obtained from the vehicle, or because the vehicle was parked in violation of any law posing a threat to the safety of others, or because it was necessary to preserve evidence until a search warrant could be obtained ... The mere fact that a vehicle may have been involved in the commission of a ***392** crime does not automatically authorize its search and seizure. There is no testimony in this record to indicate any probable cause to believe that evidence of the commission of this burglary could be obtained from the vehicle. This is particularly true since the alleged burglary in this case took place approximately fourteen (14) days before the so-called inventory search. We further add that there is no testimony in the record indicating even a suspicion that the car could or would be moved from the area where is was parked and any evidence lost. (At page 3–4).

We also do not have a situation similar to that in the recent U.S. Supreme Court case of *U.S. v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The Court in *Leon* recognized a “good faith” exception for police who have obtained a warrant and reasonably relied on it to conduct a search, only to have the warrant subsequently found to be invalidly issued. Under our facts, the effort to procure a valid search warrant by police was done as an afterthought. The seizure and search had been accomplished, and the warrant was sought to legitimize the earlier illegal police conduct. The Court specifically preserved “the continued application of the rule to suppress evidence from the (prosecution's) case where a Fourth Amendment violation has been substantial and deliberate.” *U.S. v. Leon,* 468 U.S. at p. ——, 104 S.Ct. at p. 3413. We have such a situation at hand.

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Since there was no probable cause to believe that the car would yield evidence of the crime, no exigent circumstances, no lawful inventory search or a search pursuant to a valid warrant, this evidence must be suppressed at trial.

****625** Judgment of Sentence is vacated and the case is remanded for a new trial.

Jurisdiction is relinquished.

All Citations

333 Pa.Super. 382, 482 A.2d 619

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409 Mass. 635
Supreme Judicial Court of Massachusetts,
Essex.

COMMONWEALTH
v.
Peter C. MAMACOS.

Argued Dec. 3, 1990.
|
Decided April 2, 1991.

Synopsis

Defendant charged with two counts of homicide by negligent operation of motor vehicle, one count of operating motor vehicle negligently so as to endanger, and civil infractions regarding operation of motor vehicle and alteration of its height moved to suppress results of testing of his truck and all items removed from his truck on ground such evidence was obtained without search warrant. The District Court, Haverhill Division, William H. Sullivan, J., allowed the motion, and Commonwealth appealed. After transfer of case from the Appeals Court, the Supreme Judicial Court, Essex County, O'Connor, J., held that: (1) police department had right to remove truck involved in fatal accident from scene of accident and to hold truck in storage for reasonable time, and (2) even if owner of truck involved in fatal accident had subjective expectation of privacy with respect to truck's brakes, society would not recognize such an expectation of privacy as reasonable when the truck came into possession of police following death of motorists, and accordingly, police officer's examination and testing of brakes conducted after owner requested that truck be returned to him was not "search" within meaning of Fourth Amendment.

Order vacated; case remanded.

Attorneys and Law Firms

****1140** ***635** S. Jane Haggerty, Asst. Dist. Atty., for Com.

Hugh Samson, Boston, for defendant.

Before LIACOS, C.J., and ABRAMS, NOLAN, O'CONNOR and GREANEY, JJ.

Opinion

O'CONNOR, Justice.

A criminal complaint issued against the defendant charging him with two counts of homicide by negligent operation of a motor vehicle in violation of ***636** G.L. c. 90, § 24G (1988 ed.), and one count of operating a motor vehicle negligently so as to endanger in violation of G.L. c. 90, § 24 (1988 ed.). The complaint also charged the defendant with certain civil infractions, namely operating a motor vehicle without an inspection sticker in violation of G.L. c. 90, § 20 (1988 ed.), operating a motor vehicle with defective brakes and handbrake in violation of G.L. c. 90, § 7 (1988 ed.), and altering the height of a motor vehicle in violation of G.L. c. 90, § 7P (1988 ed.). After two mistrials, the defendant filed a motion to suppress the results of tests done to his vehicle and all items removed from his vehicle on the ground that that evidence was obtained without a search warrant. A judge allowed the defendant's motion. A single justice of this court allowed the Commonwealth's application for interlocutory appeal. The case was then entered in the Appeals Court. We transferred the case to this court on our own initiative, and we now vacate the order allowing the motion to suppress.

We summarize the facts stipulated in connection with the suppression hearing as follows. On October 17, 1987, Sergeant Lawrence Streeter of the Amesbury police department was called to the scene of a motor vehicle accident in which two teenagers on a scooter had been killed. Streeter's duties included investigation and reconstruction of serious accidents, and the giving of assistance to other officers in their accident investigations. When he arrived at the scene, Streeter saw the scooter lying under the front bumper and frame of the defendant's pickup truck. The Amesbury police department then towed the truck to Amesbury Coach, where it was secured in a fenced security area.

On October 19 or 20, the defendant requested that his truck be returned to him. On October 20, after that request had been made, Streeter conducted an external examination of the truck's braking system. ****1141** After doing so, he instructed an employee of Amesbury Coach to tow the truck with all four wheels on the road surface so that he could test the braking system. Following that, he instructed the employee to elevate the front wheels so that only the rear wheels were ***637** touching the road surface, and he again tested the truck's braking system.

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Next, between October 20 and 22, Streeter returned to the scene of the accident with the defendant's truck and the scooter that had been involved in the accident. He placed the vehicles together as closely as he could to the way he had found them. Streeter then attached the entire mass to a Chitilin Scale and towed it down the road in an effort to discover the force necessary to overcome the friction with the road surface.

On October 22, after examining the exterior of the defendant's truck visually, Streeter asked a mechanic for the town of Amesbury to drive the vehicle and test the braking system with the vehicle operating on its own power. Streeter and the mechanic then removed the wheels from the truck and dismantled the braking system. Then, for the first time, Streeter obtained a search warrant to retain the pieces of the braking system that he had dismantled.

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The defendant contends that the tests conducted on his truck before a search warrant was issued violated his Fourth Amendment rights as well as his rights under art. 14 of the Massachusetts Declaration of Rights. He does not argue separately with respect to the Federal and State Constitutions, and therefore we confine our discussion to the Fourth Amendment. Our first question, the answer to which resolves this case, is whether the testing of the truck's brakes constituted a "search" in the Fourth Amendment sense. *Maryland v. Macon,* 472 U.S. 463, 468–469, 105 S.Ct. 2778, 2781, 86 L.Ed.2d 370 (1985). *Commonwealth v. Pina,* 406 Mass. 540, 544, 549 N.E.2d 106, cert. denied, 498 U.S. 832, 111 S.Ct. 96, 112 L.Ed.2d 67 (1990). *Commonwealth v. D'Onofrio,* 396 Mass. 711, 714, 488 N.E.2d 410 (1986). To determine whether Streeter's actions constituted a search, we ***638** must consider whether his actions intruded on the defendant's reasonable expectation of privacy. *California v. Ciraola,* 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986). *Rawlings v. Kentucky,* 448 U.S. 98, 104–106, 100 S.Ct. 2556, 2560–62, 65 L.Ed.2d 633 (1980). *Rakas v. Illinois,* 439 U.S. 128, 143, 143–144 n. 12, 99 S.Ct. 421, 430–31 n. 12, 58 L.Ed.2d 387 (1978). *Katz v. United States,* 389 U.S. 347, 360–361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). *Commonwealth v. Pina, supra,* 406 Mass. at 544, 549 N.E.2d 106. *Commonwealth v. Chappee,* 397 Mass. 508, 512, 492 N.E.2d 719 (1986). The question is really twofold: Did the defendant have a subjective expectation of privacy in his truck's brakes and, if he did, was that expectation one that society is prepared to recognize as objectively reasonable. *California v. Ciraola, supra,* 476 U.S. at 211, 106 S.Ct. at 1811. *Oliver v. United States,* 466 U.S. 170, 177, 104 S.Ct. 1735, 1740, 80 L.Ed.2d 214 (1984). *Commonwealth v. Panetti,* 406 Mass. 230, 231, 547 N.E.2d 46 (1989). *Commonwealth v. D'Onofrio, supra,* 396 Mass. at 714, 488 N.E.2d 410. The defendant bears the burden of proving that he had a subjective and objectively reasonable expectation of privacy. *Rawlings v. Kentucky, supra,* 448 U.S. at 104, 100 S.Ct. at 2561. *Commonwealth v. Chappee, supra,* 397 Mass. at 512, 492 N.E.2d 719.

We have no doubt that the Amesbury police were in rightful possession of the defendant's truck after the accident. Although no statute expressly gives police officers the power to tow a motor vehicle from the scene of an accident and to place it in storage, the police do have the statutory authority to tow motor vehicles in ****1142** other circumstances. For example, G.L. c. 40, § 22D (1988 ed. & Supp.1989), provides that "the city council or board of selectmen ... may adopt ... rules and regulations ... authorizing the ... police department ... to remove ... any vehicle parked or standing on any part of any way under the control of a municipality in such a manner as to obstruct any curb ramp designed for use by handicapped persons as means of egress to a street or public way ... or to impede in any way the removal or plowing of snow or ice." General Laws c. 85, § 2C (1988 ed.), provides that "[t]he department [of public works] ... may authorize [certain police officials] to remove, to some convenient place ... any vehicle ... parked or standing on any part of a state highway in such a manner as to impede in any way the removal or plowing of snow or ice or parked or ***639** standing in violation of any rule or regulation adopted under section two...." In addition, G.L. c. 255, § 39A (1988 ed.), at least implies that members of a municipal police department have the power to remove motor vehicles from the scene of an accident. Section 39A says that "[a]ny motor vehicle removed from the scene of an accident and placed for storage in the care of a garage ... by a member of the state police force, by a member of the metropolitan district police, [or] by a member of the police force of any city or town ... shall be so stored at the prevailing rates." Lastly, the United States Supreme Court has stated that, "[i]n the interests of public safety ... automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to

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preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities.... The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." *South Dakota v. Opperman,* 428 U.S. 364, 368–369, 96 S.Ct. 3092, 3097, 49 L.Ed.2d 1000 (1976). We are satisfied that the Amesbury police department had a right to remove the defendant's truck from the scene of the accident and to hold it in storage for a reasonable time, which was not shown to have been exceeded in this case.

It is unclear whether the defendant had a subjective expectation of privacy with respect to the truck's brakes. However, we assume in his favor that he did, and we turn immediately to the question whether society is prepared to recognize such an expectation as reasonable.

The Registrar of Motor Vehicles has the statutory authority to "investigate the cause of any accident in which any motor vehicle is involved." G.L. c. 90, § 29 (1988 ed. & Supp.1989). Section 29 requires that local police departments "notify the registrar ... of the particulars of every accident [in which any person is killed or injured] which happens within the limits of [its] city, town or jurisdiction." In addition, § 29 provides that, "[w]henever the death of any ***640** person results from any such accident, the registrar shall suspend forthwith the license or right to operate of the person operating the motor vehicle in said accident, and shall order the said license to be delivered to him, unless a preliminary investigation indicates that the operator may not have been at fault...." We set out these portions of the statute not because Sergeant Streeter was necessarily conducting the kind of investigation of which the statute speaks, but to illustrate the legislative determination that society places great importance on learning all the circumstances of any motor vehicle accident resulting in death, and expects that, as part of its investigation, a police department may find it necessary to conduct the kind of tests that Streeter conducted on the braking mechanism of a vehicle in its lawful possession. We think that it would stretch the Fourth Amendment's protections too far to say that society is prepared to recognize as objectively reasonable an expectation of privacy in the braking mechanism of a motor vehicle that has come into police possession following the death of a motorist on the highway.

Motor vehicles registered in this Commonwealth are subject to extensive regulation ****1143** and inspection. See G.L. c. 90, § 7A (1988 ed.); 540 Code Mass.Regs. §§ 4.03, 4.04 (1988). Such requirements tend to reduce a vehicle owner's reasonable expectation of privacy with respect to the safety equipment on his or her vehicle even without the happening of an accident. All the more so, after an accident resulting in a death, particularly in view of G.L. c. 90, § 29, quoted above, there can be no reasonable expectation of privacy in the equipment and safety features of an involved vehicle in the rightful possession of the police. We conclude that the defendant did not have an objectively reasonable expectation of privacy in the brakes of his truck after the truck was involved in the fatal accident and was removed from the highway by the police. We therefore conclude also that Sergeant Streeter's examination and testing of the brakes, even though conducted after the defendant's request that his vehicle be returned to him, was not a search within the meaning of the Fourth Amendment. *Maryland v. Macon, supra,* 472 U.S. at 469, 105 S.Ct. at 2782. ***641** *Commonwealth v. D'Onofrio, supra,* 396 Mass. at 714, 488 N.E.2d 410. Therefore, we vacate the order allowing the defendant's motion to suppress the results of the tests done on his truck and the items removed from it, and we remand the case to the District Court for further proceedings.

So ordered.

All Citations

409 Mass. 635, 568 N.E.2d 1139

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3 Misc.3d 309
Justice Court, Village of Newark,
Wayne County.

The PEOPLE of the State
of New York, Plaintiff,
v.
Robert CHRISTMANN, Defendant.

No. 03110007.
|
Jan. 16, 2004.

Synopsis
Background: Following a fatal automobile-pedestrian accident, motorist was charged with speeding and failing to exercise due care.

Holdings: The Justice Court, Village of Newark, Wayne County, Victor B. Chambers, J., held that:

retrieval by police officer of data stored in vehicle's sensing diagnostic module (SDM), did not constitute an unreasonable search and seizure;

accident data downloaded from motor vehicle's SDM was admissible without any need to lay a foundation;

evidence was sufficient to prove motorist's guilt of speeding; but

evidence was insufficient to prove motorist guilty of failure to exercise due care.

Guilty of speeding.

Attorneys and Law Firms

****438** ***310** Richard M. Healy, Wayne County District Attorney (James E. Reid of counsel) for plaintiff.

David P. Saracino, for defendant.

Opinion

VICTOR B. CHAMBERS, J.

The Defendant has been charged with Speeding 38 in a 30 speed zone in violation of section 1180(d) of the Vehicle and Traffic Law and Failure to Exercise Due Care in violation of Vehicle and Traffic Law section 1146 as the result of a fatal automobile pedestrian accident occurring on October 18, 2003.

Upon initial investigation by the Newark Police Department, it was determined to seek the assistance of New York State Trooper Robert J. Frost, who has been assigned to conduct accident reconstruction for the New York State Police. Upon arrival at the scene Trooper Frost conducted an examination of Defendant's vehicle, which was parked at the side of the road, unlocked. At that time, the pedestrian, Mabel Hommer, had died. Aside from the investigation we would expect of an ***311** automobile fatality, including measurement of skid marks, extensive photographing of the scene, determination of the relative position of the vehicle fragments and personal property, and determination of the point of impact, Trooper Frost used computer equipment in his police car to down load information from the Sensing Diagnostic Module (SDM) located in the Defendant's vehicle. He conducted this procedure without seeking or obtaining the permission of the Defendant. To do so, Trooper Frost asserted control over the vehicle, directing it not be moved until his investigation was completed. After accomplishing the tests the vehicle was returned to the Defendant. Trooper Frost thus "impounded" the vehicle even if for a ****439** short period of time. His tests also included operating the vehicle to confirm that the brakes were working properly, use of a "Total Station" measuring device to chart the relative position of landmarks, intersections, the location of the automobile, debris and personal property. Trooper Frost also operated the vehicle with an accelerometer attached in order to measure the braking capability of the car.

The Sensing Diagnostic Module has been installed in General Motors vehicles since 1990. The system detects acceleration or deceleration and makes decisions every ten milliseconds whether or not to deploy the passive restraint system in the vehicle. The system also stores vehicle data such as vehicle speed, engine RPM, throttle percentage and brake data, change in velocity or delta V and seat belt usage, all in one second increments for a period of five seconds. After

a deployment or near deployment of the air bags the data is stored for a further period of time.

Vetronix Corporation has produced a crash data retrieval system (CDR) which allows for the downloading of the above information into a lap top computer, which will then generate reports for the use of accident reconstruction. It is this system that Trooper Frost used to supplement his investigation of Defendant's accident. Physically, this was accomplished by connecting a wire to a plug located under the dashboard of Defendant's vehicle, which allowed the download.

The uncontradicted evidence is that the connection to the computer is one-way; that is, the data in Defendant's SDM cannot be corrupted or modified by connection to the computer in the police car. It is further uncontradicted that the data in the SDM after a deployment or near deployment can or will be erased after the car ignition is turned on 250 times or if another deployment or near deployment event occurs. The events that ***312** could trigger the loss of this information include bumping the vehicle into a curb, hitting a pothole, or suddenly engaging the brakes causing a faster deceleration than that which occurred during the accident. Such loss of data could occur only if the ignition of the car was turned on.

Trooper Frost testified at the trial that he was able to reconstruct the speed of the Defendant's vehicle using three methods. He first used the data from the SDM in Defendant's vehicle to determine that the speed during the last five seconds before impact was 37, 37, 38, 38 and 38 respectively. Secondly, he testified about a measured "head strike", or the location on Defendant's windshield where the pedestrian's head came in contact. From these measurements he determined the speed of Defendant's vehicle to be between 30 and 45 miles per hour. Third, he used the measurement of the tire marks, together with the data from the accelerometer to determine the deceleration rate and applied mathematical formulation to determine a speed of 38 miles per hour at impact.

Under cross examination Trooper Frost stated that the mere fact that data downloaded from the SDM is not a determination that the data is correct. He also stated that he does not base an opinion on automobile speed using the SDM data alone. There was no testimony that the module in Defendant's vehicle could be calibrated in any way, as one might do with a radar instrument or a breathalyzer.

Defendant produced a witness who testified that he was following Defendant's vehicle immediately before the accident, that he never saw the pedestrian until she was hit by Defendant's car, and that he estimated his own speed at approximately 30 miles per hour. He was not, however, able ****440** to form an estimate of the speed of Defendant's vehicle.

ISSUES

1. Was the retrieval of the data stored in Defendant's sensing diagnostic module conducted in violation of Defendant's rights under the Fourth and Fourteenth Amendments of the United States Constitution or Article 1 Section 12 of the New York State Constitution?

2. Does Section 603 and/or Section 603–a of the Vehicle and Traffic Law require and allow an investigating police officer to conduct an investigation of a vehicle involved in an accident in which a death or serious physical injury occurs, including the data stored in the vehicle's Sensing Diagnostic Module?

***313** 3. What type of evidence foundation must be laid to allow the admission into evidence of the downloaded results from the Sensing Diagnostic Module in the Defendant's automobile?

4. Is proof of the results of the download of the SDM together with the testimony of the accident reconstructionist as to the calculation of speed by measurement of skid marks and deceleration data, together with measurements of a "head strike" sufficient to sustain a finding of guilt of speeding beyond a reasonable doubt?

5. Was the proof adduced sufficient to prove a violation of Vehicle and Traffic Law Section 1146 beyond a reasonable doubt?

DISCUSSION OF ISSUES ONE AND TWO

Section 603 of the Vehicle and Traffic Law, first enacted in 1993, provides in pertinent part "Every police ... officer to whom an accident resulting in injury to a person has been reported shall immediately investigate the facts ... and report the matter to the Commissioner (of Motor Vehicles)". This statute, and its constitutional implications were thoroughly discussed in *People v. Quackenbush,* 88 N.Y.2d 534, 647 N.Y.S.2d 150, 670 N.E.2d 434 (1996). The application of this case to the instant matter will be discussed below.

In 2001 Section 603–a of the Vehicle and Traffic Law was enacted which provides that any motor vehicle accident reported or discovered by a police officer and which accident results in the serious physical injury or death shall be investigated by the officer. The statute further provides that "Such investigation shall be conducted for the purposes of making a determination of the following: the facts and circumstances of the accident; ... the contributing factors; whether it can be determined if a violation or violations of this chapter occurred; ... and, the cause of the accident ..." This statute substantially increases and specifies the responsibility of a police officer conducting the investigation from that originally mandated in Vehicle and Traffic Law Section 603.

In the case of *People v. Quackenbush, supra,* the Defendant was involved in a fatal pedestrian accident involving a bicyclist. The police impounded his car, and, two days later, conducted a safety inspection of the equipment of the vehicle, including brakes. The brakes were found to be deficient and Defendant was charged with the misdemeanor of operating with defective brakes in violation of Vehicle and Traffic Law Section 375(1).

The Defendant moved to suppress the results of the inspection upon the same grounds as urged here. The Court of Appeals ***314** concluded that "The police possessed the authority to impound the vehicle in order to comply with the investigation and reporting duties imposed Vehicle and Traffic Law Section 603". The Court stated that because a vehicle's safety ****441** equipment was subject to "extensive government regulations", including mandatory annual inspection, that a safety inspection after a fatal accident "did not offend the constitutional prohibition against unreasonable searches and seizures".

Having once determined that the impoundment procedure was satisfactory the Court then considered the process of the subsequent search. There was no exigency to the search involving mobility of the vehicle as it was under their control. Holding that only unreasonable searches violative of expectations of privacy were proscribed and finding that the search there was justified at the inception and limited in scope (citing *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889), the Court upheld the search and denied the motion to suppress. The Court found only a diminished expectation of privacy in the mechanical areas of the vehicle and further found that that expectation must yield to the overwhelming state interest in investigating fatal accidents. *People v. Quackenbush, supra* at page 539, 647 N.Y.S.2d 150, 670 N.E.2d 434. The Court also found that the search conducted of the safety equipment of the truck in question was of an administrative nature, rather than an attempt to gather information to form the basis of a criminal prosecution. See *People v. Scott,* 79 N.Y.2d 474, 583 N.Y.S.2d 920, 593 N.E.2d 1328. In the area of automobile safety, there is a high degree of governmental regulation, and a search conducted to carry out this regulation has a lower threshold of reasonableness. Since the testing done of the SDM records data regarding the performance of the vehicle during the incident such testing is a reasonable extension of *Quackenbush.* The downloading of the information is not analogous to a container search, nor does it extend to the private areas of the vehicle. There is also no opportunity for a police officer to select only the desired data or to manipulate it.

The United States Supreme Court has held that in the interest of public safety automobiles are frequently taken into custody. Vehicle accidents present one such occasion. *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000.

In the case at bar the intrusion sought to be prohibited is significantly less. In *Quackenbush*, the whole vehicle was seized, taken from the scene, held for over two days and partially taken apart. Here, the vehicle wasn't moved, only one door was ***315** opened, a sampling taken and the car immediately returned to the Defendant.

We now turn to the concept of exigency. While a pure "automobile exception" does not apply since the officer had no probable cause to believe that evidence of a crime was contained within the car, courts have upheld warrantless searches of automobiles based upon exigency. *Carroll v. U.S.,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543. Such an exception now has been mostly replaced by findings that automobiles contain a diminished expectation of privacy. *Cardwell v. Lewis,* 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325, *Robbins v. California,* 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744. Here, however, real exigency exists. Evidence regarding the pre-accident conditions within Defendant's automobile could easily be destroyed, either purposely or accidently, if the automobile was moved from the scene under its own power.

While *Quackenbush* would appear to allow impoundment of the vehicle and subsequent inspection pursuant to the authority of VTL Section 603 (now enhanced by VTL Section 603–a), I conclude that the immediate download of information from the Defendant's SDM is permitted and

required by VTL Sections 603–a and is not violative of Defendant's rights to be free **442 from unreasonable searches pursuant to the United States or New York Constitution.

DISCUSSION OF ISSUE THREE

Since *People v. Magri,* 3 N.Y.2d 562, 170 N.Y.S.2d 335, 147 N.E.2d 728, New York has allowed the introduction of evidence of proven, reliable scientific principles such as radar, photography, X-rays, clocks and ballistics, among others. When the data obtained from such systems is deemed reliable, such evidence is admissible without the need to lay a foundation by the introduction of expert testimony describing and endorsing the science involved. Thus, the reading of a speedometer would be admissible, without more, as a recording devise.

The admissibility of evidence of the data recorded on a SDM has been received into evidence as "generally accepted as reliable and accurate by the automobile industry and the National Highway and Traffic Safety Administration". See *Bachman et al v. General Motors Corporation et al,* Case No. 4–01–0237, Appellate Court of Illinois, Fourth District, which held that such evidence was admissible under the standards of *Frye v. United States,* 293 F. 1013.

***316** The Court thus concludes that such evidence is admissible in this case.

DISCUSSION OF ISSUE FOUR

The People rely upon three elements of proof to establish Defendant's guilt of Speeding in violation of Vehicle and Traffic Law Section 1180(d). The unquestioned testimony is that the accident took place within a thirty mile per hour speed zone in the Village of Newark. The first element is the data retrieved by the crash data retrieval system, previously ruled to be admissible, which reflected a speed within the five second period before impact at 37 to 38 miles per hour. Next was proof of the measurement of skid marks, location of the pedestrian after the accident, a calculation of the point of impact and measurement of the vehicle's braking capability. The results of these measurements were "plugged into" formulas learned by the officer during his training, all of which provided a speed of 38 miles per hour at impact. The windshield of Defendant's car showed a spidernet cracking just above the dashboard on the left side. The officer testified that he could calculate a range of speed based on the location of this "head strike" and that the measurements in this case reflected a speed at impact of 30 to 45 miles per hour.

In any number of cases speed has been adjudicated by measurement of physical evidence at the scene of an accident. In *Farrell v. Adduci,* 138 A.D.2d 944, 526 N.Y.S.2d 686, there was testimony of measurement of skid marks in determining speed. There is no need even for a measuring device. See *People v. Olsen,* 22 N.Y.2d 230, 292 N.Y.S.2d 420, 239 N.E.2d 354, where a conviction of Speeding was upheld, the evidence of which consisted of the mere testimony of officers as to their estimate of speed. See also *People v. Correia,* 140 Misc.2d 813, 531 N.Y.S.2d 998. The Court concludes that the evidence submitted at trial was sufficient to prove Defendant's guilt of Speeding beyond a reasonable doubt.

DISCUSSION OF ISSUE FIVE

The vast majority of reported cases interpreting Section 1146 of the Vehicle and Traffic Law are civil rather than criminal, or are cases reviewing a determination by the Department of Motor Vehicles. The section requires that drivers exercise that degree of care to avoid striking a pedestrian as a reasonable driver would exercise in like circumstances. The evidence, in the form of statements of the Defendant and the testimony of ***317** one eyewitness **443 is not of sufficient degree to establish, in this Court's opinion, that Defendant is guilty of a violation of this section beyond a reasonable doubt.

In Defendant's statement to police he reported that he was proceeding south in his own lane, on South Main Street, which at that point is a wide, two lane road. Defendant stated that he saw the pedestrian on the west side of the roadway, standing several feet onto the pavement, but not in that portion of road being traveled by vehicles. She was facing east. She was not in a cross walk. As Defendant continued south he observed a person emerge from a business located on the east side of the street, and in order to do that he glanced to the left. As he looked back to the street he felt the impact of striking the pedestrian.

A witness testified that he was following the Defendant, approximately forty feet behind. He never saw the pedestrian until she was struck by the car ahead of him.

In driving down a road, it is reasonable to assume that a pedestrian, standing out of the traveled lane of the road, will remain there while traffic passes. To require a driver approaching such a pedestrian to obtain "eye contact" is not reasonable. Nor is the fact that Defendant was proceeding at

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a speed of 38 miles per hour sufficient to establish a violation of this section.

All Citations

3 Misc.3d 309, 776 N.Y.S.2d 437, 2004 N.Y. Slip Op. 24012

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213 Cal.App.4th 743
Court of Appeal, Fourth District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,
v.
Elva DIAZ, Defendant and Appellant.

E054229
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Filed February 6, 2013
|
Review Denied April 17, 2013

Synopsis
Background: Defendant was convicted in the Superior Court, Riverside County, No. RIF149672, Mark E. Johnson, J., of involuntary manslaughter and vehicular manslaughter with gross negligence while intoxicated. Defendant appealed.

Holdings: The Court of Appeal, Hollenhorst, Acting P.J., held that:

scope of search of defendant's vehicle did not exceed probable cause;

as a matter of first impression, examination of vehicle was not a "search" which violated defendant's constitutional rights;

defendant lacked any privacy interest in speed and braking data obtained from vehicle's sensing diagnostic module; and

any error in admitting that data was harmless.

Affirmed.

**92 APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge. Affirmed. (Super.Ct.No. RIF149672)

Attorneys and Law Firms

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Melissa Mandel and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

HOLLENHORST Acting P.J.

OPINION

***745** I. INTRODUCTION

Defendant Elva Diaz appeals from her conviction of involuntary manslaughter (Pen.Code,[1] § 192, subd. (b)), as a lesser included offense to the ***746** charge of second degree murder in count 1, and vehicular manslaughter with gross negligence while intoxicated (§ 191.5, subd. (a)) in count 2. Defendant contends the admission of evidence obtained through the warrantless seizure of the sensing diagnostic module (SDM)[2] from her previously impounded vehicle and the downloading of data from the device violated her Fourth Amendment rights. We affirm.

II. FACTS AND PROCEDURAL BACKGROUND

A. Prosecution Evidence
About 8:00 p.m. on February 21, 2008, defendant drove herself and her then boyfriend, Zachary Palumbo, in her Chevrolet Tahoe truck to a bar a mile or two from ****93** their home. At the bar they drank and socialized. Palumbo had been a police officer for about nine years, and he was trained in identifying signs of intoxication. When they left the bar at 11:00 or 12:00 p.m., Palumbo believed he was less intoxicated than defendant, and he offered to drive home. An argument ensued, and defendant got into the driver's seat and insisted on driving. The argument lasted several minutes, and defendant's friend pulled up and offered Palumbo a ride. Defendant ***747** stayed in her truck, and Palumbo chose to walk home. As he was walking, he saw defendant drive by; she seemed to be driving normally.

Defendant's friend, Caryn Keppler, testified that she had been at the bar with defendant that night. When Keppler left the bar around midnight, she saw defendant and Palumbo in the parking lot having an argument about who was going to drive. Defendant got into the car and "pretty much locked herself in." Keppler drove past them and asked Palumbo if he needed

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a ride, but he declined. Keppler did not remember if she had also offered defendant a ride.

Luis Aguilar had been driving home at 12:40 a.m. when he called 911 to report a traffic accident at the intersection of Claystone and Knabe in Corona. Defendant got out of her truck, which was upside down. She told Aguilar she was a paramedic and "she s[aw] this all the time," which Aguilar understood her to mean "those types of accidents." She was crying, and she told Aguilar the accident was not her fault and that the other driver was at fault. Aguilar noticed a moderate to strong odor of alcohol on her breath, and she was slurring her speech a little. On his way walking home, Palumbo passed the crash scene—defendant's truck was on its roof, and defendant was on the curb being interviewed by a California Highway Patrol (CHP) officer. Rachel Elliott, the 18–year–old driver of the other vehicle, a Honda Accord, suffered skull fractures in the collision and died from blunt force trauma.

CHP Officer Jack Penneau arrived at the accident scene at 12:40 a.m. Defendant told him she had been driving north on Knabe on the correct side of the road, and the other vehicle had been driving south in her lane, resulting in a head-on collision. Defendant said she had one beer at 8:00 p.m.; she denied being diabetic or epileptic. The officer testified that defendant did not perform properly on field sobriety tests, including nystagmus, standing position, and finger count. She smelled of alcohol and had bloodshot eyes and slurred speech. Preliminary alcohol screenings, at 1:14 a.m., 1:16 a.m., and 1:18 a.m., resulted in readings of 0.194, 0.154, and 0.160 percent blood alcohol respectively. Defendant was arrested and transported to the hospital, where her blood was drawn before she was taken to jail. Her blood alcohol level at 2:58 a.m. was 0.20, and based on the absorption rate, would have been 0.23 at 12:30 a.m.

Defendant's truck and the victim's vehicle were impounded for evidence and towed to the towing company's secured lot. Officers determined the initial point of impact between the vehicles based on gouge or scrape marks on the pavement. The speed limit in that area was 50 miles per hour.

Stephen Turner, a member of the CHP's Multidisciplinary Accident Investigation Team (MAIT) supervised the inspection of defendant's Tahoe and ***748** reviewed and approved the report of the inspection. Before conducting the inspection, the accident history and background of the vehicle were reviewed. The external condition of the vehicle was then documented; the control modules were downloaded; and the ****94** vehicle was taken apart. Turner inspected the Accord and determined that nothing about its mechanical condition would have caused or contributed to the crash. Turner also inspected the Tahoe, beginning with an external overview and an inspection of the control aspects of the vehicle, including the throttle, steering, suspension, brakes, tires, and wheels. Turner determined there were no mechanical deficiencies that would have contributed to the collision.

Sergeant Lance Berns, Chief of the CHP's Inland Division MAIT, stated his opinion that the Tahoe had been travelling at 76 miles per hour at the point of impact. On cross-examination, Sergeant Berns conceded he could not estimate speed at the point of impact without the SDM data. The point of impact for the head-on collision was between the number one and number two lanes on northbound Knabe with the Tahoe traveling south. Defendant conceded she had crossed over the two sets of double yellow lines that separated the northbound and southbound lanes on Knabe.

Officer Richard Wong, also assigned to MAIT, testified that the main function of the SDM is to deploy the air bags. The SDM has the secondary function of recording throttle, speed, application of brakes, and transmission position. Data downloaded from the SDM showed that five seconds before the impact, the driver was not pushing on the gas pedal, and the Tahoe's speed was 84 miles per hour. Four seconds before the impact, the vehicle was traveling at 80 miles per hour with seven percent pressure on the gas pedal. Three seconds before the impact, the vehicle was traveling at 77 miles per hour, with 31 percent pressure on the gas pedal. Two seconds before the impact, the vehicle was traveling at 77 miles per hour, with 84 percent pressure on the gas pedal. One second before the impact, the vehicle was traveling at 76 miles per hour, with 94 percent pressure on the gas pedal. The brake was not on from six to eight seconds before the impact. It was on at five seconds before the impact, and not on from four to one seconds before the impact. Officer Wong testified, based on his "training and experience with collision reconstruction," that "the photographs that [he] saw of the damage to both vehicles" was consistent with "the Tahoe traveling at 76 miles per hour."

Charges were not filed against defendant until 14 months after the accident. In May 2009, it was learned that defendant was in Mexico, and extradition proceedings were begun. Defendant was returned to the United States on July 27, 2010. She told the investigator she had hidden with her father because he did not want her to be in jail while he was alive.

He had died on Easter, and she was going to come back and turn herself in after he died.

***749 B. Defense Evidence**

Dennis Burke, an investigator for the district attorney's office, testified he had interviewed Keppler in February 2009. Keppler told him she did not hear any conversation in the parking lot and did not observe any dispute at defendant's vehicle. Palumbo told Burke that Keppler had offered to give both him and defendant a ride home.

Defendant testified she had given her driver's license and keys to Palumbo at the bar, and she did not remember getting them back. At the bar, she drank multiple mixed drinks and shots of Tequila. She remembered having a hard time walking to the restroom but did not remember anything else at the bar. She did not remember going to the parking lot, having discussions at her truck, or driving away. She did not remember anyone trying to convince ****95** her not to drive. The next thing she remembered was sitting on a curb. She was extremely drunk that night. She admitted she had crossed two sets of double yellow lines, which is against the law.

Defendant was familiar with the road where the accident occurred, because she had driven it frequently in the year and a half when she lived nearby. She went to Mexico in June or July 2009 because she learned she had been charged with murder, and she was scared.

In her work as an emergency medical technician (EMT) and ambulance driver, she had seen the aftermaths of many traffic collisions, and sometimes the patients had an odor of alcohol, which could be from diabetic shock or alcohol impairment. She had been promoted to human resources, and in that capacity showed a video to others regarding the dangers of substance abuse and alcohol abuse in the workplace, and she had taken and administered a test on that subject. She denied that she knew any more than the average person about the dangers of driving under the influence. Specifically, in February 2008 she did not understand the dangerousness to human life of driving under the influence of alcohol, or the dangers to human life of driving at 84 miles per hour on Knabe Road and crossing over into oncoming traffic.

Three former fellow employees of defendant testified they did not believe EMTs had any special knowledge of the dangers of drunk driving. Nothing about their training increased their knowledge of that danger.

Palumbo told a defense investigator that defendant was "out of her mind" and unable to comprehend or listen to what he was saying that night. He said he had tried to convince defendant not to drive, but she was so intoxicated she was not listening to him and was unable to comprehend what he was saying.

***750 C. Jury Verdict and Sentence**

The jury found defendant guilty of involuntary manslaughter (192, subd. (b)) as a lesser included offense to the charge of murder in count 1, and guilty of vehicular manslaughter with gross negligence while intoxicated (§ 191.5, subd. (a)) in count 2.

The trial court sentenced defendant to the aggravated term of 10 years for count 2.[3]

III. DISCUSSION

Defendant contends the warrantless search of her vehicle and the seizure of the vehicle's SDM violated the Fourth Amendment. The issue is one of first impression in this state.[4]

****96** Preliminarily, we note that defendant concedes her Tahoe was "essentially totaled and was lawfully in police possession" when MAIT investigators downloaded data from the SDM. Moreover, she does not argue that impounding the vehicle on the night of the accident was improper or that there was no probable cause to obtain the SDM data. Rather, she argues no exigent circumstances existed, and she had a reasonable expectation of privacy in the SDM data. She argues that because the SDM was inaccessible and not in plain view, and its data were unavailable without connecting the SDM to a computer, there was a reasonable expectation that third parties would not have access even if she herself did not know of the presence of the SDM.

***751 A. Standard of Review**

On review of the trial court's denial of a motion to suppress evidence, this court accepts the trial court's express and implied factual findings when they are supported by substantial evidence, and we then independently assess whether, under the facts found, the search and seizure were reasonable under constitutional standards. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182, 58 Cal.Rptr.2d 385, 926 P.2d 365.)

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B. Defendant's Motion to Suppress Evidence

Before trial, defendant filed a motion to suppress evidence obtained through the warrantless search of the SDM from her Tahoe. The People filed an opposition, arguing that defendant had no reasonable expectation of privacy in the SDM; the instrumentality exception to the warrant requirement applied; and exclusion of SDM data was not a proper remedy for the purported unreasonable search and seizure.

The trial court conducted a hearing on the motion. It was undisputed that the search was conducted more than a year after the accident and was warrantless and without consent. Sergeant Berns testified that the Tahoe had been inspected by MAIT personnel in April 2009. He described the standard MAIT protocol for vehicle inspection: MAIT investigators inspect a vehicle from the ground up, focusing on acceleration, braking, steering, and suspension. In the inspection, MAIT investigators remove and inspect the wheels, tires, brake drums and calipers, and steering column. Sergeant Berns testified the SDM is included in the mechanical inspection of the vehicle because "it's an intricate [*sic.,* integral] component of the vehicle no different than a master cylinder." It was standard protocol to download the "black box," and MAIT did not seek court orders to do so. The MAIT manual did not discuss downloading the SDM, but MAIT personnel were trained to do so, and "the protocol was to download that module upon the mechanical inspection" by using a "box CDR retrieval system," specific software for Chevy Tahoes, and cables. Some MAIT teams download SDM data in every crash, although Inland Division MAIT does not.

To download the SDM on defendant's Tahoe, the investigators had to go under the driver's seat and cut through the carpet. The SDM controls deployment of the airbag and interrelates with the braking ****97** system, recording application of the brakes. MAIT inspection protocol includes download of the SDM data because it corroborates data the investigators look at when they check brakes, acceleration, and the steering column. The vehicle itself records the SDM data: "It doesn't care who's driving."

Sergeant Berns testified that MAIT could reconstruct the speed of the Tahoe without the SDM data but less accurately. Based on the post-impact ***752** trajectories of both vehicles, the speed was obviously high, freeway speeds. Sergeant Berns did a "bench top" reconstruction and derived a speed of about 75 miles per hour.

Officer Wong testified he had worked as a MAIT member for 12 years. He testified that the CHP MAIT Manual is very general and does not refer to SDMs. However, CHP protocol in the impound section is to download the SDM or any other component for inspection without a warrant. Officer Wong was aware of instances in other counties when a prosecutor had asked CHP to prepare a warrant to examine an SDM.

Based on his training and experience and the physical evidence from the scene and from photographs, Officer Wong did a speed calculation for the Tahoe before downloading the SDM data. He had calculated a minimum speed but could not arrive at a specific speed because of missing variables. The SDM data was important because speed was an issue in the case and for other reasons concerning the mechanical inspection of the Tahoe.

Following argument of counsel, the trial court stated, "my bet is [defendant] didn't even know she had this [SDM] in the car.... She had no subjective belief in ... a privacy interest in an SDM that she probably didn't know existed." The trial court denied the motion to suppress, finding there was probable cause to download data from the SDM and no reasonable expectation of privacy in the SDM. The trial court further held: "Assuming the defendant had such knowledge and also had an expectation of privacy, it does not seem that such expectation would be reasonable. These computer modules were placed in cars as safety devices to gather information such as braking and speed, so as to be able to deploy the air bag at an appropriate time. They were not designed to gather any personal information nor were they designed or developed by the government to gather incrimination evidence from a driver. One cannot record communication of any kind on them. Indeed, they are not under the control of the individual driver at all."

The trial court further held: "[Defendant] had no reasonable expectation of privacy in her speed on a public roadway or when and if she applied her brakes shortly before the crash. If a witness observed those actions and testified to them, the evidence would be admitted. If an expert in accident reconstruction testified to them, that evidence would be admitted. There is no difference in an electronic witness whose memory is much more accurately preserved, both to exonerate and implicate defendants." The trial court denied defendant's motion.

C. General Fourth Amendment Principles

The Fourth Amendment protects against unreasonable search and seizure those areas in which a person has a reasonable expectation of privacy. ***753** (*Katz v. United States* (1967) 389 U.S. 347, 350–351, 88 S.Ct. 507, 19 L.Ed.2d 576; *People v. Camacho* (2000) 23 Cal.4th 824, 831, 98 Cal.Rptr.2d 232, 3 P.3d 878.) To determine whether a person is entitled to Fourth Amendment protection, courts examine (1) whether the person, by his or ****98** her conduct, has exhibited an actual expectation of privacy; and (2) whether the person's subjective expectation of privacy is one that society recognizes as reasonable. (*People v. Camacho, supra,* at pp. 830–831, 98 Cal.Rptr.2d 232, 3 P.3d 878.) The defendant bears the burden of showing she had a legitimate expectation of privacy. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 104, 100 S.Ct. 2556, 65 L.Ed.2d 633.) In *Katz,* the Supreme Court stated: "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. [Citations.]" (*Katz v. United States, supra,* at pp. 351–352, 88 S.Ct. 507.)

D. Expectation of Privacy in Automobiles

The United States Supreme Court has long held that the expectation of privacy is diminished in the automobile. (*Carroll v. United States* (1925) 267 U.S. 132, 153, 156, 45 S.Ct. 280, 69 L.Ed. 543 [contraband may be seized from an automobile without a warrant if the officer has probable cause to believe the contraband was being transported in the automobile].) This automobile exception to the warrant requirement has been extended to encompass searches backed by reasonable cause of other offenses and warrantless inventory searches of impounded vehicles. (See, e.g., *Wyoming v. Houghton* (1999) 526 U.S. 295, 303, 119 S.Ct. 1297, 143 L.Ed.2d 408 [holding that when officers have probable cause to search a car, "the balancing of the relative interests weighs decidedly in favor of allowing searches of a passenger's belongings" that are capable of concealing the object of the search because "[p]assengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars"]; *United States v. Ross* (1982) 456 U.S. 798, 807, fn. 8, 102 S.Ct. 2157, 72 L.Ed.2d 572 [stating that historically, persons have been "on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts"], 823, 102 S.Ct. 2157 [stating that "an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband"]; *South Dakota v. Opperman* (1976) 428 U.S. 364, 368, 96 S.Ct. 3092, 49 L.Ed.2d 1000 [in upholding an inventory search, the court noted the diminished expectation of privacy in automobiles given "pervasive and continuing governmental regulation and controls," and "the obviously public nature of automobile travel"]; *Cardwell v. Lewis* (1974) 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325 [upholding the warrantless examination ***754** of a vehicle's exterior based upon the lesser expectation of privacy].) But the Supreme Court has also recognized some legitimate expectation of privacy in vehicles deserving of protection. (See *Arizona v. Gant* (2009) 556 U.S. 332, 345, 129 S.Ct. 1710, 173 L.Ed.2d 485 [recognizing that a motorist's privacy interest in his vehicle, although less substantial than the privacy interest in his home, "is nevertheless important and deserving of constitutional protection"]; see also *United States v. Ortiz* (1975) 422 U.S. 891, 896, 95 S.Ct. 2585, 45 L.Ed.2d 623, fn. omitted ["A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search"].)

****99** As noted, defendant does not dispute that the police had probable cause for the search. The trial court specifically found "there was probable cause to download the SDM, because speed and braking are always relevant in determining the causes of a collision." The scope of a warrantless search authorized by the automobile exception is "no broader and no narrower than a magistrate could legitimately authorize by warrant." (*United States v. Ross, supra,* 456 U.S. at p. 825, 102 S.Ct. 2157.) In *Ross,* the Supreme Court made clear that, even when the automobile exception applies, "[t]he scope of a warrantless search based on probable cause is no narrower —and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize." (*Id.* at p. 823, 102 S.Ct. 2157, fn. omitted.) The scope of a warrantless search of an automobile "is defined by the object of the search and the places in which there is probable cause to believe that it may be found." (*Id.* at p. 824, 102 S.Ct. 2157.) Thus, the vehicle is protected by the Fourth Amendment, and an individual's reasonable expectation of privacy as to the vehicle yields only as to places where there is probable cause to search. The scope of the search did not exceed probable cause.

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E. Instrumentality of the Crime Exception to Warrant Requirement

As noted, research did not reveal any published California case addressing the constitutionality of the warrantless downloading of SDM data from a lawfully impounded vehicle. However, in a series of cases, the California Supreme Court has upheld vehicle searches on the basis that the vehicle was an instrumentality of the crime or was itself evidence. In *People v. Teale* (1969) 70 Cal.2d 497, 75 Cal.Rptr. 172, 450 P.2d 564, the court upheld the warrantless seizure of an automobile when the officers had cause to believe that a murder victim had been shot in the automobile, and the court further found no Fourth Amendment violation in a criminalist's subsequent examination of the automobile, during which spatters of the victim's blood were found on the interior. (*People v. Teale, supra,* at pp. 508–511, 75 Cal.Rptr. 172, 450 P.2d 564.) The court ***755** held, " '[W]hen the police lawfully seize a car which is itself *evidence* of a crime rather than merely a container of incriminating articles, they may postpone searching it until arrival at a time and place in which the examination can be performed in accordance with sound scientific procedures.' " (*Id.* at p. 508, 75 Cal.Rptr. 172, 450 P.2d 564.)

In *North v. Superior Court* (1972) 8 Cal.3d 301, 104 Cal.Rptr. 833, 502 P.2d 1305, superseded by statute on another ground as stated in *People v. Loyd* (2002) 27 Cal.4th 997, 1000, 119 Cal.Rptr.2d 360, 45 P.3d 296, the police impounded the defendant's vehicle, which they believed had been used in a kidnapping, examined its interior without a warrant, and found the victim's fingerprints. In addition, they determined that the vehicle's tires and wheel span were consistent with impressions and measurements taken at the crime scene. (*North v. Superior Court, supra,* at p. 305, 104 Cal.Rptr. 833, 502 P.2d 1305.) The court upheld the post-seizure examination of the vehicle, explaining that the vehicle had been seized contemporaneously with the defendant's arrest, "as evidence of the alleged kidnapping; the car was believed to be the very instrumentality used to commit the kidnapping." (*Id.* at p. 306, 104 Cal.Rptr. 833, 502 P.2d 1305, fn.omitted.)

Next, in ****100** *People v. Rogers* (1978) 21 Cal.3d 542, 146 Cal.Rptr. 732, 579 P.2d 1048, the court upheld the warrantless search of a van the police had impounded from the defendant upon his arrest for committing lewd acts on children because the police had cause to believe it had been an instrumentality of the crime. The court explained, "[W]hen officers, incidental to a lawful arrest, seize an automobile or other object in the reasonable belief that the object *is itself evidence* of the commission of the crime for which the arrest is made, any subsequent examination of the object for the purpose of determining its evidentiary value does not constitute a 'search' as that term is used in the California and federal Constitutions. [Citations.] In light of the evidence indicating that the pornographic snapshots were taken in the van and might depict the victims of the reported assaults, [the officer] clearly had reason to believe that the van was itself evidence of the crimes for which defendant had been arrested." (*Id.* at pp. 549–550, 146 Cal.Rptr. 732, 579 P.2d 1048, citing *North v. Superior Court* and *People v. Teale.*)

In *People v. Griffin* (1988) 46 Cal.3d 1011, 251 Cal.Rptr. 643, 761 P.2d 103 (*Griffin*), the court upheld the taking of blood samples from the defendant's lawfully impounded truck. The court explained that "the truck in this case was itself evidence. The bloodstains that had soaked into the floorboard of the truck were clearly an appropriate subject of scientific examination and within the limits of the instrumentality exception." (*Id.* at pp. 1024–1025, 251 Cal.Rptr. 643, 761 P.2d 103.) The court observed, "The propriety of a warrantless seizure and search where the vehicle is itself evidence or the instrumentality of a crime is implicit in a number of United States Supreme Court decisions as well." (*Id.* at p. 1025, 251 Cal.Rptr. 643, 761 P.2d 103, collecting cases.)

***756** In this case, defendant's vehicle was itself an instrumentality of the crime of vehicular manslaughter. Defendant concedes it was lawfully seized. Consistent with the California Supreme Court cases discussed above, the officers' "subsequent examination of the [vehicle] for the purpose of examining its evidentiary value [did] not constitute a 'search' as that term is used in the California and federal Constitutions. [Citations.]" (*People v. Rogers, supra,* 21 Cal.3d at pp. 549–550, 146 Cal.Rptr. 732, 579 P.2d 1048.)

Defendant appears to argue, however, that the instrumentality exception no longer has validity, citing *People v. Minjares* (1979) 24 Cal.3d 410, 153 Cal.Rptr. 224, 591 P.2d 514 (*Minjares*) and *People v. Bittaker* (1989) 48 Cal.3d 1046, 259 Cal.Rptr. 630, 774 P.2d 659 (*Bittaker*). In *Minjares,* the People sought to justify the search of a closed container in the trunk of the defendant's vehicle under the instrumentality exception on the basis the car was an instrumentality of the defendant's crime of escape. The court responded, "In general, the belief that an automobile was used in the perpetration of a crime merely supplies the requisite probable cause to search the car. [Citation.] It does not justify its *warrantless*

search. To the extent that there is a separate 'instrumentality' exception under either Constitution which in any way adds to the 'automobile' exception, it is inapplicable to the facts of this case." (*Minjares, supra,* at p. 421, 153 Cal.Rptr. 224, 591 P.2d 514.) The court criticized the use of the instrumentality of a crime theory and held that the doctrine did not permit the search of a closed container within a vehicle. (*Id.* at p. 423, 153 Cal.Rptr. 224, 591 P.2d 514.) The court further stated, "If there were any vitality to the 'instrumentality' exception as it applies to automobiles ... it would be applicable only to a scientific examination of the object itself, for example for fingerprints, **101 bloodstains, or the taking of tire impressions or paint scrapings. [Citation.]" (*Id.* at p. 422, 153 Cal.Rptr. 224, 591 P.2d 514.)

Moreover, in *Griffin,* the court rejected the argument that it had repudiated the *People v. Teale* line of cases in *Minjares:* "We did not. We merely stated that the instrumentality exception was inapplicable on the facts before us in that case. [Citation.] Unlike the situation in *Minjares,* where the car trunk was merely a container of evidence, the truck in this case was itself evidence. The bloodstains that had soaked into the floorboard of the truck were clearly an appropriate subject of scientific examination and within the limits of the instrumentality exception." (*Griffin, supra,* 46 Cal.3d at p. 1025, 251 Cal.Rptr. 643, 761 P.2d 103.)

Next, in *Bittaker,* a case that "antedate[d] the enactment of article I, section 28, of the California Constitution, which bars exclusion of relevant evidence in criminal proceedings" (*Bittaker, supra,* 48 Cal.3d at p. 1077, fn. 15, 259 Cal.Rptr. 630, 774 P.2d 659), the court held that "while the instrumentality doctrine justifie[d] the officer's entry into the van to search for blood stains and other evidence of [the victim's] rape, it may not in itself justify the search of the van for *other objects not attached to or part of the van itself.*" (*Id.* at p. 1077, 259 Cal.Rptr. 630, 774 P.2d 659.) ***757** Again, in this case, the search of the SDM involved a search of an object attached to and part of the truck itself, and thus, the search fell squarely within the instrumentality exception.

Defendant argues, however, that the recent case of *United States v. Jones* (2012) 565 U.S. ––––, 132 S.Ct. 945, 181 L.Ed.2d 911] (*Jones*) indicates the police were required to obtain a warrant to search her vehicle. In *Jones,* the court held that the government's placement of a GPS tracking device on the undercarriage of a vehicle after a search warrant had expired, and the subsequent monitoring of the vehicle's movement and location for four weeks after that, violated the Fourth Amendment. (*Jones, supra,* at pp. 948–949, 132 S.Ct. 945.) The court based its decision on the common law theory of trespass in placing the GPS on the defendant's personal property, combined with the police attempt to obtain information. (*Id.* at p. 951 & fn. 5, 132 S.Ct. 945.) Moreover, the court expressly distinguished prior "beeper" tracking cases, *United States v. Knotts* (1983) 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 and *United States v. Karo* (1984) 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530, on the basis that in those cases, beepers had been installed in containers while they were in the possession of third parties, with the then-owners' permission. (*Jones, supra,* at pp. 952–953, 132 S.Ct. 945.) Here, the trespass theory underlying *Jones* has no relevance and, as the trial court aptly pointed out, the purpose of the SDM was not to obtain information for the police. Thus, *Jones* is not helpful to defendant.

F. Expectation of Privacy

As the trial court pointed out, the specific data obtained from the SDM was the vehicle's speed and braking immediately before the impact. We agree that a person has no reasonable expectation of privacy in speed on a public highway because speed may readily be observed and measured through, for example, radar devices (e.g., *People v. Singh* (2001) 92 Cal.App.4th Supp. 13, 15, 112 Cal.Rptr.2d 74), pacing the vehicle (e.g., *People v. Lowe* (2002) 105 Cal.App.4th Supp. 1, 5, 130 Cal.Rptr.2d 249), or estimation by a trained expert (e.g., *People v. Zunis* (2005) 134 Cal.App.4th Supp. 1, 6, 36 Cal.Rptr.3d 489). Similarly, a person has no reasonable expectation of privacy in use of a vehicle's brakes because statutorily required ****102** brake lights (Veh.Code, § 24603) announce that use to the public. Thus, defendant has not demonstrated that she had a subjective expectation of privacy in the SDM's recorded data because she was driving on the public roadway, and others could observe her vehicle's movements, braking, and speed, either directly or through the use of technology such as radar guns or automated cameras. In this case, technology merely captured information defendant knowingly exposed to the public—the speed at which she was ***758** travelling and whether she applied her brakes before the impact. (See, e.g., *Smith v. Maryland* (1979) 442 U.S. 735, 741–745, 99 S.Ct. 2577, 61 L.Ed.2d 220 [installation of a pen register at the telephone company's central offices, at the request of police, did not constitute a "search" within the meaning of the Fourth Amendment because the pen register merely recorded the telephone numbers dialed from the petitioner's home, and the petitioner could "claim no legitimate expectation of privacy," because "[w]hen he used his phone, petitioner voluntarily conveyed numerical

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information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business."

We conclude there was no Fourth Amendment violation in the admission of SDM evidence.

G. Harmless Error

Even if we presume for purposes of argument that the search was unlawful, we would also conclude that any error in admitting the evidence from the SDM was harmless in light of the overwhelming evidence of defendant's guilt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (*Chapman*).)

The first element of gross vehicular manslaughter while intoxicated is that the defendant drove under the influence of alcohol or with a blood-alcohol level of 0.08 or higher. Defendant's blood alcohol level was measured as 0.20 percent at 2:58 a.m., and considering the alcohol burnoff rate, was 0.23 at the time of the collision. The SDM data were irrelevant to that element of the crime.

The second element of the crime is that while driving under the influence, the defendant committed an infraction. Here, the prosecutor argued that defendant had committed two infractions: violating the maximum speed law and crossing a divided highway. Undisputed evidence, independent of the SDM data, established that defendant had violated the law by crossing over two sets of double yellow lines in the median of Knabe Road and had been driving the wrong way in the northbound lanes at the time of the collision. The import of the challenged SDM evidence was to establish defendant's speed before the collision and that she failed to apply her brakes. We note that Officer Wong testified, based on his "training and experience with collision reconstruction," that "the photographs that [he] saw of the damage to both vehicles" was consistent with "the Tahoe traveling at 76 miles per hour."

The third element of the crime is that the defendant committed the infraction with gross negligence. "[G]ross negligence can be shown by the *manner* in ***759** which the defendant operated the vehicle, that is, the overall circumstances (rather than the mere fact) of the traffic law violation." (*People v. Von Staden* (1987) 195 Cal.App.3d 1423, 1427–1428, 241 Cal.Rptr. 523.) Those overall circumstances include the defendant's intoxication and the manner in which the defendant drove. (*Ibid.*) In that case, the court upheld the jury's finding of gross negligence when the defendant "ignored his host's urging that he not drive while intoxicated"; "his level of intoxication was very high" [i.e., 0.16 percent blood alcohol level three hours after the accident, and an estimated 0.22 percent ****103** at the time of the accident]; and he exceeded the maximum safe speed by 30 miles per hour. (*Id.* at pp. 1426, 1428, 241 Cal.Rptr. 523.) In *People v. Bennett* (1991) 54 Cal.3d 1032, 2 Cal.Rptr.2d 8, 819 P.2d 849, the Supreme Court cited *People v. Von Staden* with approval and held, "The jury should ... consider all relevant circumstances, including level of intoxication, to determine if the defendant acted with a conscious disregard of the consequences rather than with mere inadvertence." (*Bennett, supra,* at p. 1038, 2 Cal.Rptr.2d 8, 819 P.2d 849.) In *Bennett,* the court upheld the jury's finding of gross negligence when the defendant had a blood alcohol level two hours after the accident of 0.20 percent, and he had been driving 10 miles over the speed limit. (*Id.* at p. 1035, 2 Cal.Rptr.2d 8, 819 P.2d 849.) Here, Palumbo testified defendant was clearly under the influence, and he tried to convince her to let him drive home. Instead, she got into the car and "pretty much" locked herself in. He also told an investigator Keppler had offered to drive defendant home. And even though the issue was contested, the jury could reasonably find that defendant, as a former EMT and ambulance driver, had greater awareness than most members of the general public of the consequences of drinking and driving. Abundant evidence supported the jury's finding of gross negligence.

The fourth element of the crime is that the defendant's grossly negligent conduct caused the victim's death. Causation was not at issue in this case.

In short, even in the absence of the SDM evidence, the jury would have convicted Diaz. Any error in admitting that evidence was necessarily harmless. (*Chapman, supra,* 386 U.S. at p. 24, 87 S.Ct. 824.)

H. Vehicle Code section 9951

Defendant appears to argue that a court order was required to download or retrieve information from the SDM in her Tahoe under Vehicle Code section 9951.[5] That statute "applies to all motor vehicles manufactured ***760** on or after July 1, 2004." (Veh.Code, § 9951, subd. (f).) Thus, on its face, the statute does not apply to defendant's 2002 Tahoe. Moreover, even if it did apply, we assess prejudice from the violation of a state statute under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243. Because we have concluded

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that defendant suffered no prejudice even under the more stringent *Chapman* standard, a fortiori, defendant suffered no prejudice under *Watson.*

IV. DISPOSITION

The judgment is affirmed.

We concur:

MCKINSTER J.

RICHLI J.

All Citations

213 Cal.App.4th 743, 153 Cal.Rptr.3d 90, 13 Cal. Daily Op. Serv. 1467, 2013 Daily Journal D.A.R. 1728

Footnotes

1 All further statutory references are to the Penal Code unless otherwise indicated.

2 One legal commentator has described SDMs as follows:

"Every vehicle with air bags has an air bag control module that monitors a developing crash and, based on the information received, decides whether to deploy the air bags. In addition, the module runs a diagnostic examination to make sure that its system is operating properly. The module also has a function that records data and, after a crash, stores some of that data in the EDR, which is a component of the air bag control module. For General Motors Corporation vehicles, this module is known as a sensing diagnostic module (SDM).... In addition to recording such matters as the warning lamp status (which, when lighted indicates problems) and whether the driver's belt is buckled, an EDR captures information about the severity of a crash, known as the delta force or the change of speed, and the duration of the crash. Moreover, the EDR records and stores four matters for a five-second period before a crash event—the vehicle speed, the engine revolutions per minute (RPM), the brake switch status (whether the brake has been applied), and the throttle position.

"The SDM, which is controlled by a microprocessor, has multiple functions: (1) it determines if a severe enough impact has occurred to warrant deployment of the air bag; (2) it monitors the air bag's components; and (3) it permanently records information. The SDM contains software that analyzes the longitudinal deceleration of a vehicle to determine whether a deployment event has occurred based on testing that was done previously to determine what events would require protection by an air bag. When the SDM senses an event (either a deployment event or an event that is not severe enough to require an air bag—that is, a near-deployment event), that information is recorded to the microprocessor's electrically erasable programmable read-only memory (EEPROM). When the air bag is deployed, the SDM records the event as a 'Code 51.') If the data from an EDR is properly evaluated, it can provide an impartial source of evidence for the reconstruction and biomechanics community to utilize." (Annot., Admissibility of Evidence Taken from Vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "Black Boxes" (2008) 40 A.L.R.6th 595.)

3 Defendant represents that count 1 was later dismissed, although the dismissal is not reflected in the record.

4 A New York court has addressed similar issues. In *People v. Christmann* (Just.Ct.2004) 3 Misc.3d 309, 312, 776 N.Y.S.2d 437, an officer downloaded data from the SDM of the defendant's vehicle that had been involved in a fatal accident and used the data to determine the speed of the vehicle at impact. The defendant challenged the warrantless downloading of the data under the Fourth Amendment, but the court rejected the challenge. The court relied on *People v. Quackenbush* (1996) 88 N.Y.2d 534, 647 N.Y.S.2d 150, 670 N.E.2d 434, in which the police impounded a vehicle involved in a fatal pedestrian accident and conducted a safety inspection of the vehicle, including its brakes. The *Quackenbush* court upheld the seizure and search of the vehicle, reasoning that vehicles' safety equipment was subject to "extensive government regulation," including mandatory annual inspections, and a safety inspection after a fatal accident did not offend the Fourth Amendment because the a diminished expectation of privacy in the mechanical areas of a vehicle must yield to the overwhelming state interest in investigating fatal accidents. (*Quackenbush, supra,* at pp. 538–539, 647 N.Y.S.2d 150, 670 N.E.2d 434.) The *Christmann* court held that the downloading of SDM data was a "reasonable extension" of the *Quackenbush* holding (*Christmann, supra,* at p. 314, 776 N.Y.S.2d 437) and further held, "The downloading of the

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information is not analogous to a container search, nor does it extend to the private areas of the vehicle. There is also no opportunity for a police officer to select only the desired data or to manipulate it." (*Ibid.*)

5 Manufacturers of vehicles equipped with SDMs must disclose their existence in the owner's manual. (Veh.Code, § 9951, subd. (a).) Subdivision (c) of that statute permits the downloading or retrieval of information from such devices only under the following circumstances: "(1) The registered owner of the motor vehicle consents to the retrieval of the information. [¶] (2) In response to an order of a court having jurisdiction to issue the order. [¶] (3) For the purpose of improving motor vehicle safety, ... and the identity of the registered owner or driver is not disclosed in connection with that retrieved data.... [¶] (4) The data is retrieved by a licensed new motor vehicle dealer, or by an automotive technician ... for the purpose of diagnosing, servicing, or repairing the motor vehicle." (Veh.Code, § 9951, subd. (c).)

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40 Cal.App.5th 853
Court of Appeal, Fourth District, Division 1, California.

The PEOPLE, Plaintiff and Appellant,
v.
Brandon Lance LEE,
Defendant and Respondent.

D073740
|
Filed 10/03/2019

Synopsis

Background: Defendant charged with various drug and weapons offenses filed motion to suppress the evidence obtained from warrantless vehicle search. The Superior Court, San Diego County, No. SCD273095, Margie G. Woods, J., granted the motion and the People appealed.

Holdings: The Court of Appeal, Dato, J., held that:

officer lacked probable cause to believe evidence of illegal activity would be found in vehicle, and

search was not justified by a community caretaking function and thus was not a valid inventory search.

Affirmed.

****515** APPEAL from an order of the Superior Court of San Diego County, Margie G. Woods, Judge. Affirmed. (Super. Ct. No. SCD273095)

Attorneys and Law Firms

Summer Stephan, District Attorney, Mark A. Amador, Linh Lam, Christine Bannon and Anne Spitzberg, Deputy District Attorneys, for Plaintiff and Appellant.

Sandra Gillies, under appointment by the Court of Appeal, for Defendant and Respondent.

Opinion

DATO, J.

***856** Following a traffic stop, officers searched Brandon Lance Lee's car without a warrant and discovered 56 grams of cocaine, a firearm, and other items associated with selling narcotics. After Lee was charged with various drug and weapons offenses, he filed a motion to suppress the evidence obtained from the warrantless vehicle search. The trial court granted Lee's motion, rejecting the People's contentions that the search was proper under the automobile exception as supported by probable cause or, alternatively, as an inventory search of a vehicle following an impound. Reviewing that order, we rely on the trial court's express and implied factual findings, provided they are supported by substantial evidence, to independently determine whether the search was constitutional.

In evaluating the People's reliance on the automobile exception to the warrant requirement, we weigh the totality of the circumstances to determine whether officers had probable cause to search Lee's car. Our analysis, like that of the trial court, does not overlook the small, permissible amount of marijuana found in Lee's pocket. But following the legalization of marijuana in 2016, California law now expressly provides that legal cannabis and related products "are not contraband" and their possession and/or use "shall not constitute the basis for detention, search, or arrest." (Health & Saf. Code, § 11362.1, subd. (c).) As a result, the trial court properly concluded that Lee's possession of a small amount of marijuana was of little relevance in assessing probable cause. Because the other factors relied on by the People were also of minimal significance, we conclude that even considering the totality of circumstances known to the officer there did not exist " ' "a fair probability that contraband or evidence of a crime will be found." ' " (*Alabama v. White* (1990) 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (*Alabama*).)

We likewise find no error in the trial court's conclusion that the search was not valid as an inventory search. The search here served no community caretaking function. And based on the manner in which the search was conducted and the statements of the officer to Lee and his passenger, the trial ***857** court reasonably found that the primary purpose of the search was *not* to inventory the contents of Lee's car, but rather to investigate Lee for possible criminal behavior.

We therefore affirm the order granting Lee's motion to suppress the evidence obtained from the unlawful search of his car.

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**516 FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *The Traffic Stop and Subsequent Search*

One evening in August 2017, Officers Carlos Robles and Thomas Cooper of the San Diego Police Department observed a gold-colored Cadillac DeVille with no front license plate and tinted windows in possible violation of Vehicle Code section 26708. They initiated a traffic stop and parked their vehicle near the Cadillac outside an apartment complex. Cooper approached the passenger side to speak with the front seat passenger, Michael H.[2] Robles walked to the driver's window and asked the driver, defendant Lee, for his driver's license. Lee said he did not have his license with him. Robles instructed Lee to step out of the vehicle and performed a patdown search to confirm he did not have any sort of identification.

During this search, Officer Robles discovered a bag containing a small amount of marijuana and a wad of cash in Lee's pocket.[3] Robles asked if he delivered medical marijuana; Lee replied, "Yes sir." Robles started to handcuff Lee when, according to Robles, Lee "tensed up." Lee then leaned back into the car and said something to Michael.[4] Robles then walked Lee to his patrol car and placed him in the backseat. Lee told Robles the Cadillac belonged to him and provided his name and date of birth.[5]

Cooper ran the two individuals' names while Robles spoke with Michael. Robles asked what happened to the money he had previously seen on the ***858** Cadillac's center console. Michael showed it to Robles and flipped through the bills, counting $10 in total. Cooper's searches revealed that Lee's license was suspended and Michael did not have a license. In addition, Michael had been arrested in the past for making criminal threats. Robles instructed Michael to exit the car to be placed in handcuffs. He explained that Michael would be free to leave if nothing was found during the vehicle search.

Officer Robles then spoke with Lee about his suspended license. Lee stated he knew his license had been suspended and explained it was the result of a failure to appear in court. Robles asked Lee if there was anything illegal in the car, and Lee told him there was not. Robles asked again and told him he was going to search the car because it was being impounded due to his suspended license.[6] Lee offered to have ****517** someone come pick up the car for him, but Robles told him, "That's not going to work." Robles asked Lee a third time if there was anything illegal in the car, and Lee again responded no. Lee began to ask if he could grab something from the car, and Robles told Lee he could take whatever he needed after the search confirmed there was nothing illegal in the car.

Robles began to search the Cadillac, starting with the front passenger seat. He examined the space between the seat and the center console, then under the seat. He attempted to access the glovebox, but it was locked. He opened both compartments of the center console and examined several items inside. He activated the screen of a cell phone sitting next to the center console.

Moving to the backseat, Robles pulled the bench seat up and used a flashlight to examine the space underneath. After he returned the seat to a resting position, he pulled down the center backseat armrest and discovered it provided access to the trunk. A black backpack sitting in the trunk became visible once the armrest had been pulled down. Robles took the backpack out of the trunk. He found a firearm in the backpack's main compartment and a large sum of money in its front pocket.

Robles returned to his patrol car and twice asked Lee if there was anything in the Cadillac he needed to discuss with the officers. Lee said no both times. Robles also asked Michael if he knew about anything illegal in the car, and Michael said he did not. Robles continued searching the car, looking under ***859** the driver's side seat and the driver's side floormat. He examined the space between the center console and the driver's side seat. He briefly searched the backseat area once more, including the back pocket of the driver's seat.

Robles again returned to his patrol car and had Lee step out and face the vehicle. He searched Lee's person for the keys to the glovebox and, not finding them, ultimately requested and retrieved them from Michael. Using the key to open the glovebox, he found inside a white envelope with two egg-sized plastic baggies containing a white powdery substance. The substance was later determined to be about 56 grams, or two ounces, of cocaine. He also found more small plastic baggies, a kitchen knife, and a small glass container. A further search of the vehicle revealed several small digital scales.

Robles did not fill out the impound form (ARJIS-11) at the scene when he performed his search as he did not have a copy of the form with him. This form was filled out by another

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officer, who conducted his own search of the Cadillac at a later time after it was impounded. Robles did not assist with filling out the form.

The San Diego County District Attorney charged Lee with transportation of cocaine not for personal use while armed with a firearm (Health & Saf. Code, § 11352, subd. (a);[7] Pen. Code, §§ 1210, subd. (a), 12022, subd. (c), count 1); possession for sale of cocaine weighing more than 28.5 grams while armed with a firearm (Health & Saf. Code, § 11351; **518 Pen. Code, §§ 1203.073, subd. (b)(1), 12022, subd. (c), count 2); having a concealed firearm in a vehicle (Pen. Code, § 25400, subd. (a)(1), count 3); and possession of a large-capacity magazine (Pen. Code, § 32310, subd. (c), count 4).

B. *Lee's Suppression Motion*

After the preliminary hearing, Lee filed a motion to suppress the evidence obtained during the search of his car, claiming it was obtained in violation of the Fourth Amendment. (U.S. Const., 4th Amend.) The People argued the search was permitted as an inventory search, or alternatively that there was probable cause to search the vehicle. At the motion hearing, Officer Robles testified he performed an inventory search as part of his impounding the Cadillac. When pressed why he searched unusual places such as underneath the backseat, he said that in his experience people commonly keep valuables or hide illegal items there. Robles acknowledged that the small bag of marijuana in Lee's pocket contained an amount consistent with personal use and was not illegal on its own. And he agreed that the money in Lee's *860 pockets combined with the legal amount of marijuana was not evidence of a crime. As Robles further explained, he asked Lee if he was involved in medical marijuana delivery because several illegal delivery services had recently emerged.

The trial court granted Lee's motion to suppress, concluding that although the initial traffic stop was lawful, the subsequent vehicle search was not an inventory search, not one incident to arrest, and not supported by probable cause. The court found that the manner in which Officer Robles searched the vehicle and his repeated questions to Lee about anything illegal inside indicated the primary purpose of the search was to investigate, not to inventory the vehicle's contents or serve a community caretaking function. That Robles did not fill out the required ARJIS-11 form or assist the officer who ultimately did was additional indication that the purpose of the search was not to inventory the contents of the vehicle.

The court further concluded that the $100 to $200 in cash on Lee's person, the small bag of legal marijuana, Lee's acknowledgement of delivering medical marijuana, and his "tensing up" did not provide probable cause to search the vehicle. It questioned Robles's credibility, finding his testimony "less convincing." In a later proceeding, the People announced they could not move forward, and the court dismissed the case on its own motion.

DISCUSSION

The People appeal the grant of Lee's motion to suppress the evidence obtained during Officer Robles's search of the Cadillac. As they did below, they contend the search was valid because there was probable cause to believe the car contained contraband. In the alternative, they claim the search was a proper inventory search in the course of impounding the vehicle.

A. *Standard of Review*

In reviewing a trial court's decision to grant a motion to suppress evidence, we rely on the trial court's express and implied factual findings, provided they are supported by substantial evidence, to independently determine whether the search was constitutional. (See *People v. Brown* (2015) 61 Cal.4th 968, 975, 190 Cal.Rptr.3d 583, 353 P.3d 305.) "Thus, while we ultimately exercise our independent judgment to determine the constitutional propriety of a search or seizure, we do so within the context of historical facts determined by the trial court." (*People v. Tully* (2012) 54 Cal.4th 952, 979, 145 Cal.Rptr.3d 146, 282 P.3d 173.) It is the trial court's **519 role to evaluate witness credibility, resolve conflicts in the testimony, weigh the evidence, and draw factual inferences. (*Ibid.*) We review those factual findings under the *861 deferential substantial evidence standard, considering the evidence in the light most favorable to the trial court's order. (*Ibid.*)

B. *Automobile Searches and the Fourth Amendment*

A warrantless search is unlawful under the Fourth Amendment "unless it falls within one of the 'specifically established and well-delineated exceptions.' " (*People v. Woods* (1999) 21 Cal.4th 668, 674, 88 Cal.Rptr.2d 88, 981 P.2d 1019; see also *Arizona v. Gant* (2009) 556 U.S. 332,

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338, 129 S.Ct. 1710, 173 L.Ed.2d 485.) Automobiles are the subject of special exceptions, and warrantless searches of automobiles "have been upheld in circumstances in which a search of a home or office would not." (*South Dakota v. Opperman* (1976) 428 U.S. 364, 367, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (*Opperman*).) These broader exceptions from the Fourth Amendment's general prohibition against warrantless searches derive from the inherent mobility of automobiles and a diminished expectation of privacy given the public nature of automobile travel. (*Id.* at pp. 367–368, 96 S.Ct. 3092.) The two exceptions relevant here include (1) a search of any area of the automobile where there is probable cause to believe evidence of a crime or contraband may be found, generally referred to as the "automobile exception" (*People v. Evans* (2011) 200 Cal.App.4th 735, 753, 133 Cal.Rptr.3d 323 (*Evans*)), and (2) an inventory search conducted in the course of impounding an automobile (see e.g., *People v. Torres* (2010) 188 Cal.App.4th 775, 786, 116 Cal.Rptr.3d 48 (*Torres*)).

We conclude the vehicle search in this case does not fall within either of these exceptions. As to the first—the automobile exception—the facts known to Officer Robles at the time he removed the occupants were insufficient to establish probable cause to search the Cadillac. The recent legalization of marijuana in California means we can now attach fairly minimal significance to the presence of a legal amount of the drug on Lee's person, and the remaining facts cited by the People do not provide any reasonable basis to believe contraband would be found in the car. As to the second, the inventory search exception does not apply because no community caretaking function was served by impounding the Cadillac, and the trial court reasonably found that Robles's primary motive was to investigate, not inventory, the vehicle's contents. Because the search was neither supported by probable cause nor constituted a proper inventory search, it was constitutionally unreasonable and the trial court properly granted Lee's motion to suppress.

1. *Officer Robles Did Not Have Probable Cause To Search Lee's Vehicle.*

The People argue that the search of Lee's car was proper under the automobile exception to the warrant requirement. Under this exception, ***862** "police who have probable cause to believe a lawfully stopped vehicle contains evidence of criminal activity or contraband may conduct a warrantless search of any area of the vehicle in which the evidence might be found." (*Evans*, *supra*, 200 Cal.App.4th at p.753, 133 Cal.Rptr.3d 323; see also *United States v. Ross* (1982) 456 U.S. 798, 821, 102 S.Ct. 2157, 72 L.Ed.2d 572.) A probable cause inquiry relies on an objective standard; we do not consider an officer's subjective beliefs. (*Evans*, at p. 753, 133 Cal.Rptr.3d 323.)

Probable cause is a more demanding standard than mere reasonable suspicion. (****520** *People v. Souza* (1994) 9 Cal.4th 224, 230–231, 36 Cal.Rptr.2d 569, 885 P.2d 982.) It exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found ...." (*Ornelas v. United States* (1996) 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911.) In determining whether a reasonable officer would have probable cause to search, we consider the totality of the circumstances. (See *Illinois v. Gates* (1983) 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527.)

The People rely on several factors they contend, taken together, establish probable cause to believe evidence of illegal activity would be found in the vehicle. These include: (1) the marijuana in Lee's pocket; (2) Lee's affirmative response when Officer Robles asked if he delivered medical marijuana; (3) the "wadded-up" $100 to $200 cash in his pocket; (4) the additional $10 in cash in the center console; and (5) the manner in which Lee "tensed" as Robles handcuffed him and led him to the patrol car. They emphasize the marijuana found, arguing that cases like *People v. Mower* (2002) 28 Cal.4th 457, 122 Cal.Rptr.2d 326, 49 P.3d 1067 (*Mower*) and *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 56 Cal.Rptr.3d 306 (*Strasburg*) stand for the proposition that possession of a legal amount of marijuana does not deprive police "of the capacity to entertain a suspicion of criminal conduct."

If by this argument the People mean simply that possession of a small (legal) amount of marijuana does not foreclose the possibility that defendant possesses a larger (illegal) amount, they are obviously correct. But there must be evidence—that is, *additional* evidence beyond the mere possession of a legal amount—that would cause a reasonable person to believe the defendant has more marijuana. And it would be incorrect to say that California's legalization of marijuana is of no relevance in assessing whether there is probable cause to search a vehicle in which police find a small and legal amount of the drug. To understand the significance of California's legalization of marijuana to the suppression motion here, we must construe the relevant cases in their historical context.

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***863** California transitioned to legalized marijuana in stages, from (1) total illegality to (2) permitted medical use to (3) decriminalization to (4) recreational legalization. Prior to 1996, any possession or use of marijuana was illegal. But in November 1996, voters approved a ballot initiative—Proposition 215, the Compassionate Use Act of 1996 (Act)—which added section 11362.5 to the Health and Safety Code. (*Strasburg, supra*, 148 Cal.App.4th at pp. 1052, 1057, 56 Cal.Rptr.3d 306; see § 11362.5.) This Act allowed individuals suffering from an illness to obtain and use marijuana for medical purposes with a physician's recommendation. (*Strasburg*, at p. 1057, 56 Cal.Rptr.3d 306.) These individuals, as well as their primary caregivers, were immune from criminal prosecution or sanction. (*Ibid.*)

Strasburg would become the leading case on how the Act impacted probable cause for vehicle searches where marijuana is found. In *Strasburg*, an officer walked up to the defendant's car and noticed the odor of marijuana. (*Strasburg, supra*, 148 Cal.App.4th at p. 1055, 56 Cal.Rptr.3d 306.) The defendant admitted he had just been smoking marijuana in his car. When asked if he had any marijuana with him, he handed the officer a Ziploc bag containing about three-quarters of an ounce of marijuana. (*Ibid.*) The officer also noticed another small amount of marijuana, about 2.2 grams, in the car. (*Ibid.*) The defendant repeatedly asserted that he had a medical marijuana card, but the officer declined to view it. (****521** *Id.* at pp. 1055–1056, 56 Cal.Rptr.3d 306.) The defendant was detained, the car was searched, and the officer discovered 23 ounces of marijuana and a large scale. (*Id.* at p. 1056, 56 Cal.Rptr.3d 306.)

The appellate court upheld the denial of the defendant's motion to suppress. (*Strasburg, supra*, 148 Cal.App.4th at p. 1060, 56 Cal.Rptr.3d 306.) The odor of marijuana, the defendant's admission he had just been smoking it, and the quantities of marijuana provided to the officer and observed in the vehicle prior to the search constituted probable cause to believe the defendant's vehicle contained additional (illegal) amounts of the substance. (*Id.* at p. 1059, 56 Cal.Rptr.3d 306.) The court rejected the defendant's argument that his medical marijuana prescription negated the existence of probable cause to search his car. (*Id.* at pp. 1059–1060, 56 Cal.Rptr.3d 306.) It relied on *Mower, supra*, 28 Cal.4th 457, 122 Cal.Rptr.2d 326, 49 P.3d 1067, which held that status as a qualified patient under medical marijuana laws provides only limited immunity from prosecution in the form of an affirmative defense, not immunity from arrest. (*Strasburg*, at p. 1058, 56 Cal.Rptr.3d 306.) Accordingly, a defendant's medical marijuana prescription and current medical marijuana laws could provide limited immunity but “not a shield from reasonable investigation” that would affect the officer's probable cause to search the car. (*Id.* at p. 1060, 56 Cal.Rptr.3d 306.)

Three years after *Strasburg*, the governor signed Senate Bill No. 1449 (2009–2010 Reg. Sess.) decriminalizing marijuana possession. (Stats. 2010, ***864** ch. 708, §§ 1−2.) By amending section 11357 of the Health and Safety Code and section 23222 of the Vehicle Code, this legislation converted possession of up to one ounce of marijuana, including while driving, from a misdemeanor to an infraction. (Stats. 2010, ch. 708, §§ 1-2.) *People v. Waxler* (2014) 224 Cal.App.4th 712, 168 Cal.Rptr.3d 822 (*Waxler*) addressed how this decriminalization would affect probable cause determinations for vehicle searches.

As the officer in *Waxler* approached the defendant's truck “he smelled ‘the odor of burnt marijuana’ and ‘saw a marijuana pipe with ... what appeared to be burnt marijuana in the bowl.’ ” (*Waxler, supra*, 224 Cal.App.4th at p. 716, 168 Cal.Rptr.3d 822.) Searching the truck, the officer found methamphetamine and a methamphetamine pipe. (*Ibid.*) The appellate court affirmed the trial court's denial of the defendant's motion to suppress evidence seized from his truck. (*Ibid.*) It held that the officer had probable cause to search the truck based on the odor of marijuana and his observation of burnt marijuana, noting that under *Strasburg*, “the odor of marijuana justifies the warrantless search of an automobile.” (*Id.* at pp. 719, 721, 168 Cal.Rptr.3d 822.) Despite the intervening decriminalization of marijuana after *Strasburg*, the court reasoned that “[o]ther than certain quantities of medical marijuana, possession of *any* amount of marijuana ... is illegal in California and is therefore ‘contraband.’ ” (*Id.* at p. 721, 168 Cal.Rptr.3d 822, italics added.) “Thus, a law enforcement officer may conduct a warrantless search of a vehicle pursuant to the automobile exception when the officer has probable cause to believe the vehicle contains marijuana, which is contraband.” (*Ibid.*)

While *Waxler* was the leading case addressing probable cause to search a vehicle following the decriminalization of marijuana, it does little to help resolve similar issues following recreational *legalization.* With the passage of Proposition 64 by voters in 2016, California law now permits adults 21 years of age and older to legally possess up to 28.5 grams, or about one ****522** ounce, of marijuana. (§ 11362.1, subd. (a)(1).) Critically, the statute expressly provides that

"[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, *and no conduct deemed lawful by this section shall constitute the basis for detention*, *search*, *or arrest.*" (§ 11362.1, subd. (c), italics added.) *Waxler* relied heavily on the fact that any amount of nonmedical marijuana remained *contraband* despite the change in the law reducing possession of up to one ounce from a misdemeanor to an infraction. But following legalization, California law now specifically states that up to one ounce of marijuana possessed by an adult age 21 or over is *not* contraband. Accordingly, *Waxler* does not help us determine whether or to what extent legally possessed marijuana now affects whether there is probable cause to search a vehicle.

***865** The 2016 amendments to the Health and Safety Code similarly appear to undercut much of *Strasburg*'s probable cause analysis. The *Strasburg* court held that the odor and sight of less than one ounce of marijuana provided police with probable cause to search the defendant's vehicle. (*Strasburg, supra*, 148 Cal.App.4th at p. 1059, 56 Cal.Rptr.3d 306.) Yet section 11362.1, subdivision (c) now specifically states that lawful conduct involving marijuana—including possession of up to one ounce—shall not form the basis for a search.

Arguing that *Strasburg* and *Waxler* remain good law, the People urge us to follow *People v. Fews* (2018) 27 Cal.App.5th 553, 238 Cal.Rptr.3d 337 (*Fews*), a case we find readily distinguishable. In *Fews*, officers initiated a traffic stop of a car near an area of San Francisco known for drug sales and drug-related violence. (*Id.* at p. 557, 238 Cal.Rptr.3d 337.) The driver quickly got out of the vehicle and reached through the open door to retrieve some items. Defendant, the passenger, remained seated but was seen "making 'furtive movements.' " (*Ibid.*) When officers approached the driver, they noticed the odor of marijuana and saw a half-burnt cigar in the driver's hands that he confirmed contained marijuana. (*Ibid.*) The officers searched both the driver and the defendant, as well as the vehicle, and discovered a firearm in the defendant's pocket. (*Id.* at p. 558, 238 Cal.Rptr.3d 337.)

Affirming the denial of the defendant's suppression motion, the *Fews* court found "no compelling reason to depart from *Strasburg* and *Waxler*" on the facts presented. (*Fews*, *supra*, 27 Cal.App.5th at p. 562, 238 Cal.Rptr.3d 337.) It rejected the defendant's argument that the legalization of marijuana meant it was no longer contraband. (*Id.* at p. 563, 238 Cal.Rptr.3d 337.) As the court explained, Health and Safety Code, section 11362.1, subdivision (c) only applies to conduct deemed *lawful* under that section, which does not include "[d]riving a motor vehicle on public highways under the influence of any drug (see Veh. Code, § 23152, subd. (f)) or while in possession of an open container of marijuana (Veh. Code, § 23222, subd. (b)(1) ...." (*Fews*, at p. 563, 238 Cal.Rptr.3d 337.) Testimony that the officers smelled recently burned marijuana and saw a half-burnt cigar containing marijuana supported a reasonable inference that the driver was illegally operating a vehicle under the influence of marijuana or, at the very least, driving while in possession of an open container of marijuana. Because neither would be *lawful* under section 11362.1, the defendant could not rely on the "not contraband" designation of section 11362.2, subdivision (c) to avoid the holding in *Waxler*. (*Fews*, at p. 563, 238 Cal.Rptr.3d 337.)

***866** Whatever the merits of the *Fews* analysis,[8] the facts here present a very different ****523** scenario. Officer Robles did not smell the odor of burnt marijuana—suggesting the possibility of driving under the influence—and there was no evidence of marijuana in an open container in Lee's car. Indeed, Robles conceded there was nothing illegal about the small amount of marijuana in Lee's pocket. As such, the reasoning used by *Fews* to rely on *Strasburg* and *Waxler* does not apply. In addition, the other factors surrounding the *Fews* search, such as the locale, odd behavior of the driver, and "furtive movements" of the defendant provided a much stronger basis for probable cause than the facts surrounding Officer Robles's search of the Cadillac.

Consistent with the directive of section 11362.1, subdivision (c), Lee's possession of a small and legal amount of marijuana provides scant support for an inference that his car contained contraband. The other evidence relied on by the People adds little to the calculus. Like his possession of a legal amount of marijuana, Lee's admission that he delivers medical marijuana is not particularly significant in the absence of evidence that his delivery business was illegal. The cash found in Lee's pocket and in the center console of the car might be of significance if it suggested illegal drug sales. But we do not know exact amount or the denominations of the bills —only that the total was between $100 and $200 and that the denominations may have included $1, $5, $10, and $20 bills. Finally, Officer Robles's testimony that Lee "tensed up" as he was handcuffed hardly seems an unusual reaction for someone being detained and escorted to the back of a police car. More significantly, the trial judge questioned Robles's credibility, and we are bound to draw all reasonable inferences in support of the court's order granting the suppression motion.[9]

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Considering the facts in the light most favorable to the court's order, even the totality of the circumstances falls well short of establishing probable cause to search the Cadillac. Those circumstances simply were not enough to ***867** support the " 'fair probability that contraband or evidence of a crime will be found.' " (*Alabama*, *supra*, 496 U.S. at p. 330, 110 S.Ct. 2412.)

2. *Officer Robles Did Not Conduct a Valid Inventory Search.*

Inventory searches are a well-defined exception to the Fourth Amendment's warrant requirement. (*Colorado v. Bertine* (1987) 479 U.S. 367, 371, 107 S.Ct. 738, 93 L.Ed.2d 739.) When a vehicle is impounded or otherwise in lawful police custody, an officer may conduct a warrantless search aimed at securing or protecting ****524** the vehicle and its contents. (*Opperman*, *supra*, 428 U.S. at p. 373, 96 S.Ct. 3092.) "The policies behind the warrant requirement are not implicated in an inventory search [citation], nor is the related concept of probable cause." (*Colorado v. Bertine*, at p. 371, 107 S.Ct. 738.)

To determine whether a warrantless search is properly characterized as an inventory search, "we focus on the purpose of the impound rather than the purpose of the inventory." (*People v. Aguilar* (1991) 228 Cal.App.3d 1049, 1053, 279 Cal.Rptr. 246 (*Aguilar*).) "The decision to impound the vehicle must be justified by a community caretaking function 'other than suspicion of evidence of criminal activity' [citation] because inventory searches are 'conducted in the absence of probable cause' [citation]." (*Torres*, *supra*, 188 Cal.App.4th at p. 787, 116 Cal.Rptr.3d 48.) For example, impounding serves a community caretaking function when a vehicle is parked illegally, blocks traffic or passage, or stands at risk of theft or vandalism. (*Id.* at p. 790, 116 Cal.Rptr.3d 48; *People v. Williams* (2006) 145 Cal.App.4th 756, 762–763, 52 Cal.Rptr.3d 162 (*Williams*).) Also relevant to the caretaking inquiry is whether someone other than the defendant could remove the car to a safe location. (*Torres*, at p. 790, 116 Cal.Rptr.3d 48.)

The absence of a proper community caretaking function suggests an impound is a pretext to investigate without probable cause, a purpose which is inconsistent with an inventory search. (*Torres*, *supra*, 188 Cal.App.4th at p. 788, 116 Cal.Rptr.3d 48.) Officers may not use an inventory search as "a ruse for a general rummaging in order to discover incriminating evidence." (*Florida v. Wells* (1990) 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1.) Unlike the probable cause determination, which rests solely on an objective standard, the inventory search exception evaluates both the objective reasonableness of the impound decision and the subjective intent of the impounding officer to determine whether the decision to impound was "motivated by an improper investigatory purpose." (*Torres*, at p. 791, 116 Cal.Rptr.3d 48.) Such purpose renders a decision to impound and the subsequent inventory search unlawful under the Fourth Amendment. (*Aguilar*, *supra*, 228 Cal.App.3d at p. 1053, 279 Cal.Rptr. 246.)

Officer Robles's search of the Cadillac is similar to the search in *Torres*. There, a deputy searched the defendant's person following a traffic stop after ***868** he admitted not having a driver's license. (*Torres*, *supra*, 188 Cal.App.4th at p. 780, 116 Cal.Rptr.3d 48.) This search yielded four cell phones and $965. (*Ibid.*) At that point the deputy decided to impound the defendant's truck and soon after performed a search in which he discovered 12 ounces of methamphetamine and evidence of sales. (*Ibid.*) The deputy conceded "he had decided to impound the truck 'in order to facilitate an inventory search' " and that he was not the one who had filled out the required inventory search form. (*Id.* at pp. 781, 782, 116 Cal.Rptr.3d 48.) The appellate court found the impound decision and subsequent inventory search unreasonable and reversed the trial court's denial of the defendant's motion to set aside the information. (*Id.* at pp. 789, 793, 116 Cal.Rptr.3d 48.) This conclusion turned on the apparent investigatory motive of the deputy and the absence of a community caretaking function for impounding the vehicle; "[t]he prosecution failed to show the truck was illegally parked, at an enhanced risk of vandalism, impeding traffic or pedestrians, or could not be driven away by someone other than defendant." (*Id.* at pp. 789–790, 116 Cal.Rptr.3d 48.)

Like the prosecution in *Torres*, the People here failed to show that the ****525** decision to impound Lee's car served any sort of community caretaking function. The car was parked in or alongside an apartment complex. It was not blocking a roadway, the sidewalk, or a driveway.[10] Although both Lee and his passenger were unable to drive the car (as neither had a valid license), Lee offered to have someone else come pick it up so it would not need to be impounded. Robles rejected the offer without explanation, saying simply, "That's not going to work." On these facts, the trial court properly concluded that the impound served no community caretaking function.

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In addition, ample evidence supports the trial court's finding that the impound and purported inventory search were a pretext to look for incriminating evidence. Robles repeatedly asked Lee and passenger Michael if there was anything *illegal* in the car, as opposed to whether there were valuables or other items in the car he needed to inventory. Robles told Michael he would be released and free to go if nothing *illegal* was found in the car. And he denied Lee's request to remove some of his personal belongings before the car was searched.

***869** Video from Robles's body-worn camera supports the inference that his motive was to investigate criminal activity, not protect private property. Rather than search areas where someone might normally keep valuables, he examined places where illegal items might be stashed, such as the underside of the backseat. Robles's testimony that in his experience people often keep valuables in such places does not change our view that the typical person does not. More importantly, the trial judge questioned Robles's veracity and Robles admitted that he searched underneath the backseat because it is a common place to hide illegal items. In their totality, these facts provide substantial evidence to support the trial court's finding that the focus of Robles's search was finding incriminating evidence.[11] This motivation is inconsistent with an inventory search. (*Torres, supra*, 188 Cal.App.4th at p. 789, 116 Cal.Rptr.3d 48.)

The People point to Vehicle Code provisions (*ante*, fn. 6) and local police procedures as authorizing Robles to impound Lee's vehicle and conduct an inventory search. But the fact that an inventory search is *authorized* is not determinative of the search's constitutionality. Indeed, "[i]nventory search jurisprudence *presumes* some objectively reasonable basis supports the impounding." (*Torres, supra*, 188 Cal.App.4th at p. 791, 116 Cal.Rptr.3d 48.) Thus, "statutory authorization does not, in and of itself, determine the constitutional reasonableness of the seizure." (*Williams, supra*, 145 Cal.App.4th at p. 762, 52 Cal.Rptr.3d 162; *id.* at pp. 762–763, 52 Cal.Rptr.3d 162 [while officer had statutory authority to impound defendant's vehicle, the impound served no community caretaking function where the car was parked legally by the curb in a residential area and was not blocking traffic or ****526** access; therefore, officer's vehicle search was unconstitutional].) Although Robles had statutory authority to impound Lee's car after apprehending him for driving on a suspended license (see Veh. Code, §§ 14602.6, subd. (a)(1), 22651, subd. (p)), that does not automatically render any impound and subsequent inventory search constitutionally proper. Substantial evidence supports the trial court's finding that Robles's decision to impound Lee's vehicle served no valid community caretaking function. We accordingly conclude that the search of Lee's vehicle cannot be justified by the inventory search exception to the Fourth Amendment's warrant requirement.

***870** DISPOSITION

The order granting Lee's motion to suppress evidence obtained from the unconstitutional search of his car is affirmed.

Benke, Acting P. J., and Aaron, J., concurred.

All Citations

40 Cal.App.5th 853, 253 Cal.Rptr.3d 512, 19 Cal. Daily Op. Serv. 9818, 2019 Daily Journal D.A.R. 9528

Footnotes

1. A substantial part of the factual background is based on video evidence provided by a body camera worn by Officer Robles.

2. Lee and Michael H. were the only individuals in the car. We refer to Lee's passenger by his first name and last initial, intending no disrespect.

3. The amount of cash in Lee's pocket was later determined to be between $100 to $200 in United States bills. The audio from Robles's body worn camera suggests it was in $1 and $5 denominations, but the testimony of investigating officer Detective Steven Skinner at the preliminary hearing states the money found was in $5, $10, and $20 denominations. It is unclear whether Detective Skinner was referring to all the money found during the patdown search and subsequent vehicle search or only to cash later found in the vehicle. The record does not indicate how much money was found in the vehicle.

4 Robles thought he heard something about a "bag." Lee and Michael told Robles later that when Lee leaned into the car, he had asked Michael to grab Lee's phone.

5 It was later determined that the car was not owned by Lee.

6 The Vehicle Code permits an officer to impound a car when a person is found to be driving with a suspended license. (Veh. Code, § 14602.6, subd. (a)(1) [officer may immediately arrest a person found driving with a suspended license and cause the removal and seizure of the vehicle]; Veh. Code, § 22651, subd. (p) [officer may remove a vehicle "[i]f the peace officer issues the driver of [the] vehicle a notice to appear for violation of [Veh. Code] Section 12500" which requires a person to have a valid driver's license to drive upon a highway].) Lee was neither arrested nor issued a citation for driving with a suspended license.

7 Subsequent statutory references are to the Health and Safety Code, unless otherwise noted. We continue to refer to the code by name as appropriate for clarity.

8 There may be an analytic difference between evidence of illegal activity—impaired driving or violation of the open container law—and whether that evidence suggests that contraband will be found in the vehicle, which is the critical issue in establishing probable cause to conduct a search.

9 The People acknowledge that the trial court questioned Robles's "veracity" based on his "inconsistent statements" and being "impeached in certain part of his testimony." But they maintain the court made no "specific" or "material factual findings regarding his testimony." The argument misses the point. Our deference to the trial court's resolution of factual questions extends not merely to specific or express factual findings, but to implied findings as well. (*People v. Woods* (1999) 21 Cal.4th 668, 673, 88 Cal.Rptr.2d 88, 981 P.2d 1019.) It was for that court to listen to Robles's testimony about Lee "tensing up," judge his credibility, and draw whatever reasonable inferences it chose to from the statement. (See *People v. Lawler* (1973) 9 Cal.3d 156, 160, 107 Cal.Rptr. 13, 507 P.2d 621.) We are left to resolve all factual conflicts in a manner most favorable to and supportive of the trial court's decision to grant the motion to suppress. (See *People v. Martin* (1973) 9 Cal.3d 687, 692, 108 Cal.Rptr. 809, 511 P.2d 1161.)

10 In their opening brief the People claimed there was a sign visible in the video footage suggesting that Lee's Cadillac was improperly parked in a private parking lot. In their reply brief, however, they concede no such sign is visible. Moreover, Officer Robles never testified this was a reason he decided to impound the vehicle, and it would in any event not explain Robles's refusal to allow Lee to arrange for someone to pick up the car.

11 We also note that Robles did not fill out or have with him the impound inventory ARJIS-11 form when he conducted the search of Lee's car. Nor did he assist the officer who later performed an inventory search and filled out the required form. These facts further suggest that the motivation behind Robles's search was to investigate, not to inventory. (See *People v. Wallace* (2017) 15 Cal.App.5th 82, 92–93, 222 Cal.Rptr.3d 795.)

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88 N.Y.2d 534, 670 N.E.2d 434, 647 N.Y.S.2d 150

The People of the State of New York, Respondent,
v.
James Quackenbush, Appellant.

Court of Appeals of New York
175
Argued June 6, 1996;

Decided July 9, 1996

CITE TITLE AS: People v Quackenbush

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Term of the Supreme Court in the Second Judicial Department, entered October 16, 1995, which (1) reversed, on the law, an order of the Justice Court of the Town of East Hampton, Suffolk County (James R. Ketchum, J.), granting a motion by defendant to suppress evidence obtained as the result of a safety inspection of his motor vehicle pursuant to Vehicle and Traffic Law § 603, and (2) remanded the matter for further proceedings.

People v Quackenbush, 166 Misc 2d 364, affirmed.

HEADNOTES

Motor Vehicles
Brakes
Authority of Police to Impound Vehicle Involved in Personal Injury Accident

(1) The police possessed the authority to impound defendant's vehicle after it was involved in a fatal accident in order to comply with the investigatory and reporting duties imposed by Vehicle and Traffic Law § 603, which requires that whenever an accident resulting in injury to a person has been reported to the police within five days of its occurrence, the police "shall immediately investigate the facts, or cause the same to be investigated, and report the matter to the commissioner [of Motor Vehicles] forthwith" (Vehicle and Traffic Law § 603 [1]) on a form prepared by the Commissioner that includes, among other data, a description of the accident, the damage to the vehicles and their undercarriages, and a report on whether the vehicle operators were ticketed, arrested or charged with any violations. A determination of whether the vehicle was suffering from a safety defect at the time of the accident has obvious relevance in preparing the accident description and in reporting whether violations were issued to drivers of vehicles involved. Section 603 does not expressly authorize the police to remove the vehicle from the accident scene and impound it in order to complete the requisite investigation and report, but as a practical matter, an inspection of a vehicle to determine whether any defects in its safety equipment constituted a contributing cause of the accident cannot reasonably be undertaken on the roadway. Thus, section 603 implicitly grants the police the authority to impound a vehicle in furtherance of their administrative mandate to fully investigate the cause of a fatal automobile accident, as well as to ensure the safety of those conducting the accident investigation.

Searches and Seizures
Warrantless Impoundment of Vehicle--Personal Injury Accident

(2) The warrantless impoundment and inspection of defendant's vehicle pursuant to Vehicle and Traffic Law § 603 after it was involved in a fatal accident ***535** did not violate the constitutional proscriptions against unreasonable searches and seizures *(see,* US Const 4th Amend; NY Const, art I, § 12). Warrantless administrative searches may be upheld in the limited category of cases where the activity or premises sought to be inspected is subject to a long tradition of pervasive government regulation and the regulatory statute authorizing the search prescribes specific rules to govern the manner in which the search is conducted. As a practical matter, a person involved in a closely regulated business or activity generally has a diminished expectation of privacy in the conduct of that business because of the degree of governmental regulation. The inspection scheme at issue here, designed to further the compelling safety interest of the government in regulating the use of motor vehicles on the State's public highways, provides assurances that the inspection will be reasonable. The mechanical areas of automobiles are subject to extensive and long-standing safety regulation and, therefore, there is only a diminished

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expectation of privacy in the mechanical areas of a vehicle, which necessarily yields to the State's legitimate public safety interests in determining all of the circumstances surrounding the death and the cause of the accident and in ensuring that the vehicle is not returned to the roadway in an unsafe condition when a fatal accident involving an automobile has occurred. Here, the rules remove the possibility that the inspection will be undertaken in an arbitrary manner: the safety inspection authorized by section 603 is only conducted in response to a particular event that calls into question the safe mechanical functioning of the vehicle, and it is the standard policy of the police department to uniformly conduct this mechanical inspection on every vehicle involved in an accident resulting in either serious physical injury or death. The scope of the intrusion was strictly tailored to a determination of whether any safety violations existing on the vehicle at the time of the accident could have contributed to its cause--the initial justification for the intrusion. The length of the intrusion, a two-day impoundment, although greater than the temporary detainment of automobiles normally associated with a stop for a routine traffic check, was not unreasonable as a matter of law.

Searches and Seizures
Warrantless Impoundment of Vehicle--Exigent Circumstances

(3) With respect to the warrantless impoundment and inspection of defendant's vehicle pursuant to Vehicle and Traffic Law § 603 after it was involved in a fatal accident, any exigency normally associated with the mobility of a vehicle was removed by its impoundment and thus could not justify the warrantless intrusion.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Searches and Seizures, §§ 77, 106, 199.

Vehicle and Traffic Law § 603; NY Const, art I, § 12.

US Const 4th Amend.

NY Jur 2d, Criminal Law, § 514.

ANNOTATION REFERENCES

See ALR Index under Search and Seizure. ***536**

POINTS OF COUNSEL

John P. Courtney, Amagansett, for appellant.

I. The impounding of defendant's vehicle violated the rights guaranteed him under the 4th Amendment of the United States Constitution and under article I, § 12 of the New York State Constitution. *(People v Galak,* 81 NY2d 463; *New York v Belton,* 453 US 454; *California v Carney,* 471 US 386; *People v Blasich,* 73 NY2d 673; *People v Yancy,* 86 NY2d 239; *People v Belton,* 55 NY2d 49; *South Dakota v Opperman,* 428 US 364; *People v Class,* 63 NY2d 491, 67 NY2d 431.)

II. The warrantless search of defendant's vehicle two days after it had been impounded by the police violated the rights guaranteed him under the 4th Amendment of the United States Constitution and under article I, § 12 of the New York State Constitution. *(People v Milerson,* 51 NY2d 919; *People v Ready,* 61 NY2d 790; *People v Drayton,* 172 AD2d 849; *People v Allen,* 124 AD2d 1046; *Michigan v Tyler,* 436 US 499; *Colonnade Corp. v United States,* 397 US 72; *United States v Biswell,* 406 US 311; *People v Burger,* 67 NY2d 338; *Colorado v Bertine,* 479 US 367; *People v Galak,* 80 NY2d 715.)

James M. Catterson, Jr., District Attorney of Suffolk County, Riverhead *(Mary-Ellen Harkin* of counsel), for respondent.

I. The impoundment and performance of a safety inspection on respondent's vehicle was properly conducted pursuant to the mandates of Vehicle and Traffic Law § 603. *(People v Keta,* 79 NY2d 474, 185 AD2d 994; *South Dakota v Opperman,* 428 US 364; *People v Scott,* 63 NY2d 518; *South Dakota v Neville,* 459 US 553.)

II. The police-directed examination of appellant's brakes was clearly proper and not violative of the dictates of either State or Federal constitutional provisions, protecting the People from unreasonable searches and seizures; as there exists no reasonable expectation of privacy in the brakes of an automobile, any inspection thereof does not constitute a "search". *(Maryland v Macon,* 472 US 463; *California v Ciraola,* 476 US 207; *Rawlings v Kentucky,* 448 US 98; *Katz v United States,* 389 US 347; *People v Whitfield,* 81 NY2d 904; *Oliver v United States,* 466 US 170; *People v Scott,* 63 NY2d 518; *United States v Martinez-Fuerte,* 428 US 543; *People v Belton,* 55 NY2d 49; *People v Class,* 63 NY2d 491, 475 US 106, 67 NY2d 431.)

III. Appellant consented to have his vehicle impounded and a safety inspection performed. *(People v Gonzalez,* 39 NY2d 122; *People v Springer,* 92 AD2d 209; *Schneckloth v Bustamonte,* 412 US 218; *People v Kuhn,* 33 NY2d 203;

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People ***537** *v Yukl,* 25 NY2d 585; *People v Day,* 150 AD2d 595; *People v Hall,* 142 AD2d 735; *People v Anderson,* 42 NY2d 35; *People v Rodney P.,* 21 NY2d 1; *People v Torres,* 97 AD2d 802.)

OPINION OF THE COURT

Titone, J.

(1, 2) Defendant has been charged with the offense of operating a motor vehicle with inadequate brakes (Vehicle and Traffic Law § 375 [1]). He seeks to suppress evidence of the defective condition of his brakes which was obtained by police when his vehicle was impounded and inspected after being involved in a fatal accident. Defendant claims that the police lacked the authority to impound his vehicle and that the warrantless inspection of his brakes that yielded evidence of their defective condition constituted an illegal search and seizure in violation of the 4th and 14th Amendments to the United States Constitution and article I, § 12 of the New York State Constitution. We conclude that the police possessed the authority to impound the vehicle in order to comply with the investigatory and reporting duties imposed by Vehicle and Traffic Law § 603. We also hold that the warrantless inspection, which was limited to the vehicle's safety equipment that is normally subject to extensive government regulation and which was related in scope to the duty to investigate the facts surrounding an accident involving a death, did not offend the constitutional prohibitions against unreasonable searches and seizures.

I.

Defendant's vehicle was involved in a fatal accident with a bicyclist on August 23, 1993. At the accident scene, defendant was informed that the police were impounding the vehicle for a safety inspection. A mechanic employed by the Town of East Hampton inspected the vehicle on August 25, 1995 and completed a standard form Motor Vehicle Examination Report, in which he was asked to report, in a sworn statement, the condition of the following equipment on defendant's vehicle: the horn, windshield, wipers, brake pedal, headlights, tires, brakes, and steering. Significantly, the mechanic stated that he found "metal to metal contact" on the right rear brakes. Defendant was charged with the misdemeanor of operating a motor vehicle with inadequate brakes in violation of ***538** Vehicle and Traffic Law § 375 (1) based on the results of that safety inspection.[1]

Defendant moved to suppress the evidence on the ground that the Vehicle and Traffic Law does not explicitly authorize the police to impound a vehicle to conduct a safety inspection after an accident involving personal injury. Defendant also claimed that the inspection of the vehicle without a warrant, probable cause or exigent circumstances constituted an illegal search in violation of the 4th and 14th Amendments to the United States Constitution and of article I, § 12 of the New York State Constitution.

At a *Mapp* hearing, Detective Reich testified that the damage to the vehicle and defendant's admission that he had collided with the bicycle led him to conclude that defendant's vehicle was the instrumentality that caused the victim's death and that the car should be impounded and held for an inspection to enable the police to comply with their accident investigating duties and reporting obligations dictated by Vehicle and Traffic Law § 603. Detective Reich testified that the impoundment was also necessary to avoid the potential destruction of evidence, given that defendant was known to be a mechanic, and that police department policy required impoundment in all automobile accidents that resulted in serious physical injury or death.

Justice Court suppressed the evidence obtained as a result of the safety inspection. The court held that evidence obtained pursuant to the investigation and reporting responsibility mandated by Vehicle and Traffic Law § 603--an "administrative inspection"--could not be utilized for purposes of a criminal prosecution. The court also ruled that the police failure to fully inform the defendant of his right to withhold his consent to the inspection effectively eradicated an otherwise valid consent and that the "exigent circumstances" exception to the warrant requirement could not be asserted after the impoundment of the vehicle. Finally, the court held that the car could not be seized based on a threshold probable cause showing because the police did not have reasonable cause to believe that defendant had committed a crime at the time of the accident.

On the People's appeal, a divided Appellate Term reversed the order granting the motion to suppress and denied the motion. ***539** The court ruled that the impoundment and inspection of the vehicle was properly performed pursuant to the mandates of Vehicle and Traffic Law § 603, that the examination of the brakes was not a "search" within the meaning of the 4th Amendment, and that defendant had consented to the impoundment and inspection of his vehicle. The court further concluded that defendant had not met his

burden of proving that he had a legitimate expectation of privacy in the vehicle, especially where a death had resulted. Under such circumstances, the majority concluded that "it could be readily understood why a 'safety inspection' looking for anything that might constitute a malfunction on any part of the pickup truck was mandatory ... to avoid the possibility of a repetition thereof."

One Justice dissented on the ground that the safety inspection and examination of defendant's brakes was a "search" of a "hidden area" of a motor vehicle in which defendant enjoyed a reasonable expectation of privacy under the New York State Constitution. Thus, the dissent concluded that the warrantless search of the brakes was unjustified. A Judge of this Court granted defendant's application for leave to appeal, and we now affirm.

II.

(1) The initial question for this Court is whether the police had the authority to impound defendant's vehicle for a safety inspection after it was involved in the fatal accident. We conclude that Vehicle and Traffic Law § 603 implicitly grants the police the authority to impound vehicles for a safety inspection in order to fulfill their investigatory and reporting duties under the statute.

Vehicle and Traffic Law § 603 requires that whenever an accident resulting in injury to a person has been reported to the police within five days of its occurrence, the police "shall immediately investigate the facts, or cause the same to be investigated, and report the matter to the commissioner [of Motor Vehicles] forthwith" (Vehicle and Traffic Law § 603 [1]) on a form prepared by the Commissioner (*id.,* § 604). The information transmitted from the police to the Commissioner must include, among other data, a description of the accident, the damage to the vehicles and their undercarriages, and a report on whether the vehicle operators were ticketed, arrested or charged with any violations (*see,* Department of Motor Vehicles ***540** Form MV-104A).[2] The officer's determination of whether the vehicle was suffering from a safety defect at the time of the accident has obvious relevance in preparing the accident description and in reporting whether violations were issued to drivers of vehicles involved.[3] The police reports are designed to serve several administrative functions, such as aiding the Commissioner of Motor Vehicles in promulgating regulations to enhance the safety of our roads (*see,* L 1973, ch 634, Bill Jacket, Mem of Chairman of Committee on Transportation, dated May 27, 1973), and assisting in the prompt resolution of personal injury and property damage claims against automobile owners and insurers arising from automobile collisions (*see,* Bill Jacket, L 1969, ch 517).

Section 603 does not expressly authorize the police to remove the vehicle from the accident scene and impound it in order to complete the requisite investigation and report. However, that legislation "impose[s] a duty of investigation" (Bill Jacket, L 1969, ch 517, Mem of Motor Vehicle Commissioner Tofany to Governor's Counsel, dated May 5, 1969), and in turn, a proper investigation may require an inspection of the mechanical areas of the vehicle. As a practical matter, an inspection of a vehicle to determine whether any defects in its safety equipment constituted a contributing cause of the accident cannot reasonably be undertaken on the roadway where licensed mechanics and proper facilities and equipment are unavailable. Thus, we conclude that section 603 implicitly grants the police the authority to impound a vehicle in furtherance of their administrative mandate to fully investigate the cause of a fatal automobile accident, as well as to ensure the safety of those conducting the accident investigation (*see, South Dakota v Opperman,* 428 US 364, 368- 369).

(3) Having concluded that the police had implicit authority to impound the vehicle for a safety inspection, we turn our attention to a determination of whether the impoundment and inspection procedure, undertaken without the issuance of a ***541** warrant, violated the constitutional proscriptions against unreasonable searches and seizures (*see,* US Const 4th Amend; NY Const, art I, § 12). We agree with defendant that any exigency normally associated with the mobility of a vehicle (*see, e.g., People v Belton,* 55 NY2d 49, 54) was removed by its impoundment and thus could not justify the warrantless intrusion. Nonetheless, we conclude that the warrantless inspection was justified by other factors providing assurances that the initiation and scope of the search were reasonable.

The 4th Amendment of the United States Constitution and article I, § 12 of our State Constitution protect individuals " 'from unreasonable government intrusions into their legitimate expectations of privacy' " (*People v Class,* 63 NY2d 491, 494, quoting *United States v Chadwick,* 433 US 1, 7). In determining whether a seizure and search is unreasonable, we must be satisfied that the governmental intrusion "was justified at its inception" and "was reasonably

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related in scope to the circumstances which justified the interference in the first place" (*Terry v Ohio,* 392 US 1, 20).

The requirement that the police, "whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure" (*Terry v Ohio,* 392 US 1, 20, *supra)* serves to ensure that a determination of the reasonableness of the search results from a neutral balancing of the need for the intrusion on the one hand and the severity of the invasion on an individual's legitimate expectation of privacy on the other (*id.,* at 19). The warrant requirement, traditionally applied "to searches undertaken to procure evidence of criminality" (*People v Scott,* 79 NY2d 474, 493) also extends to searches of private property undertaken by State agents in the furtherance of administrative or regulatory schemes (*id.; see also, Michigan v Tyler,* 436 US 499, 505).

Warrantless administrative searches may be upheld in the limited category of cases where the activity or premises sought to be inspected is subject to a long tradition of pervasive government regulation and the regulatory statute authorizing the search prescribes specific rules to govern the manner in which the search is conducted (*People v Scott,* 79 NY2d 474, 499, *supra*). As a practical matter, a person involved in a closely regulated business or activity generally has a diminished expectation of privacy in the conduct of that business because of the degree of governmental regulation. Because of the minimal expectation of privacy in a closely regulated business, warrantless searches of such conduct are considered "more ***542** necessary and less intrusive than such inspections would be if conducted on less heavily regulated businesses" (2 Ringel, Searches & Seizures, Arrests and Confessions, at 14-20 [2d ed]).

"Pervasive regulation" will only be found where the operations of an industry or activity are regulated by detailed governmental standards (*People v Scott,* 79 NY2d, at 499, *supra*). The requisite close regulation will not be found where governmental regulations impose "relatively nonintrusive obligations" on businesses or activities, such as the requirements that participants pay fees, register or report to governmental agencies (*id.*).

The additional requirement that the administrative search of a pervasively regulated activity be governed by specific rules designed "to guarantee the 'certainty and regularity of ... application' " (*id.,* at 499) serves to "provide either a meaningful limitation on the otherwise unlimited discretion the statute affords or a satisfactory means to minimize the risk of arbitrary and/or abusive enforcement" (*id.,* at 500). Together, these dual components of the "pervasively regulated business" exception to the administrative warrant requirement constitute "a constitutionally adequate substitute for a warrant" (*id.,* at 502) because they ensure that there is a compelling need for the governmental intrusion and that the search is limited in scope to that necessary to meet the interest that legitimized the search in the first place (*Terry v Ohio,* 392 US, at 19, *supra; see also, Michigan v Tyler,* 436 US, at 507, *supra*).

III.

(2) The justifications for dispensing with the warrant requirements in closely regulated businesses provide a useful analytical framework for our resolution of this case. The inspection scheme at issue here, designed to further the compelling safety interest of the government in regulating the use of motor vehicles on the State's public highways (*People v Ingle,* 36 NY2d 413, 419), provides similar assurances that the inspection will be reasonable. The mechanical areas of automobiles are subject to extensive and long-standing safety regulation analogous to that which has served to except pervasively regulated businesses from the administrative warrant requirement. New York drivers must subject their vehicles to annual inspections of their safety equipment by licensed mechanics before being granted the privilege of driving on our roadways (*see,* Vehicle and Traffic Law § 301; 15 NYCRR part 79).

Because of this extensive regulation of vehicular safety equipment, there is only a diminished expectation of privacy ***543** in the mechanical areas of a vehicle.[4] When a fatal accident involving an automobile has occurred, that minimal privacy expectation necessarily yields to the State's legitimate public safety interests in determining all of the circumstances surrounding the death and the cause of the accident (*People v Ingle,* 36 NY2d 413, *supra*) and in ensuring that the vehicle is not returned to the roadway in an unsafe condition. As one jurisdiction has noted in reaching a similar conclusion, "[s]ociety places great importance on learning all the circumstances of any motor vehicle accident resulting in death", and would not "recognize as objectively reasonable an expectation of privacy in the braking mechanism of a motor vehicle that had come into police possession following the death of a motorist on the highway" (*Commonwealth v Mamacos,* 409 Mass 635, 640, 568 NE2d 1139, 1142).

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The rules governing the inspection at issue here also comport with 4th Amendment principles because they remove the possibility that the inspection will be undertaken in an arbitrary manner.[5] The safety inspection authorized by Vehicle and Traffic Law § 603 is only conducted in response to a particular event--an automobile accident resulting in personal injury or ***544** death--that calls into question the safe mechanical functioning of the vehicle. Uncontroverted hearing testimony also established that it is the standard policy of the East Hampton Police Department to uniformly conduct this mechanical inspection on every vehicle involved in an accident resulting in either serious physical injury or death. Thus, vehicles are not randomly or arbitrarily selected from the flow of traffic for enforcement of the inspection scheme at issue here (*cf., People v Ingle,* 36 NY2d 413, *supra; People v Miller,* 52 AD2d 425, 431, *affd* 43 NY2d 789).

The scope of the intrusion was also strictly tailored to a determination of whether any safety violations existing on the vehicle at the time of the accident could have contributed to its cause--the initial justification for the intrusion. This safety inspection, which included an examination of the brakes, wipers, windshield, and headlights was less extensive than that required to be conducted annually on all cars in this State (*see,* Vehicle and Traffic Law § 301; 15 NYCRR 79.3). The police and licensed mechanics are accorded no discretion in selecting the areas subject to examination and the mechanics must examine the vehicle according to standard protocol. The inspection is limited to mechanical parts of the vehicle and does not extend to the private areas of the car where personal effects would be expected to be contained and to which " different and more stringent rules apply" (*People v Ingle,* 36 NY2d 413, 421, *supra; see also, People v Class,* 63 NY2d 491, 495, *supra*).

The fact that the length of the intrusion here--a two-day impoundment--is greater than the temporary detainment of automobiles normally associated with a stop for a routine traffic check (*see,* Vehicle and Traffic Law § 390; *People v Ingle,* 36 NY2d 413, *supra*) does not change the result. The immediate and more extended seizure of the vehicle without a warrant in this case was justified to ensure that the police report to the Commissioner accurately reflected the condition of the safety equipment on the vehicle at the time of the accident. Indeed, the officers at the scene would have been remiss in their duties had they prematurely released the vehicle to defendant, an auto mechanic, prior to a full determination of the cause of the accident. The impoundment served to secure the accident condition of the vehicle from changes due to subsequent road use or even intentional tampering. Given that the police must ***545** employ licensed mechanics to conduct the safety inspection on the vehicle, the two-day delay in conducting the inspection-- which for safety and reliability reasons could not be conducted at the scene--was not unreasonable as a matter of law.

On these facts, we are satisfied that the inspection of the braking mechanism on defendant's vehicle after its involvement in a fatal collision did not constitute an unreasonable search in the constitutional sense. Given our conclusion that this search was reasonable under the 4th Amendment, the evidence obtained through that inspection was properly held admissible by Appellate Term in this criminal prosecution (*People v Scott,* 79 NY2d, at 502, n 5, *supra).*

Accordingly, the order of Appellate Term should be affirmed.

Chief Judge Kaye and Judges Simons, Bellacosa, Smith, Levine and Ciparick concur.
Order affirmed. ***546**

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Footnotes

1 Defendant was not charged with any offense in connection with the bicyclist's death.

2 The following safety violations are delineated in the Vehicle and Traffic Law: bad brakes (Vehicle and Traffic Law § 375 [1]); unsafe tires (§ 375 [35] [c]); cracked or obstructed windshield (§ 375 [30]); inadequate muffler (§ 375 [31]) and improper headlights (§ 375 [2]).

3 A 1993 statistical report prepared by the Department of Motor Vehicles contained in the respondent's appendix indicates that information on the "apparent accident contributing factors" is compiled solely from State-wide police reports submitted

to the Commissioner and that “defective brakes” is one among a number of mechanical defects on a vehicle that may be listed on a police accident report as a contributing cause of the accident.

4 Although constitutional protections against unreasonable government intrusions extend to searches of automobiles and seizures of their contents (*People v Class, supra; Terry v Ohio, supra*), there is generally “only a diminished expectation of privacy in an automobile” (*People v Scott,* 63 NY2d 518, 525, citing *United States v Martinez-Fuerte,* 428 US 543, 561). Drawing on precedent of the United States Supreme Court, this Court has explained that the reduced expectation of privacy in a vehicle is occasioned by the facts that “automobiles 'operate on public streets; ... are serviced in public places; ... their interiors are highly visible and they are subject to extensive regulation and inspection' ” (*People v Belton,* 55 NY2d 49, 53, quoting *Rakas v Illinois,* 439 US 128, 154).

5 In *People v Ingle* (36 NY2d 413, *supra*), this Court discussed the reasonableness of “routine safety checks” undertaken by the State Police pursuant to Vehicle and Traffic Law § 390 in which the police temporarily detained vehicles to determine whether they were “being operated in compliance with the Vehicle and Traffic Law” (*id.,* at 415). The Court explained that the reasonableness of the stop must be measured by a balancing of the State's “vital and compelling interest in safety on the public highways” against the motorist's “general right to be free from arbitrary State intrusion on his freedom of movement even in an automobile” (*id.,* at 419). Noting that such stops are “limited seizure [s] within the meaning of constitutional limitations” (*id.,* at 419), the Court explained that the police must have “some valid reason, however slight” to single out a particular vehicle for an inspection to determine whether any equipment violations are present“ (*id.,* at 416). While the Court determined that random traffic checks on the highways are also permissible, the Court concluded that those stops must be undertaken by ” some system or uniform procedure, and not gratuitously or by individually discriminatory selection“ (*id.*) to be reasonable in the constitutional sense.

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265 Kan. 835
Supreme Court of Kansas.

STATE of Kansas, Appellee,
v.
Marvin L. CANAAN, Appellant.

No. 76921.
|
July 24, 1998.

Synopsis
Defendant was convicted, in the District Court, Johnson County, William A. Cleaver, J., of premeditated murder, aggravated robbery, and aggravated burglary. Defendant appealed. The Supreme Court, Lockett, J., held that: (1) search of defendant's truck was justified as inventory search; (2) defendant was not in custody, for *Miranda* purposes, when he was questioned by police during his hospitalization; (3) luminol testing for presence of blood was generally accepted in the scientific community, as required for admissibility under *Frye* test; and (4) trial court did not abuse its discretion in limiting defendant's cross-examination of state's witness.

Affirmed.

****684 *835** *Syllabus by the Court*

1. The Fourth and Fourteenth Amendments to the United States Constitution prohibit unreasonable searches and seizures. Unless a search falls within one of a few exceptions, a warrantless search is per se unreasonable.

2. Upon the hearing of a motion to suppress evidence, the State bears the burden of proving to the trial court the lawfulness of the search and seizure.

3. The “exclusionary rule” prohibits the admission of the “fruits” of illegally seized evidence, *i.e.,* any information, object, or testimony uncovered or obtained, directly or indirectly, as a result of the illegally seized evidence or any leads obtained therefrom.

4. An inventory search of a motor vehicle is a warrantless search and is not valid unless the police first have lawful custody of the vehicle.

****685** 5. The police may legally impound a vehicle if authorized by statute or if there are reasonable grounds for impoundment.

6. One circumstance that constitutes reasonable grounds for impoundment of a vehicle is where the police have an unattended-to motor vehicle from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his or her property, as in the case of the intoxicated, mentally incapacitated, or seriously injured driver.

7. The scope of cross-examination is a matter within the sound discretion of the trial court and, absent a clear showing of abuse, the exercise of that discretion will not constitute prejudicial error.

8. Cross-examination may be permitted into matters which were the subject of direct examination. Where general subject matter has been opened up on direct examination, cross-examination may go to any phase of the subject matter and is not restricted to identical details developed or specific facts gone into on direct examination. Questions asked on cross-examination must be responsive to testimony given on direct examination, or material and relevant thereto.

9. Under the plain view exception to the search warrant requirement, a law enforcement official can ***836** seize evidence of a crime if (1) the initial intrusion which afforded authorities the plain view is lawful; (2) the discovery of the evidence is inadvertent; and (3) the incriminating character of the article is immediately apparent to searching authorities.

10. The *Frye* test requires that before expert scientific opinion may be received into evidence, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. The State has the burden of satisfying the *Frye* test by proving the reliability of the underlying scientific theory upon which scientific evidence is based.

11. The scientific technique upon which the luminol test for the presence of blood is based has been generally accepted as reliable in the scientific community.

12. Whether an expert or lay witness is qualified to testify as to his or her opinion lies within the discretion of the trial court,

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and the district court will not be reversed on appeal absent a showing of abuse of discretion.

13. The *Miranda* rule requires that a person must be warned of certain rights prior to any questioning initiated by law enforcement officers after the person is taken into custody or deprived of his or her freedom in any significant way.

14. “Custody” means the restraint of a person pursuant to an arrest or the order of a court or magistrate. “Detention” means the temporary restraint of a person by a law enforcement officer.

Attorneys and Law Firms

Steven R. McConnell, Deputy Appellate Defender, argued the cause, and Mary Curtis, Assistant Appellate Defender, and Jessica R. Kunen, Chief Appellate Defender, were on the brief, for Appellant.

Steven J. Obermeier, Assistant District Attorney, argued the cause, and Paul J. Morrison, District Attorney, and Carla J. Stovall, Attorney General, were with him on the brief, for Appellee.

Opinion

LOCKETT, Justice:

Defendant Marvin Canaan was convicted of premeditated murder, aggravated robbery, and aggravated burglary. Defendant appeals, claiming the district court failed to: (1) suppress ***837** evidence seized in a warrantless search; (2) suppress defendant's statements made in the emergency room; (3) conduct a *Frye* hearing as to the admissibility of luminol testing; and (4) permit cross-examination of a prosecution witness.

FACTS:

Sometime in the morning hours of October 20, 1994, Michael Kirkpatrick was murdered. The evening before, he was observed at a bar with Canaan. During the investigation, the victim's neighbor, Jerry Staley, informed police that Canaan had been at the victim's house the evening before and had been driving a maroon Oldsmobile. Because the victim had been with Canaan, Detective Harold Hughes of the Johnson County Sheriff's office ****686** and an officer from the Gardner Police Department went to Canaan's home to ask what Canaan knew of the murder. The officers observed a maroon Oldsmobile at Canaan's home.

Canaan's wife informed Hughes that her husband would be home about 1 p.m. and that he was driving a Dodge Ramcharger pickup truck. In response to Hughes' questions, Canaan's wife said that Canaan had been wearing a white pullover shirt and burgundy jogging pants that evening. She told Hughes that the pants Canaan wore had been washed and dried but the shirt was in the washer. At the officer's request, she removed the shirt from the washing machine and gave it to him.

After leaving Canaan's home, the officers were informed that the defendant's pickup was parked near the pharmacy in Gardner, Kansas. The officers proceeded to the pharmacy, parked, and waited for Canaan to appear.

Less than 5 minutes later, Canaan returned to the pickup and drove west on U.S. Highway 56. The officers believed Canaan was driving home from the pharmacy. When he turned on 183rd Street in Gardner, the officers realized Canaan was not going home. The officers followed. On the gravel road Canaan sped up to approximately 55 mph. The speed limit was 35 mph.

After Canaan had accelerated to 55 mph, the officers activated their lights and siren and Canaan stopped. When Hughes approached, ***838** Canaan observed the officer's identification and accelerated away. The chase reached speeds up to 75 mph.

After running three stop signs, Canaan's pickup crashed into a tree. Detective Hughes called for emergency medical assistance, approached the wrecked pickup, and found Canaan lying on the passenger side of the truck unconscious. Hughes did not open the truck door. Canaan was removed from the truck and placed on a stretcher by EMS attendants.

Captain Jones (Johnson County) arrived and began to investigate the scene of the crash. He observed a gray wallet lying on the ground just outside the pickup's passenger door. To identify the driver, Jones removed the driver's license. It was Canaan's license. Jones then noticed a black wallet on the floorboard of the truck. Jones examined this wallet and found it contained the murder victim's driver's license. Jones replaced the victim's license and wallet where he had found it.

Later that day, Detective Hughes obtained a warrant to search Canaan's pickup for

> "hair, blood, fibers, pair tennis shoes, blue jacket, and any other clothing which exhibits damage to fabric which could have been caused by cutting or has tissues or blood on it, knives or sharp edged instruments, U.S. currency, illegal narcotics, evidence written or otherwise indicating illegal narcotics transactions, and *wallet.*" (Emphasis added.)

At the hospital, Detective Scott Atwell was assigned to stay with Canaan until he was released. Atwell, who was not aware of Canaan's connection to the murder investigation, was to ascertain where Canaan was going, if he was released from the hospital.

While at the hospital, Atwell received a telephone call from a superior officer telling him to photograph Canaan's injuries. Atwell believed, and he told Canaan, that the pictures were for the accident investigation. Canaan agreed to be photographed. While the officer photographed the wounds, Canaan told Atwell that he (Canaan) could verify that he did not have the wounds prior to the accident.

Later, Canaan asked Atwell if he knew where his wallet and clothing were. Atwell told Canaan there was a black wallet with a velcro closure on the floorboard of the truck. Canaan said the black ***839** wallet was not his. Atwell then asked whose wallet Canaan thought it was. Canaan did not respond.

Canaan also informed Atwell that he did not remember the accident. In response, Atwell asked why Canaan did not stop. Canaan responded that there was cocaine in the pickup that belonged to someone else.

Upon being taken to a regular hospital room, Canaan telephoned his wife. After this conversation, Canaan told Atwell that he now understood why the officers wanted to ****687** talk to him. Detective Atwell asked, "Why?" Canaan responded that the officer wanted to ask him about a murder in Edgerton.

During the investigation, the police requested John Wilson of the Regional Crime Lab to conduct luminol tests. Wilson tested Canaan's Oldsmobile and house.

Canaan filed three separate motions to suppress evidence. Prior to trial, Canaan first moved to suppress the introduction of the black wallet found in the pickup and its contents, and testimony as to the wallet. Canaan asserted that there was no probable cause for the officers to stop him because no warrant had been issued for his arrest and there was no reasonable articulable suspicion that he had committed, was committing, or was about to commit a crime. The district court ruled:

> "With respect to the defendant's Motion to Suppress regarding the stop, the Court would find that Detective Hughes had a reasonable suspicion to stop the defendant's vehicle; that the observation of the wallet by Captain Jones and the cursory check of identification was reasonable; that the [subsequent] search of the automobile [*sic*] pursuant to warrant was proper and not tainted by the actions of Captain Jones [policeman who examined the black wallet at the scene]."

Canaan then moved to suppress his statements to Atwell at the hospital. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a trial judge, where there is a proper objection, to make a preliminary examination as to the voluntariness of a confession offered by the prosecution, resolve evidentiary conflicts, and submit to the jury only those confessions he or she believes to be voluntary. *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). After a *Jackson v. Denno* hearing, the district judge ruled that Canaan's statements ***840** to Atwell were not made while Canaan was in custody and therefore were admissible.

Canaan then filed a third motion asserting that the luminol testing failed to meet "the criteria of admissibility of scientific tests as set forth in *Frye, Lowry,* and *Deppish.*" The district court found that "[t]he luminol testing ... has widespread acceptance, it's not novel or new, and obviously the State must lay its foundation, but the Court will not require a *Frye* test."

Canaan brings this direct appeal of his convictions for premeditated murder, aggravated robbery, and aggravated burglary.

ISSUES ON APPEAL

Failure To Suppress Evidence

The Fourth and Fourteenth Amendments to the United States Constitution prohibit unreasonable searches and seizures. Unless a search falls within one of a few exceptions, a warrantless search is per se unreasonable. *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576

(1967). Upon the hearing of a motion to suppress evidence, the State bears the burden of proving to the trial court the lawfulness of the search and seizure. *State v. Damm,* 246 Kan. 220, 222, 787 P.2d 1185 (1990) (citing *Mincey v. Arizona,* 437 U.S. 385, 390–91, 98 S.Ct. 2408, 57 L.Ed.2d 290 [1978]). If the State fails to meet its burden, the evidence seized is excluded.

The “exclusionary rule” also prohibits the admission of the “fruits” of illegally seized evidence, *i.e.,* any information, object, or testimony uncovered or obtained directly or indirectly as a result of the illegally seized evidence or any leads obtained therefrom. This exclusionary principle is known as the “fruit of the poisonous tree doctrine.”

In recent years, the United States Supreme Court has limited the applicability of the exclusionary rule. The exclusionary rule does not apply if the connection between the illegal police conduct and the seizure of the evidence is “so attenuated as to dissipate the taint.” *Segura v. United States,* 468 U.S. 796, 805, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984). For example, if the evidence was ***841** seized pursuant to an independent source, it would be admissible at trial.

Canaan argues that (1) the seizure of the black wallet found on the floor of his truck does not fall within one of the well-delineated exceptions to the requirement for a search ****688** warrant and thus is per se unreasonable and illegal, and (2) the search warrants issued to search his truck, Oldsmobile, and house were based upon the illegal seizure of the black wallet. Therefore, according to Canaan, all evidence seized during execution of the search warrants must be suppressed as the fruit of the poisonous tree.

At the suppression hearing, Detective Hughes testified that after he saw Canaan speeding, he activated his lights and siren. Hughes acknowledged he was not stopping Canaan for speeding, but to talk to Canaan about the murder. The State argued to the district judge that where an officer observes a traffic infraction, a stop is lawful, even though pretextual. For support, the State cited *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

In *Whren,* plainclothes police officers patrolling a “high drug area” noticed violations of traffic laws. After pulling over the offending driver, they observed and seized two plastic bags containing what appeared to be crack cocaine.

In moving to suppress the evidence, Whren argued that in traffic cases there is a high susceptibility to impermissible pretextual stops by law enforcement officers based on illegal factors such as race. Whren argued that under the circumstances the standard should be, disregarding the traffic violation, whether a reasonable officer would have pulled over an individual. The Supreme Court rejected this argument and held subjective intentions of the officer play no role in ordinary probable cause Fourth Amendment analysis. 517 U.S. at 813, 116 S.Ct. 1769.

Under *Whren,* it does not matter that Hughes initially pulled Canaan over to question him about the murder; the officer's observation of a traffic infraction provided sufficient probable cause for the officer to justify stopping Canaan. We point out that Canaan was not “stopped” by the officer. Canaan stopped when the vehicle he was driving crashed into a tree while he was fleeing from the ***842** officer. The general rule is that flight after the commission of a crime may be an indication or admission of guilt and admissible regardless of the time or stage in the proceedings when the flight occurs. It is not necessary that the flight occur immediately after the perpetration of the crime. It may occur before filing formal charges, before arrest, after indictment, or after arrest. *State v. Walker,* 226 Kan. 20, 22, 595 P.2d 1098 (1979); see *State v. Bowman,* 252 Kan. 883, 891, 850 P.2d 236 (1993).

However, it is important to note that probable cause to stop Canaan is not the same as probable cause to search Canaan's vehicle. The question is, under the circumstances, whether the evidence found in Canaan's pickup, Oldsmobile, and house was admissible. The State argues there was sufficient evidence independent of the wallet to support probable cause to issue the search warrants obtained before and after the accident. The State points out that Captain Jones retrieved the black wallet from the pickup to identify the crash victim. According to the State, Jones was required by statute to identify and verify the driver involved in the accident.

Captain Jones testified:

> “I wasn't sure who the driver of the vehicle was. I had a driver's license that said Marvin Canaan, but I didn't know if that was Marvin Canaan they had on the stretcher or not. So I retrieved the other wallet to see if I could get identification.”

The State's argument is supported by statute. K.S.A. 8–1611 provides:

"(a) Every law enforcement officer who:

"(1) Investigates a vehicle accident of which a report must be made as required in this article; or

"(2) otherwise prepares a written report as a result of an investigation either at the time of and at the scene of the accident or thereafter by interviewing the participants or witnesses, when such accident under paragraphs (1) or (2) results in injury or death to any person or total damage to all property to an apparent extent of $500 or more, shall forward a written report of such accident to the department of transportation within 10 days after investigation of the accident.

"(b) Such written reports required to be forwarded by law enforcement officers and ****689** the information contained therein shall not be privileged or held confidential."

***843** K.S.A. 8–1612 provides:

"(a) The department of transportation shall prepare and upon request supply to police departments, sheriffs and other appropriate agencies or individuals, forms for written accident reports as required in this article, suitable with respect to the persons required to make such reports and the purposes to be served. The written reports shall call for sufficiently detailed information to disclose, with reference to a vehicle accident, the cause, conditions then existing and the persons and vehicles involved."

When Captain Jones, while investigating the accident scene, opened the wallet and observed the victim's driver's license in the black wallet, the plain view doctrine applied. Under the plain view exception to the search warrant requirement, a law enforcement official can seize evidence of a crime if "(1) the initial intrusion which afforded authorities the plain view is lawful; (2) the discovery of the evidence is inadvertent; and (3) the incriminating character of the article is immediately apparent to searching authorities." *State v. Parker,* 236 Kan. 353, Syl. ¶ 2, 690 P.2d 1353 (1984).

Captain Jones had a duty to acquire information sufficient to investigate and report on the accident. He recognized that the murder victim's wallet was evidence of a separate crime and returned the wallet to where he found it, sealed the vehicle with tape, and ordered the vehicle treated as a crime scene, *i.e.,* evidence in the murder of Michael Kirkpatrick. This was proper.

The State does not claim the officers were conducting a search incident to an arrest, nor does it claim they had probable cause and exigent circumstances justifying a warrantless search. Rather the State contends the initial search was to obtain information required by statute, and the information leading to the arrest was provided by that search and a subsequent inventory search.

An inventory search of a motor vehicle is a warrantless search and is not valid unless the police first have lawful custody of the vehicle. See *State v. Boster,* 217 Kan. 618, 624, 539 P.2d 294 (1975). Police may legally impound a vehicle if authorized by statute or if there are reasonable grounds for impoundment. 217 Kan. at 624, 539 P.2d 294 (citing *State v. Singleton,* 9 Wash.App. 327, 511 P.2d 1396 [1973]). An officer impounding a vehicle may make a "warrantless inventory search of the personal property within the vehicle, including ***844** the glove box and trunk, when the same may be accomplished without damage to the vehicle or its contents." *State v. Fortune,* 236 Kan. 248, Syl. ¶ 5, 689 P.2d 1196 (1984).

When the owner, operator, or person in charge of a vehicle is capable and willing to instruct police officers as to the vehicle's disposition, then absent some other lawful reason for impounding the vehicle, the person should be consulted, and his or her wishes followed concerning the vehicle's disposition. If the impoundment of the vehicle is unreasonable and, therefore, unlawful, the inventory search following impoundment is unlawful. All evidence obtained through an unlawful search is inadmissible and must be suppressed. *State v. Teeter,* 249 Kan. 548, 552, 819 P.2d 651 (1991).

According to the *Singleton* court, and cited with approval by the *Boster* court, one circumstance that constitutes reasonable grounds for impoundment is where the police remove " 'an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver.' " 217 Kan. at 624, 539 P.2d 294 (quoting *Singleton,* 9 Wash.App. at 332–33, 511 P.2d 1396). We reaffirmed this factor as grounds for impoundment in *State v. Teeter,* 249 Kan. at 552, 819 P.2d 651.

After the accident, Canaan was unconscious and was taken to the hospital and admitted. He was incapacitated and "incapable of deciding upon steps to be taken to deal with his

property." The police had little choice but to seize the vehicle to assure the security of the property. There were two wallets in plain view. In light of these facts, **690 an inventory search was justified to protect the police from any tort claims that might later be asserted. See *Boster,* 217 Kan. at 623, 539 P.2d 294. All evidence discovered at the scene of the accident was lawfully obtained.

Defendant argues evidence seized during execution of the search warrants was fruit of the poisonous tree, *i.e.,* the discovery of the victim's wallet. The State argued that the victim's wallet would have been discovered when the search warrant for narcotics and currency in the pickup was executed. Therefore, the inevitable discovery doctrine applied.

*845 The inevitable discovery/independent source doctrine allows admission of evidence that could have been discovered by means wholly independent of any constitutional violation. For unlawfully obtained evidence to be admitted, the prosecution must establish by a preponderance of the evidence that the unlawfully obtained evidence ultimately or inevitably would have been discovered by lawful means. The prosecution need not prove the absence of bad faith in obtaining the evidence. *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

The State's argument is without merit because there was no independent source in that the same officers were involved in the homicide investigation and the accident investigation. Additionally, as previously determined, there is no poisonous tree. However, because the district judge signed search warrants to search both of defendant's vehicles and his house, we review whether there was probable cause for the warrants to search Canaan's vehicle and his house as part of the murder investigation. Before a search warrant may be issued, there must be a finding of probable cause by a neutral and detached magistrate. The application for a search warrant and supporting affidavits should supply the magistrate with sufficient factual information to support an independent judgment that probable cause to search exists. *State v. Gilbert,* 256 Kan. 419, 424, 886 P.2d 365 (1994).

In determining whether to issue a search warrant, a magistrate should consider the "totality of the circumstances" presented and make a practical, common-sense decision whether there is a fair probability that a crime has been or is being committed and the defendant committed the crime, or that contraband or evidence of a crime will be found in a particular place. On appeal, the duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed to issue the search warrant. *State v. Gilbert,* 256 Kan. at 424, 886 P.2d 365 (quoting *State v. Abu–Isba,* 235 Kan. 851, Syl. ¶¶ 1, 2, 3, 685 P.2d 856 [1984]).

The affidavit filed seeking the search warrant does not mention that "the wallet" to be seized contained the murder victim's driver's license. Therefore, there is no need to determine whether a detached magistrate signed the warrant on the basis of the contents *846 of the wallet. Instead, we examine the search warrant affidavit to determine whether there was a substantial basis for concluding there was probable cause that a crime was committed and that the objects of the search might yield evidence of the crime.

The affidavit for the warrant stated that the victim had been stabbed to death; Canaan had been seen with the victim the night before; Canaan's wife told the police that at one time Canaan owned large hunting-type knives; Canaan refused to stop and fled when emergency equipment was activated, resulting in his crash the day after the murder; and the victim and Canaan were believed to be involved in illegal narcotics. The search warrant affidavit was based on other evidence and not premised on Captain Jones' discovery of the victim's wallet at the scene of the wreck.

> " 'Probable cause' to issue a search warrant is like a jigsaw puzzle. Bits and pieces of information are fitted together until a picture is formed which leads a reasonably prudent person to believe a crime has been or is being committed and that evidence of the crime may be found on a particular person or in a place or means of conveyance." *State v. Morgan,* 222 Kan. 149, 151, 563 P.2d 1056 (1977).

**691 The facts provided in the affidavit create a picture from which a reasonable magistrate could find probable cause to issue a search warrant.

Because there was no fruit from the poisonous tree, and the affidavit contained sufficient information for a reasonable magistrate to issue the search warrant, the search warrant was valid and the evidence obtained from that search was properly seized.

Statements Violative Of *Miranda?*

Canaan sought to suppress his conversations with Detective Atwell in the hospital emergency room as violative of

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Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The *Miranda* rule requires that a person must be warned of certain rights prior to any questioning initiated by law enforcement officers after that person is taken into custody or deprived of his or her freedom in any significant way (detained).

"Custody" means the restraint of a person pursuant to an arrest or the order of a court or magistrate. "Detention" means the temporary ***847** restraint of a person by a law enforcement officer. K.S.A. 22–2202 (9), (10).

Canaan asserts that the test is whether reasonable persons would believe themselves to be in custody. He argues he was not free to leave the hospital or able to move around without help. Canaan also argues that because he had been chased by the police prior to the accident and escorted to the hospital by the police after the accident, reasonable persons would believe he or she was in custody.

This argument is not supported by the facts. Canaan was neither arrested nor restrained while at the hospital. He was alone for significant periods of time. Canaan was not arrested for the murder until months after his release from the hospital. The evidence is uncontroverted that the initial reason the police were at the hospital was to find out when Canaan was to be released so that they could later question him about the murder. There is no evidence that Canaan was deprived of his liberty by the police at the hospital. The district court did not err in concluding that Canaan was not in custody or detained; therefore, no violation of *Miranda* occurred.

Admissibility of Luminol Testing

During the course of the investigation, John Wilson performed a luminol test on the Oldsmobile Canaan was driving the night of the murder. The luminol test indicated the possible presence of blood on the left corner of the driver's seat and door panel.

An additional luminol test of Canaan's home by Wilson indicated the presence of bloody footprints on the front porch and step and down the main hallway into the master bedroom. According to Wilson, the footprints turned at the edge of the bed as if someone turned and sat down on the bed. Finally, the luminol reacted when it contacted a watch on a nightstand in Canaan's bedroom. These items were tested again. A second presumptive test by use of phenolphthalein confirmed the reaction to blood on the Oldsmobile seat.

DNA tests were later conducted by Valerie Fahrnow, a forensic chemist for the Johnson County Crime Lab, on a white shirt owned ***848** by Canaan and on the watch that was on the nightstand. The luminol's reaction to the watch was confirmed by a DNA test. The blood on the watch was not statistically similar to the blood of the victim or Canaan, but was consistent with the blood of Jerry Staley, the individual who discovered the murder victim. Staley had previously told the officers he had traded the watch to the victim for cocaine.

Canaan filed a pretrial motion requesting a *Frye* hearing as to the admissibility of luminol testing. See *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923). The *Frye* test requires that before expert scientific opinion may be received into evidence, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. The State has the burden of satisfying the *Frye* test by proving the reliability of the underlying scientific theory upon which the luminol test is based. If the validity of the new scientific technique has not been generally accepted as ****692** reliable or is only regarded as an experimental technique, then expert testimony based upon its results should not be admitted into evidence. *State v. Hill,* 257 Kan. 774, Syl. ¶ 4, 895 P.2d 1238 (1995).

Whether an expert or lay witness is qualified to testify as to his or her opinion lies within the discretion of the trial court, and the district court will not be reversed on appeal absent a showing of abuse of discretion. *City of Dodge City v. Hadley,* 262 Kan. 234, 241–42, 936 P.2d 1347 (1997). The district court ruled that "[t]he luminol testing ... has widespread acceptance [in the scientific community], it's not novel or new, and obviously the State must lay its foundation, but the Court will not require a *Frye* test." Judge Cleaver required that a foundation be laid on luminol testing.

At trial, Canaan renewed his objection to the introduction of luminol evidence, asserting luminol is only a presumptive test for blood. In other words, it may indicate the presence of blood, but also reacts similarly with other materials, including common household cleansers. The district court overruled the defendant's objection, ruling that the fact the luminol test is a presumptive test goes to the weight, rather than the admissibility, of the evidence.

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***849** On appeal, Canaan argues the district judge should have conducted a *Frye* hearing because Kansas has never determined the reliability of luminol evidence. Additionally, Canaan argues for the first time on appeal that there was no evidence that "John Wilson was qualified to testify as an expert in the field of luminol testing techniques or as to the validity and reliability of the exact techniques he used in this case." Canaan cites *State v. Miller,* 240 Kan. 733, 732 P.2d 756 (1987), and *State v. Witte,* 251 Kan. 313, 836 P.2d 1110 (1992), for the proposition that the *Frye* test is both an evidentiary and foundational standard.

The *Witte* court observed that the *Frye* court

> " ' "deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles.... Several reasons founded in logic and common sense support a posture of judicial caution in this area. Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials. We have acknowledged the existence of a '... misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature.' " '
>
> " '... Courts should be reluctant to resolve the disputes of science. It is not for the law to experiment, but for science to do so. Without the *Frye* test, juries would be compelled to make determinations regarding the validity of experimental or novel scientific techniques. As a result, one jury might decide that a particular scientific process is reliable, while another jury might find that the identical process is not. Such inconsistency concerning the admissibility of a given scientific technique or process in criminal cases would be intolerable.' " 251 Kan. at 323, 836 P.2d 1110 (quoting *State v. Washington,* 229 Kan. 47, 54, 622 P.2d 986 [1981]).

Following the rationale of *Frye,* both *Miller* and *Witte* required the State to prove the reliability of the underlying science and the acceptance of it in the appropriate scientific field. However, Canaan misinterprets these cases. Only when there is a doubt as to the scientific reliability of evidence must the State prove the reliability and acceptance of the science.

Canaan then claims that the State did not lay a proper foundation for Wilson to testify about luminol. We note that the trial court did not require the State to prove the scientific basis for the use of luminol because it found luminol testing is universally accepted. The trial court did require the State to lay a foundation as to Wilson's qualifications to administer the test. Canaan did not object to ***850** Wilson's qualifications or methods for administering the test until this appeal. A party may not raise an issue for the first time on appeal. However, a review of Wilson's testimony shows he was clearly qualified to administer the luminol tests and that the underlying science was reliable and accepted.

****693** At trial, John Wilson testified that he has been the chief chemist at the Regional Crime Lab in Kansas City since 1978. Besides supervising other forensic chemists, he analyzes various types of trace evidence (such as blood) and also responds to crime scenes upon request. He is involved in teaching two crime scene classes a year for local law enforcement in Kansas and Missouri to train people how to proceed at crime scenes. He is also involved in teaching some specialized classes, 1–day seminars at local colleges, and occasional classes at various association meetings.

Wilson, who has a degree in biology and chemistry, testified that he had worked at the Johnson County Crime Lab 2 years prior to becoming the chief chemist for the Regional Crime Lab in 1978. Wilson started as a forensic chemist at the Kansas City, Missouri police lab in 1973 and has been involved in forensic chemistry for approximately 23 years. Wilson has attended a number of classes and various seminars with the American Academy of Forensic Science (an association of forensic scientists). He has also attended a number of seminars at the FBI academy in Quantico, Virginia, and classes on blood analysis at the University of California.

Wilson further testified that he has received training in luminol testing. He has completed a number of classes at the FBI academy, including a crime scene investigation course, and has attended various seminars with the American Academy of Forensic Scientists and the Midwest Association of Forensic Scientists.

Wilson testified that luminol testing has been used by forensic scientists for about 60 years. It has been available for approximately 80 years and scientific papers on luminol were published in the 1920's. He testified that he had conducted luminol testing hundreds of times and has testified as an expert witness in other criminal cases over the years regarding the results of luminol testing.

Wilson explained how luminol testing works: Luminol is a chemical that reacts with blood and undergoes a chemical reaction that ***851** gives off light (chemiluminescence). When blood and luminol come into contact, it essentially

causes a very faint blue glow that one can see in the dark. Luminol testing works by placing a luminol reagent in very small concentrations in a sodium hydroxide water solution and then placing it in a spray mister, which creates a very fine mist. The forensic chemist makes the area as dark as possible because the actual spraying needs to occur in total darkness. The forensic chemist then begins spraying the very fine mist in the area to be searched for blood stains. If blood is present, a chemical reaction causes a blue glow. The chemiluminescence of the blood and luminol mixture occurs if it is dark enough and there is enough blood present. Luminol testing is extremely sensitive, depending on what one is looking for and what surface is being sprayed. It is sensitive to 1:1,000,000 to 1:10,000,000 parts per million.

Wilson testified that luminol testing is fairly specific for blood and that there are few things other than blood that cause luminol to react. Forensic scientists use it to locate crime scenes that have been cleaned up and are then able to reconstruct what occurred at the crime scene. They could determine the sequence of events, where the blood was, perhaps how it was cleaned up, and maybe even tracks made by footprints that have blood on them. Luminol can show things like tire tracks, shoe prints, and handprints that are made in blood. The duration of the luminescent results of a positive test before fading will vary. It can last from a few seconds to several minutes. Ideally, it would last long enough to photograph. The time it remains luminescent depends upon the material the blood is on and how the spray that is being used affects it. In his years of experience, Wilson has had occasion to have positive luminol results for footprints 20 to 50 times. There was one occasion where he was able to follow a person outdoors across a public park for over a quarter of a mile. Wilson stated that the luminol test is generally accepted as a presumptive test for blood in the scientific community of forensic science and is recognized as reliable within the scientific community of forensic scientists.

In *State v. Stenson,* 132 Wash.2d 668, 940 P.2d 1239 (1997), the defendant challenged the admissibility of phenolphthalein, a chemical ****694** similar to luminol in that it is also a presumptive test for ***852** blood. The Washington court noted that Florida, California, and Alabama all permit the introduction of evidence that is presumptive for blood. In analyzing how the presumptive blood evidence was used during the trial, the *Stenson* court held the introduction of presumptive blood test results were admissible so long as the evidence indicates that the test used was a presumptive test only and does not confirm the material tested contains blood. In *Stenson,* there was significant testimony that the test was only presumptive. There was also testimony about what types of material besides blood could cause a false positive. The *Stenson* court observed that the fact the test was only presumptive went to the weight, rather than the admissibility, of the test. 132 Wash.2d at 714, 718, 940 P.2d 1239. Other states have accepted the introduction of luminol evidence. See, *e.g., People v. Hendricks,* 145 Ill.App.3d 71, 87, 99 Ill.Dec. 20, 495 N.E.2d 85 (1986); *State v. Jones,* 213 Neb. 1, 6–7, 328 N.W.2d 166 (1982).

Arkansas requires a follow-up test to luminol testing to confirm the presence of human blood *related to the crime* because luminol can return false positive results by reacting to material other than human blood. Additionally, luminol is not time specific. According to Arkansas courts, luminol evidence, without additional factors relating the results to the crime, may confuse a jury. *Houston v. State,* 321 Ark. 598, 600, 906 S.W.2d 286 (1995). Similarly, Hawaii has rejected the introduction of luminol tests without confirming tests that indicate blood relevant to the crime scene, finding them more prejudicial than probative. *State v. Fukusaku,* 85 Hawai'i 462, 496–97, 946 P.2d 32 (1997).

The use of luminol is universally accepted as a presumptive test for blood. The State sought its admission as a presumptive test. The State satisfied the *Frye* test by proving the reliability of the underlying scientific theory upon which the luminol test is based. The scientific technique upon which the luminol test is based has been generally accepted as reliable, and Wilson had been trained to follow the procedures established to test the phenomenon and used those methods properly pursuant to the training.

The fact that luminol also detects some other substances is irrelevant to its universal acceptance as a presumptive blood test. ***853** This fact goes to the weight, not the admissibility, of the evidence. In challenging the weight of this evidence, the defendant elicited testimony that informed the jury that luminol also reacts to other substances.

Right To Cross–Examine

The scope of cross-examination is a matter within the sound discretion of the trial court and, absent a clear showing of abuse, the exercise of that discretion will not constitute prejudicial error. *State v. Westfahl,* 21 Kan.App.2d 159, Syl. ¶ 3, 898 P.2d 87, *rev. denied* 258 Kan. 863 (1995). The

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admission or exclusion of evidence, subject to exclusionary rules, is within the trial court's discretion. Discretion is abused only when judicial action is arbitrary, fanciful, or unreasonable, or when no reasonable person would adopt the trial court's view. *State v. Haddock,* 257 Kan. 964, 978, 897 P.2d 152 (1995).

One of Canaan's theories was that Jerry Staley committed the murder. The defense sought to impeach the testimony of Staley and his credibility during the State's case in chief. During its case in chief, the State limited its questions of Staley to the last time he had seen the victim alive, what he had done between the time he had seen the victim alive and when he had found the victim, and what he had done upon finding the victim. Canaan attempted to introduce his theory of the case in his cross-examination of Staley. None of Canaan's attempts to impeach Staley during cross-examination went to the facts to which Staley previously had testified during direct examination. The trial court informed the defense attorney he could elicit further testimony by recalling the witness when presenting defense evidence.

At trial, Staley, the victim's neighbor who had purchased cocaine from the victim on the night in question, testified for the State. Staley testified he purchased cocaine at 2:30 a.m. the day of the murder. He also testified to finding the victim's body. On cross-examination, ****695** defense counsel began to question Staley about interviews Staley had with the police where he indicated he had been to the victim's apartment numerous times the evening before the body was discovered. The district court sustained the State's objection ***854** that defense counsel's question went beyond the scope of the State's direct examination.

When defense counsel sought on cross-examination to impeach Staley's credibility by bringing out statements that Staley had been to the victim's apartment numerous times the evening prior to the murder, the State objected. The trial court sustained the State's objection to the cross-examination as beyond the scope of direct. Defense counsel then asked specific questions regarding Staley's telling the police he had visited the victim other times during the evening. After discussing Staley's statement to the police indicating Staley had used cocaine with the victim two other times during the evening, the State again objected. The district court again sustained the State's objection, finding that the defense's cross-examination exceeded the scope of the State's direct examination.

Canaan cites numerous cases stating that limiting cross-examination to the scope of direct may unconstitutionally interfere with a defendant's Sixth Amendment right to a fair trial. The facts in those cases are not similar to our circumstances.

Cross-examination may be permitted into matters which were subject of direct examination. Where general subject matter has been opened up on direct, cross-examination may go to any phase of the subject matter and is not restricted to identical details developed or specific facts gone into on direct examination. Questions asked on cross-examination must be responsive to testimony given on direct examination, or material and relevant thereto. *State v. Hobson,* 234 Kan. 133, Syl. ¶ 8, 671 P.2d 1365 (1983).

The district court limited defense's cross-examination to the scope of the State's direct examination. When limiting the cross-examination, the trial judge informed defense counsel that other contacts Staley had with the victim could be admitted during the defense's presentation of its case in chief. The trial court merely delayed the presentation of evidence and did not prohibit the admission of the evidence. There was no abuse of discretion.

Affirmed.

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308 Kan. 1422
Supreme Court of Kansas.

STATE of Kansas, Appellant,
v.
Julia Colleen EVANS, Appellee.

No. 119,458
|
Opinion filed November 21, 2018.

Synopsis

Background: Defendant was charged with unlawful possession of methamphetamine and possession of drug paraphernalia after officers performing a warrantless search of her purse and wallet found evidence of those crimes. The District Court, Dickinson County, Benjamin J. Sexton, J., granted defendant's motion to suppress, and the State appealed.

Holdings: On transfer from the Court of Appeals, the Supreme Court, Luckert, J., held that:

law enforcement officer's individual practice of collecting something of value for safekeeping was insufficient to satisfy any exception to the Fourth Amendment's warrant requirement, and

law enforcement officer's duty to investigate and complete accident report was insufficient to justify warrantless search of defendant's closed purse and zipped wallet.

Affirmed and remanded.

Syllabus by the Court

1. In construing the command for reasonable searches under the Fourth Amendment to the United States Constitution, the United States Supreme Court has held that a search of private property is unreasonable unless it has been authorized by a valid search warrant or one of the specifically established and well-delineated exceptions to the warrant requirement.

2. Law enforcement officers have discretion in conducting inventory searches so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.

3. An essential predicate to any valid warrantless seizure of incriminating evidence under the plain-view exception to the warrant requirement is that a law enforcement officer cannot have violated the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. In addition, the evidence's incriminating character must be immediately apparent.

4. Where a container is involved, complying with the warrant requirement or one of its well-delineated exceptions is required because the Fourth Amendment provides protection to the owner of every container if the container conceals its contents from plain view.

5. Under the facts of this case, the State failed to meet its burden of demonstrating that a specifically established and well-delineated exception to the warrant requirement permitted the search for a driver's license in an automobile driver's purse and wallet.

****2** Appeal from Dickinson District Court; Benjamin J. Sexton, judge.

Attorneys and Law Firms

Daryl E. Hawkins, assistant county attorney, argued the cause, and Andrea Purvis, county attorney, and Derek Schmidt, attorney general, Topeka, were with him on the brief for appellant.

Whitney T. Kauffeld, assistant public defender, argued the cause and was on the brief for appellee.

Opinion

The opinion of the court was delivered by Luckert, J.:

****3** ***1423** Julia Colleen Evans argues law enforcement officers violated her rights under the Fourth Amendment to the United States Constitution when they conducted a warrantless search of her purse and wallet after an ambulance took her from the scene of an automobile accident. To justify the constitutionality of the search, the State must establish the law enforcement officers conducted a search under authority of a warrant or one of the specifically established and well-

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delineated exceptions to the warrant requirement. Here, the State relies on the plain-view exception and the officer's administrative caretaking function of locating a driver's license to complete an accident report. The district court held the State had not met its burden of establishing the application of an established exception to the warrant requirement, and we affirm.

Facts and Procedural History

The State charged Evans with two counts: (1) unlawful possession of methamphetamine and (2) possession of drug paraphernalia after officers performing a warrantless search of her purse and wallet found evidence of those crimes. Evans moved to suppress evidence, and the district court held an evidentiary hearing on Evans' motion. The State presented testimony from Dickinson County Sheriff's Deputy Mark Longbine and Abilene Police Department Sergeant Mark Haaga.

Deputy Longbine testified he responded to a call of a car accident on I-70. At the scene, Longbine observed it appeared the driver “went off the side of the road, and went up the incline, and flipped one time, and landed with the door against” a pole. Longbine approached the car and found Evans was in pain and distraught. Longbine talked to her, and learned her first name.

Sergeant Haaga arrived to assist Deputy Longbine. Shortly after Haaga arrived, Longbine left the scene to respond to another call. Haaga spoke with the driver, who said her name was Julia Evans. She also told him she did not want to have an ambulance. She ***1424** informed him she had called her ex-boyfriend. Haaga knew the ambulance was almost at the scene and knew emergency personnel would have to extract Evans from the car. Haaga noticed no signs Evans was impaired, nor did he detect any smell of alcohol, marijuana, or anything else emanating from the car.

Once emergency personnel arrived, Sergeant Haaga directed traffic while the emergency personnel removed Evans from the car. As the emergency personnel were placing Evans in the ambulance, Haaga “asked them to ask her where her driver's license was, so [he] could obtain that, for the accident report.” They said they would get back to him but did not. After the ambulance pulled away, Haaga observed a purse in the car. He also saw a woman's wallet next to—not in—the purse. It is his practice under these circumstances to collect anything of possible value from the car for safekeeping so it is not lost or stolen when, as in this case, the car will be towed to a “wrecker yard.”

After entering the car to take custody of the purse and wallet, Sergeant Haaga looked through Evans' purse. When he did not find Evans' driver's license, he turned to the wallet. He opened a zippered compartment on the outside—what Haaga described as the “backside”—of the wallet. In the compartment he found “a small plastic baggie with the white crystal substance in it.” He believed the substance was methamphetamine. He then opened the main part of the wallet and found Evans' driver's license. Haaga testified he was not investigating a crime at the time, he was just looking for the license.

Sergeant Haaga later took the purse and wallet to the sheriff's department and gave them to Deputy Longbine. Longbine explained the reason for taking Evans' purse was to obtain her driver's license number so ****4** the sheriff could determine “if she's suspended, or not suspended. It gives us her name. Her photo, also, gives us the information of knowing that is the person that was in the car.” In addition, the sheriff's office uses the license number to determine whether the driver has a record or is required to have an interlock device on the car. Longbine said that at that time he was only investigating the accident, and it is necessary to obtain the driver's license to do paperwork for the accident. Longbine testified to ***1425** testing the white crystals; they tested positive for methamphetamine.

Longbine explained he could not take the purse to Evans because there was not enough manpower for him to go to the hospital. But he no longer had the wallet. He explained:

> “I gave it back to her—matter of fact, her boyfriend kept on calling and calling for it. And she—he—she wanted it. And I said I'm only going to take it and give it to her. And then when she got out of the hospital—she was still in her gown, and she was—it looked like she had her arm propped up. And that's when I went outside and handed it to her.”

After hearing Deputy Longbine's and Sergeant Haaga's testimony, the district court judge ruled from the bench. The judge first noted Haaga conducted a search without a warrant. The judge then noted none of the exceptions to the warrant requirement applied. The judge acknowledged the “officer's situation ... of investigating an accident, and—and wanting to take the shortcut.” The judge observed that alternatives were available, such as impounding the automobile or getting

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a warrant if a search was justified. But "the opening of the wallet, and the opening of the zipper violate the defendant's constitutional rights." The judge granted Evans' motion to suppress.

The State moved to reconsider. The district court judge again ruled from the bench. The judge first distinguished the cases cited by the State. In doing so, the judge noted that the officers had the name of Julia Evans. And the court acknowledged that the purpose of the car search was for safekeeping of property. "He should be commended for that. He—that was what he should have done. He should have taken that into his custody, took for good and safe keeping." But the judge criticized the steps taken from that point. He noted "there's got to be a heightened sense of privacy in regards to a woman's purse." But the officer opened the purse and then the wallet. And "[i]nstead of popping open the wallet and looking in the middle where we would normally, where he found the driver's license, he opened a zip-locked side on the wallet and there he found the drugs." The judge concluded: "There was no reason for this officer to search that purse, and then eventually search the ***1426** wallet." The judge reaffirmed the previous ruling to suppress the evidence.

The State filed an interlocutory appeal. See K.S.A. 2017 Supp. 22-3603. We transferred the case from the Court of Appeals on our own motion under K.S.A. 20-3018(c).

Analysis

Evans based her motion to suppress on the Fourth Amendment to the United States Constitution. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This right extends to an individual's automobile and items in it, although "the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home." *New York v. Class*, 475 U.S. 106, 114-15, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986).

Applying the Fourth Amendment, the United States Supreme Court has repeatedly held that the touchstone of any analysis is reasonableness. See *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). And in construing the command for reasonableness, the Supreme Court has held "that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' " 413 U.S. at 439, 93 S.Ct. 2523 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 18 L.Ed.2d 930 [1967]). As we have noted: " 'This "warrant ****5** requirement" espouses a marked preference for searches authorized by detached and neutral magistrates to ensure that searches "are not the random or arbitrary acts of government agents," but rather intrusions "authorized by law" and "narrowly limited" in object and scope.' " *State v. Boggess*, 308 Kan. 821, 826, 425 P.3d 324 (2018).

If a warrant is not obtained, the government may seize property or conduct a search only if one of the " 'specifically established and well-delineated exceptions' " to the warrant requirement applies. *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); see *Maryland v. Dyson*, 527 U.S. 465, 466, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999). The most commonly recognized ***1427** exceptions to the warrant requirement include consent, search incident to lawful arrest, stop and frisk, probable cause to search accompanied by exigent circumstances, the emergency doctrine, inventory searches, plain view, and administrative searches of closely regulated businesses. *State v. Ramirez*, 278 Kan. 402, 404-05, 100 P.3d 94 (2004). Of these common exceptions, the State, in its brief on appeal, has cited cases applying the plain-view and inventory exceptions, although it never clearly invokes the inventory exception. "If the State fails to meet its burden [of establishing these exceptions], the evidence seized is excluded." *State v. Canaan*, 265 Kan. 835, 840, 964 P.2d 681 (1998).

Sergeant Haaga's actions raise Fourth Amendment concerns at two steps, each of which must comply with the Fourth Amendment. First, he entered the automobile and seized Evans' purse and wallet. Second, he opened and searched the purse and wallet. We must consider these steps separately because the United States Supreme Court has explained that even though the seizure of a container within an automobile—such as a purse or wallet—may be justified under the Fourth Amendment, a container, if its contents are unknown, "may only be opened pursuant to either a search warrant ... or one of the well-delineated exceptions to the warrant requirement." *Horton v. California*, 496 U.S. 128, 141, n.11, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

When we examine whether the State has met its burden of establishing a warrant exception at each of these steps, we apply a bifurcated standard of review. Under that bifurcated standard, we review the factual underpinnings of the district

court's decision to determine whether they are supported by substantial competent evidence. *State v. Talkington*, 301 Kan. 453, 461, 345 P.3d 258 (2015). Here, the parties do not argue about the district court's factual findings. Instead, they focus on the court's legal conclusion. Under our bifurcated standard of review, we review the district court's legal conclusion de novo. This means we give the district court's legal conclusion no deference. 301 Kan. at 461, 345 P.3d 258.

We apply this standard in the context of the State's argument about why it met its burden of establishing that the search and seizure of Evans' purse and wallet were justified under specifically ***1428** established and well-delineated exceptions to the warrant requirement. The State has cited two lines of cases as authority for the warrantless seizure of the property and the search of the purse and wallet. One line includes *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, and *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). These cases involved a seizure of property followed by search of an automobile. The second line of authority rests on this court's decision in *Canaan*, 265 Kan. 835, 964 P.2d 681. There, the court applied the well-established warrant exceptions of plain view and inventory searches. We hold the State has failed to establish that either line of cases justifies the search of Evans' purse and wallet.

Before turning to those cases, we pause to set aside a potential exception the State argues the district court inappropriately put in play by stating that the officers could have impounded the car or obtained a warrant. The State explicitly concedes that probable cause did not exist here and that neither Deputy Longbine nor Sergeant Haaga had a reason to investigate any sort of criminal activity or behavior. Evans agrees the officers lacked probable cause to justify a search and would not have had a basis for seeking a warrant. While we think the State misinterprets ****6** the point the district court was making, we need not discuss the matter in detail because the parties agree the probable cause plus exigent circumstances exception to the warrant requirement does not apply here.

Focusing on what the State does argue, it asserts the district court's other errors arose because it "ignored the plain view situation as well as the provision pertaining to administrative caretaking function such as locating a driver's license to accurately complete an accident report." We begin with a discussion of the community caretaking function on which the State relies.

1. Dombrowski *and* Opperman *do not support the search of the purse and wallet.*

At oral argument, the State justified its reliance on the community caretaking theory by focusing its argument on *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523. In its brief, the State relied on ***1429** *Opperman*, 428 U.S. 364, 96 S.Ct. 3092. Neither case supports the search of Evans' purse and wallet.

In *Dombrowski*, Chester Dombrowski wrecked a car in a rural area. While officers investigated the accident, Dombrowski told them he was a Chicago police officer. The investigating officers believed that Chicago police were required to carry a police-issued service revolver at all times. Because Dombrowski had no gun on him, one of the officers looked for the gun in the front seat and in the glove compartment of the wrecked car while waiting for a private tow truck. He did not find the revolver.

When the tow truck arrived, the officers took Dombrowski to the hospital, where he fell into an unexplained coma. Subsequently, one of the officers drove to the private garage where the car had been towed. The car had been left outside and unguarded. The officer began a more thorough search for the revolver, and in the process discovered evidence that led to Dombrowski being charged with and convicted of murder.

The question of whether the officer could conduct the warrantless search of the car at the garage reached the United States Supreme Court after Dombrowski filed post-conviction proceedings in federal court. He argued his conviction should be set aside because the trial court had not suppressed the evidence discovered in the car search in violation of his Fourth Amendment rights. The United States Supreme Court rejected Dombrowski's argument.

In doing so, the Court recognized the community caretaking function of local law enforcement officers when investigating automobile accidents "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Dombrowski*, 413 U.S. at 441, 93 S.Ct. 2523. And the Court noted that, at times, such "noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband." 413 U.S. at 442, 93 S.Ct. 2523. The Court then discussed two factual considerations it felt important to its decision to uphold the constitutionality of the search.

First, the Court noted officers had seized the car because it "constituted a nuisance along the highway" and the driver was too "intoxicated (and later comatose)" to "make arrangements to have ***1430** the vehicle towed and stored." 413 U.S. at 443, 93 S.Ct. 2523. Thus, the police had seized the car for "safety." 413 U.S. at 443, 93 S.Ct. 2523. The Court noted there was "no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure." *Dombrowski*, 413 U.S. at 445, 93 S.Ct. 2523.

Here, the State compares the reasons for towing Evans' car to those in *Dombrowski*—safety. In response, Evans argues the police had no justification for impounding her car, which the State does not dispute. Then, she at least implies—and the facts support—that she was conscious and able to make decisions about her car. And she told Sergeant Haaga she did not want an ambulance and had called her ex-boyfriend. See *Canaan*, 265 Kan. at 844, 964 P.2d 681 ("When the owner, operator, or person in charge of a vehicle is capable and willing to instruct police officers as to the vehicle's disposition, then absent some other lawful reason for impounding the ****7** vehicle, the person should be consulted, and his or her wishes followed concerning the vehicle's disposition.").

But the record is unclear about whether she expressed her wishes about her car's disposition or was even aware of its condition. In fact, these issues and factual questions were not the focus of the arguments to the district court, and Evans did not ask the district court to make any factual findings about whether the State could tow her car. Thus, we do not reach any possible justifications for towing Evans' car. See *State v. Seward*, 289 Kan. 715, 720-21, 217 P.3d 443 (2009) (holding litigant who fails to object to inadequate findings and conclusions foreclosed from making appellate argument based on what is missing). Instead, we assume, without deciding, that the State appropriately towed Evans' car.

Next, Sergeant Haaga seized Evans' purse and wallet. In *Dombrowski*, the seizure of items in the car occurred because of concerns for public safety of leaving a firearm unguarded. That concern does not exist here. But the district court found the concerns for safekeeping of property were a legitimate basis for seizing the property, and Evans does not dispute this on appeal. In other words, that issue is also not before us. See *State v. Angelo*, 306 Kan. 232, 236, 392 P.3d 556 (2017).

***1431** Instead, Evans focuses on the lack of a Fourth Amendment justification for the search of her purse and wallet. In *Dombrowski*, the law enforcement officer's caretaking role was not, by itself, a basis for the Court to uphold the search. This brings us to the second factual point critical to the *Dombrowski* Court's analysis: "[T]he search of the trunk to retrieve the revolver was 'standard procedure in (that police) department,' to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Dombrowski*, 413 U.S. at 443, 93 S.Ct. 2523. Likewise, the decision in *Opperman*, 428 U.S. 364, 96 S.Ct. 3092, emphasized the need for standard procedures governing a search of property in law enforcement's custody.

Opperman established inventory searches of property seized by law enforcement officers can be reasonable if performed to: (1) protect an owner's property while in law enforcement hands, (2) protect law enforcement against claims or disputes over lost or stolen property, or (3) protect law enforcement from potential danger. 428 U.S. at 369, 96 S.Ct. 3092. Each of these could be considered part of law enforcement's caretaking role. But the *Opperman* Court stressed that a valid purpose did not automatically mean the search complied with the Fourth Amendment. Instead, the inventory search must follow "standard police procedures." 428 U.S. at 376, 96 S.Ct. 3092.

Thus, neither case allowed the search simply because law enforcement officers had some caretaking role or duty. Instead, officers had to conduct the search under a standard policy. A decision of the United States Supreme Court dealing with the search of a container found in a lawfully seized car, *Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990), explains why the Court requires evidence of a standard policy that governs the search.

In *Wells*, after officers impounded a car, they conducted an inventory search that revealed a locked suitcase in the trunk. A law enforcement officer directed employees of the impoundment facility to force open the suitcase, and officers found marijuana. Citing several of its past decisions, including *Opperman*, the Court noted that officers have discretion in conducting inventory searches " 'so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.' " 495 U.S. at 3-4, 110 S.Ct. 1632 (quoting ***1432** *Colorado v. Bertine*, 479 U.S. 367, 375, 107 S.Ct. 738, 93 L.Ed.2d 739 [1987]). The Court explained that requiring a standardized procedure before allowing

containers to be opened during an inventory search prevented unrestrained rummaging by law enforcement officers:

> "Our view that standardized criteria ... or established routine ... must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to ****8** discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.' *Bertine*, 479 U.S. at 376 [107 S.Ct. 738] (Blackmun, J., concurring)." *Wells*, 495 U.S. at 4, 110 S.Ct. 1632.

See *State v. Baker*, 306 Kan. 585, 590, 395 P.3d 422 (2017) (recognizing the need for standardized inventory requirements).

Applying this rule in *Wells*, the United States Supreme Court noted the law enforcement officers who had searched the car were not directed by any "policy what[so]ever with respect to the opening of closed containers encountered during an inventory search. We hold that absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment." *Wells*, 495 U.S. at 4-5, 110 S.Ct. 1632; see *Baker*, 306 Kan. at 594, 395 P.3d 422 ("producing *no* evidence of a policy with respect to the opening of containers—as occurred here—does not pass constitutional muster").

Likewise, here, we have no evidence establishing the standard procedures of either the Abilene Police Department or the Dickinson County Sheriff's Office. Sergeant Haaga testified "there was a wrecker coming for [Evans' car], and *it's my practice*, when there's something of possible value in the car, I like to collect it for safekeeping, so it doesn't get lost, or stolen from the wrecker yard." (Emphasis added.) But an individual officer's practice does not meet the standard discussed in *Dombrowski*. He also did not speak to any policy about searching closed purses and zipped wallets once seized —a standard the *Wells* decision makes clear must exist for the search to be constitutional. In fact, the State has never argued that the search complies with the inventory search exception to the warrant requirement. Yet, as *Dombrowski*, *Opperman*, *Wells,* and other cases make clear, the caretaking role of law enforcement does not itself constitute an exception to the warrant requirement.

***1433** Without evidence of a standardized policy allowing the search, we hold the authority of *Dombrowski*, *Opperman*, and other related cases does not support the State's contention that the search of Evans' purse and wallet fits a well-delineated exception to the warrant requirement.

2. Canaan *and the completion of the accident report do not justify the search.*

The other case on which the State heavily relies is *Canaan*, 265 Kan. 835, 964 P.2d 681. The State argues *Canaan* justifies the search of Evans' purse and wallet because it recognizes an officer's statutory duty to complete an accident report. See K.S.A. 2017 Supp. 8-1611 and K.S.A. 8-1612. The State's arguments seem to suggest that a law enforcement officer's exercise of the statutory duty creates an exception to the warrant requirement. But the *Canaan* court relied on the plain view and inventory search exceptions to the warrant requirement—it did not create a new exception allowing a search simply because officers have a duty to complete the report.

As for the two exceptions applied by the *Canaan* court, we have already determined the State failed to meet its burden of establishing one—the inventory search exception. And, as we will discuss, the plain-view exception does apply under the facts here, which are distinguishable from those in *Canaan*. We begin our discussion of how *Canaan*'s facts affect the State's arguments.

In *Canaan*, law enforcement officers spotted the truck of a murder suspect. They began to follow the truck, and the suspect fled and eventually wrecked his truck. The officers found the suspect unconscious. After emergency personnel had opened the truck door and removed the suspect, officers began to investigate. An officer saw a gray wallet on the ground near the passenger door. He testified he removed the driver's license to identify the driver. The officer then noticed a black wallet on the floorboard of the truck. "[He] examined this wallet and found it contained the murder victim's driver's license." *Canaan*, 265 Kan. at 838, 964 P.2d 681. He then returned the wallet to the truck, sealed the truck, and began the process of obtaining a search warrant. The affidavit in support of the request for a warrant included the evidence ****9** of the victim's wallet, and the ***1434** driver sought to suppress the evidence by arguing the officer had unlawfully obtained this evidence.

At the suppression hearing, the law enforcement officer testified:

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" 'I wasn't sure who the driver of the vehicle was. I had a driver's license that said Marvin Canaan, but I didn't know if that was Marvin Canaan they had on the stretcher or not. So I retrieved the other wallet to see if I could get identification.' " 265 Kan. at 842 [964 P.2d 681].

The State argued that under those circumstances the officer conducted the search "to obtain information required by statute." *Canaan*, 265 Kan. at 843, 964 P.2d 681. And the court agreed the officer "had a duty to acquire information sufficient to investigate and report on the accident." 265 Kan. at 843, 964 P.2d 681. The court based this conclusion on Kansas statutes requiring law enforcement officers to complete an accident report. The court held: "When [the law enforcement officer], while investigating the accident scene, opened the wallet and observed the victim's driver's license in the black wallet, the plain view doctrine applied." 265 Kan. at 843, 964 P.2d 681. That holding does not apply under the facts of this case or under current law.

Plain view means an officer sees an item from a lawful position or during a lawful search. " 'What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.' " *Horton*, 496 U.S. at 135, 110 S.Ct. 2301 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S.Ct. 2022, 29 L.Ed.2d 564 [1971]). The Court added: "It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." 496 U.S. at 136, 110 S.Ct. 2301. And "not only must the item be in plain view; its incriminating character must also be 'immediately apparent.' " 496 U.S. at 136, 110 S.Ct. 2301 (quoting *Coolidge*, 403 U.S. at 466, 91 S.Ct. 2022).

If those requirement are met, "the seizure of an object in plain view does not involve an intrusion on privacy." 496 U.S. at 141, 110 S.Ct. 2301. In a footnote, the Court added: "Even if the item is a container, its seizure does not compromise the interest in preserving the privacy of its contents because it may only be opened pursuant to either ***1435** a search warrant or one of the well-delineated exceptions to the warrant requirement. [Citations omitted.]" 496 U.S. at 141 n.11, 110 S.Ct. 2301. Where a container is involved, complying with the warrant requirement or one of its well-delineated exceptions is required because "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *United States v. Ross*, 456 U.S. 798, 822-23, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

Here, Sergeant Haaga invaded Evans' privacy because her purse and her wallet concealed their contents from plain view. Thus, neither Evans' driver's license nor the methamphetamine and drug paraphernalia were in plain view before he began rummaging through the purse and wallet. If he violated the Fourth Amendment by searching, the fact the drugs and paraphernalia came into view does not matter. Thus, the question becomes whether his search of the purse and wallet was justified by one of the well-delineated exceptions to the warrant requirement.

The State cites none of the common exceptions to the warrant requirement to justify the search. Rather, it relies on Kansas statutes requiring an officer to complete an accident report —K.S.A. 2017 Supp. 8-1611 and K.S.A. 8-1612—a duty it categorizes as a community caretaking function. Yet, as we have discussed, neither *Dombrowski, Opperman*, nor any other United States Supreme Court decision that the parties have cited justifies a search in the absence of standards that control an officer's discretion. And no standards are mentioned in the record. Instead, the State relies on statutes that do not create a duty that warrants a search.

Under K.S.A. 2017 Supp. 8-1611,"[e]very law enforcement officer who: (1) [i]nvestigates ****10** [an] accident of which a report must be made as required in this article; or (2) otherwise prepares a ... report ... either at the time of and at the scene of the accident or thereafter by interviewing the participants or witnesses" is required to send the report to the department of transportation "within 10 days after investigation of the accident." K.S.A. 2017 Supp. 8-1611(a). In addition, K.S.A. 8-1612(a) requires the department of transportation to prepare forms for written accident ***1436** reports and requires, among other things, that the report must list "the persons and vehicles involved."

As the district court noted, the driver in *Canaan* was unconscious and the officers did not know who was in the ambulance, whereas here, Evans was conscious. She also disclosed her identity to the law enforcement officers and there was nothing—such as the presence of two wallets—to suggest confusion about her identity or to suggest she had given Sergeant Haaga inaccurate information. Thus, the law enforcement officers had the necessary information about the driver.

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The officers testified they wanted the driver's license so they could, among other things, verify her identity. But the circumstances did not present an exigency or an emergency that required an immediate verification of Evans' identity or give rise to the emergency doctrine exception to the warrant requirement. Compare *United States v. Dunavan*, 485 F.2d 201 (6th Cir. 1973) (upholding search when driver was foaming at the mouth and unable to talk and officer was seeking information explaining nature of the defendant's condition and the best means of treating it), and *Evans v. State*, 364 So.2d 93 (Fla. Dist. Ct. App. 1978) (holding officer lawfully searched purse for medical information that would account for driver's condition of being unable to communicate in any way), with *Morris v. State*, 908 P.2d 931 (Wyo. 1995) (holding search of effects not permissible when individual was conscious and able to ask and answer questions).

Additionally, K.S.A. 2017 Supp. 8-1611 and K.S.A. 8-1612 do not require immediate action. K.S.A. 2017 Supp. 8-1611(a)(2) specifically provides for interviews and additional investigation after the officer leaves the scene of the accident. And the only statutory deadline for completing an accident report allows the officer up to "10 days after investigation of the accident." K.S.A. 2017 Supp. 8-1611(a)(2). Significantly, the statutes recognize information may be unavailable. See K.S.A. 8-1612(b) (officer is to provide information requested by the accident report form "unless not available"). If Evans' driver's license had not been available by the end of the investigation, the officers still could have completed their duty by submitting a report with the information they had available.

***1437** Through other statutes, the Kansas Legislature has indicated officers have some discretion in even asking to see a driver's license and, if asked, drivers do not have to immediately display their license. K.S.A. 2017 Supp. 8-1604 states that a driver involved in an accident must "give such driver's name, address and the registration number of the vehicle such driver is driving, *and upon request shall exhibit such driver's license*." (Emphasis added.) Here, the record does not establish that the officers asked Evans for her license or relayed such a request through, for example, hospital personnel or her ex-boyfriend. Even if one of the officers had asked Evans to display her license, the law allows some flexibility in the time for response. And, since the officers would not release Evans' possessions to anyone but her, they had the opportunity to ask her to produce her license when she came to retrieve her purse and wallet. While K.S.A. 8-244 required Evans to have her driver's license "in ... her immediate possession" while operating a vehicle, she could not have been convicted of violating the statute if she "produce[d] in court or the office of the arresting officer a driver's license theretofore issued to such person and valid at the time" of the accident.

These Kansas statutes express a legislative intent that drivers have a reasonable time to produce their own driver's license. And the Legislature did not impose a duty on officers that would justify invading the privacy guaranteed by the Fourth Amendment when, as in this case, the driver is conscious and able to answer the officer's questions about her ****11** identity. See *People v. Wright*, 804 P.2d 866, 871 (Colo. 1991) (upholding suppression of evidence where "the officer was not confronted with a situation in which there was no other reasonable alternative other than to search the defendant's purse for the information necessary for a completed report"). The Legislature gave officers time after an accident to investigate and even allowed for filing an incomplete report if information is unavailable.

Under the record presented to us, the officers did not have the right to intrude into Evans' purse and wallet. Simply put, the intrusion that afforded the plain view violated the Fourth Amendment.

***1438** Conclusion

The State has failed to meets its burden of establishing that the officer's search of Evans' purse and wallet was permitted under one of the specifically established and well-delineated exceptions to the warrant requirement. Thus, the search violated Evans' Fourth Amendment rights, and the evidence seized during the search must be suppressed. The judgment of the district court is affirmed. The case is remanded for further proceedings.

All Citations

308 Kan. 1422, 430 P.3d 1

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914 N.W.2d 794
Supreme Court of Iowa.

STATE of Iowa, Appellee,
v.
Bion Blake INGRAM, Appellant.

No. 16-0736
|
Filed June 29, 2018

Synopsis

Background: Following denial of motion to suppress evidence discovered during warrantless inventory search of impounded vehicle following traffic stop, defendant was convicted after a bench trial in the District Court, Jasper County, Steven J. Holwerda, J., of possession of methamphetamine and possession of drug paraphernalia.

The Supreme Court, Appel, J., held that unconsented-to warrantless search of black cloth bag during inventory search of vehicle violated state constitution.

Reversed and remanded.

Cady, C.J., filed concurring opinion.

Mansfield, J., filed concurring opinion, in which Waterman and Zager, JJ., joined.

***797** Appeal from the Iowa District Court for Jasper County, Steven J. Holwerda, Judge.

Attorneys and Law Firms

Defendant appeals his conviction for possession of methamphetamine. REVERSED AND REMANDED.

Mark C. Smith, State Appellate Defender, and Mary K. Conroy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Kyle Hanson, Assistant Attorney General, for appellee.

Opinion

APPEL, Justice.

In this case, a driver challenges the constitutionality of an inventory search of his vehicle, which was to be towed after police discovered it was not lawfully registered. After conducting a search, the police found a controlled substance. The district court denied the driver's motion to suppress, and he was convicted of possession. The driver argues this search was unconstitutional under the Fourth Amendment of the United States Constitution. Alternatively, even if the Federal Constitution does not prohibit warrantless inventory searches under these particular circumstances, the driver argues article I, section 8 of the Iowa Constitution provides greater protections.

We accept the invitation to restore the balance between citizens and law enforcement by adopting a tighter legal framework for warrantless inventory searches and seizures of automobiles under article I, section 8 of the Iowa Constitution than provided under the recent precedents of the United States Supreme Court. In doing so, we encourage stability and finality in law by decoupling Iowa law from the winding and often surprising decisions of the United States Supreme Court. In the words of another state supreme court, we do not allow the words of our Iowa Constitution to be "balloons to be blown up or deflated every time, and precisely in accord with the interpretation of the U.S. Supreme Court, following some tortuous trail." *Penick v. State*, 440 So.2d 547, 552 (Miss. 1983). We take the opportunity to ***798** stake out higher constitutional ground today.

I. Facts and Procedural Background.

At about 6:39 a.m. on October 30, 2015, a police officer pulled over Bion Ingram, who was driving on Highway 14 in Newton, Iowa. The officer had noticed the vehicle's license plate was not illuminated as required. After speaking with Ingram, the officer also noticed the vehicle's registration sticker did not match its license plate—the vehicle's actual registration had expired in 2013. Because of the registration violation, the officer decided to impound the vehicle and told Ingram it would be towed.

The officer did not arrest Ingram at that point but had him sit in the patrol vehicle while the officer wrote citations for the traffic violations. Ingram told the officer he was going to work, and the officer agreed to drive Ingram to a nearby

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gas station for Ingram's friend to pick him up and take him to work. Ingram asked to be able to retrieve his work items from the vehicle, but the officer did not allow Ingram to do this until the officer finished writing the citations.

The officer told Ingram the contents of the vehicle would be inventoried before towing and asked Ingram if there was anything of value in the vehicle. Ingram said there was nothing of value in the vehicle. Another officer arrived and inventoried the contents of the vehicle. The officers did not obtain a warrant to search the vehicle.

During the inventory, the second officer discovered a black cloth bag on the floor next to the gas pedal. When the officer opened the bag, the officer discovered a glass pipe and what field tests revealed to be almost a gram of methamphetamine. Ingram was arrested.

Ingram was charged by trial information with possession of methamphetamine, second offense, and charged by citation with possession of drug paraphernalia. Ingram filed a motion to suppress the results of the search based on the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution. Ingram argued the search violated his rights under the Fourth Amendment and article I, section 8. Ingram contended the inventory search should not have been conducted and the vehicle impoundment was a pretext to search the vehicle. The State resisted. The district court held a hearing on the motion to suppress and denied the motion on the ground that inventory searches are an exception to the warrant requirement.

Ingram was tried on the minutes on March 30, 2016. The judge found Ingram guilty of both charges on April 4. Ingram appealed and we retained the appeal.

On appeal, Ingram argues the district court erred by (1) denying his motion to suppress because the inventory search violated the United States and Iowa Constitutions and (2) finding there was sufficient evidence that he knowingly possessed a controlled substance. Ingram also argues he received ineffective assistance of counsel when his trial counsel failed to challenge the admissibility of the results of the field drug test. Because we hold that Ingram's motion to suppress should have been granted, we do not reach the other issues.

II. Standard of Review.

We review the denial of a motion to suppress on constitutional grounds de novo. *State v. Wilkes*, 756 N.W.2d 838, 841 (Iowa 2008); *State v. Heuser*, 661 N.W.2d 157, 161 (Iowa 2003).

***799 III. Iowa vs. United States Constitution.**

This case involves a challenge to a warrantless inventory search and seizure of an automobile under the search and seizure provisions of the Iowa and United States Constitutions. At the outset, it is important to emphasize that this court is the ultimate arbiter of the meaning of the search and seizure clause of article I, section 8 of the Iowa Constitution, while the United States Supreme Court has the final say in interpreting the search and seizure provision of the Fourth Amendment to the United States Constitution.

The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. Amend. IV. Article I, section 8 of the Iowa Constitution requires that “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated.” Iowa Const. art. I, § 8.

Although the Iowa and United States Constitutions have similarly worded search and seizure provisions, that does not mean the two regimes and the cases under them may be conflated. We jealously reserve the right under our state constitutional provisions to reach results different from current United States Supreme Court precedent under parallel provisions. *See, e.g.*, *Zaber v. City of Dubuque*, 789 N.W.2d 634, 654 (Iowa 2010); *Wilkes*, 756 N.W.2d at 842 n.1; *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 9 (Iowa 2006). As has been noted by other state courts before us, it would amount to malpractice for lawyers not to understand the potential for an independent state court interpretation under the state constitution that is more protective of individual rights. *State v. Lowry*, 295 Or. 337, 667 P.2d 996, 1013 (1983) (en banc) (Jones, J., concurring specially); *Commonwealth v. Kilgore*, 719 A.2d 754, 757 (Pa. Super. Ct. 1998); *State v. Jewett*, 146 Vt. 221, 500 A.2d 233, 234 (1985); *see also State v. Baldon*, 829 N.W.2d 785, 816 (Iowa 2013) (Appel, J., concurring specially). The caselaw and law commentaries now groan with the volume and weight of ample materials for lawyers to construct independent state constitutional law varying from applicable federal precedent. *See State v. Short*, 851 N.W.2d 474, 489–91 (Iowa 2014); *State v. Ochoa*, 792 N.W.2d 260, 264–65 & nn.2–3 (Iowa 2010).

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The growth of independent state constitutional law is important in the search and seizure context. Unlike the decisions of the United States Supreme Court in recent years, which generally have sought to minimize the scope of individual protection under the Fourth Amendment, our recent caselaw under the search and seizure provision of the Iowa Constitution has emphasized the robust character of its protections. *See, e.g.*, *State v. Coleman*, 890 N.W.2d 284, 299 (Iowa 2017); *State v. Gaskins*, 866 N.W.2d 1, 6–7 (Iowa 2015); *Short*, 851 N.W.2d at 482–85; *Baldon*, 829 N.W.2d at 833–34; *Ochoa*, 792 N.W.2d at 274. We have repeatedly declined to follow the approach of the United States Supreme Court in its interpretation of what one commentator has referred to as an ever-shrinking Fourth Amendment. *See Gaskins*, 866 N.W.2d at 12–13; *Short*, 851 N.W.2d at 506; *Baldon*, 829 N.W.2d at 803 (majority opinion); *Ochoa*, 792 N.W.2d at 291; *see generally* Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257 (1984).

In this case, Ingram raises his challenge under the search and seizure provisions of both the Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution. Ingram's argument ***800** under the United States Constitution cites to federal cases that generally provide warrantless inventory searches of automobiles are permissible, if they are conducted pursuant to policies adopted by law enforcement which govern the decision to impound the vehicle and the nature and scope of any subsequent search. *See Florida v. Wells*, 495 U.S. 1, 4, 110 S.Ct. 1632, 1635, 109 L.Ed.2d 1 (1990); *United States v. Kennedy*, 427 F.3d 1136, 1144 (8th Cir. 2005).

The challenge raised by Ingram under the search and seizure provision of article I, section 8 of the Iowa Constitution has different dimensions. Ingram notes a number of state courts have rejected the two-pronged policy approach of the United States Supreme Court in favor of a more restrictive approach that sharply limits warrantless searches and seizures of automobiles. *See, e.g.*, *State v. Daniel*, 589 P.2d 408, 417–18 (Alaska 1979); *State v. Lucas*, 859 N.E.2d 1244, 1251 (Ind. Ct. App. 2007); *State v. Mangold*, 82 N.J. 575, 414 A.2d 1312, 1318 (1980); *State v. Hite*, 266 Or.App. 710, 338 P.3d 803, 809 (2014).

When a party raises claims under both the Federal and State Constitutions, this court has generally held we retain the discretion whether to proceed to analyze the case in the first instance under the State or Federal Constitution. *State v. Pals*, 805 N.W.2d 767, 772 (Iowa 2011). In contrast, some states adopt a primary-state-law approach to dual constitutional claims, where the court will almost or mostly always consider state constitutional claims before moving on to consider federal constitutional claims. *See State v. Kono*, 324 Conn. 80, 152 A.3d 1, 27 (2016) (explaining when federal law is unclear or defendant not entitled to relief thereunder, court will consider state constitutional claim first); *Malyon v. Pierce County*, 131 Wash.2d 779, 935 P.2d 1272, 1277 (1997) (en banc) (stating when the issue is adequately briefed, court will analyze the state constitutional issue first); *see generally* Eric M. Hartmann, Note, *Preservation, Primacy, and Process: A More Consistent Approach to State Constitutional Law*, 102 Iowa L. Rev. 2265, 2282 (2017).

Although the primary approach has attractive features, it also has problems. Notwithstanding the caselaw developing independent state constitutional law, trial court records often reveal counsel had not raised an independent state constitutional argument at all. When this occurs, appellate counsel must advance an ineffective-assistance-of-counsel claim to preserve the issue. When a double-barreled preservation problem occurs, namely, where the state constitutional issue is not raised in the district court and the failure to do so is not presented as an ineffective-assistance-of-counsel claim on appeal, we decline to reach the state constitutional issues. *See State v. Prusha*, 874 N.W.2d 627, 629–30 (Iowa 2016).

Minimally better, counsel sometimes have merely added a citation to article I, section 8 of the Iowa Constitution but then generally adopted federal caselaw in describing the claim. Where state constitutional law claims have been minimally preserved in this fashion, we may, in our discretion, decide the case based on potentially dispositive federal constitutional grounds and save our state constitutional interpretation for another day. In the alternative, we may apply the federal standards in a fashion more stringent than under federal caselaw. *See Pals*, 805 N.W.2d at 772. Given the inconsistent presentation of state constitutional claims in our cases, we have so far declined to adopt a primary approach that requires us to consider and resolve state constitutional claims prior to addressing federal constitutional ***801** claims. *Baldon*, 829 N.W.2d at 821–22 (Appel, J., concurring specially).

In this case, however, Ingram raised the Iowa constitutional issue in the district court. In his appellate briefing, Ingram has specifically urged us to follow a different approach to

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warrantless inventory searches under the Iowa Constitution than has been employed by recent cases of the United States Supreme Court and, to the extent the claim was not preserved in the district court, has raised an ineffective-assistance claim. We will proceed to consider the state constitutional issues.

IV. Warrantless Inventory Searches and Seizures of Automobiles Under Article I, Section 8 of the Iowa Constitution.

A. Overview of Constitutional Choices.

1. *Introduction.* Constitutional interpretation of open-textured provisions of a state constitution is always about choice. *See* Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & Pol. 123, 124 (2011). Judicial development of open-textured constitutional provisions is not a mathematical exercise, inexorably leading to a provable answer. *See Gompers v. United States*, 233 U.S. 604, 610, 34 S.Ct. 693, 695, 58 L.Ed. 1115 (1914) ("But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil."), *disapproved of on other grounds by Bloom v. Illinois*, 391 U.S. 194, 211, 88 S.Ct. 1477, 1487, 20 L.Ed.2d 522 (1968). As judges, in interpreting open-textured provisions of the Iowa Constitution, it is our duty to select from possible plausible alternative approaches the best approach to reflect the important constitutional values underlying the text. State constitutional law is not about proofs, but about informed choices.

In order to consider the proper framework for analyzing the validity of warrantless inventory searches and seizures involving automobiles under article I, section 8 of the Iowa Constitution, it is helpful to lay out the various constitutional choices made by the United States Supreme Court and the courts of other states under state constitutional search and seizure provisions. The constitutional choices made by the United States Supreme Court and other state courts are, of course, not binding upon us, but they may broaden our constitutional perspectives, may provide us with helpful insights, and may help guide the ultimate resolution of the Iowa constitutional issue before us. With respect to the cases of the United States Supreme Court, we must be attentive to Justice Harlan's often-quoted observation that because of federalism concerns, the Supreme Court may underenforce constitutional norms in its interpretation of federal constitutional provisions when they are applied against the states, *Ker v. California*, 374 U.S. 23, 44, 83 S.Ct. 1623, 1645–46, 10 L.Ed.2d 726 (1963) (Harlan, J., concurring), and to the equally often-quoted and somewhat sheepish observation by the Supreme Court that states are free to adopt approaches more protective of liberty under their state constitutions, *Bustop, Inc. v. Bd. of Educ. of L.A.*, 439 U.S. 1380, 1382, 99 S.Ct. 40, 41, 58 L.Ed.2d 88 (1978). In short, we look to the decisions of other courts, including the decisions of the United States Supreme Court, not because they are authoritative, but in the hope their logic and rationales may be persuasive. *Ochoa*, 792 N.W.2d at 267; *Kingsway Cathedral*, 711 N.W.2d at 9.

2. *Approach to warrantless inventory searches and seizures involving automobiles prior to recent United States Supreme* ***802** *Court cases.* We begin with a brief review of state and federal cases prior to recent United States Supreme Court cases related to warrantless inventory searches and seizures of automobiles. As will be seen below, the cases are rich and varied.

For example, a leading early state court case is *Mozzetti v. Superior Court*, 4 Cal.3d 699, 94 Cal.Rptr. 412, 484 P.2d 84 (1971) (en banc). The *Mozzetti* court began by discussing the privacy interests involved in searches of automobiles. *Id.* at 412, 484 P.2d at 88. According to the court,

> It seems undeniable that a routine police inventory of the contents of an automobile involves a substantial invasion into the privacy of the vehicle owner. Regardless of professed benevolent purposes and euphemistic explication, an inventory search involves a thorough exploration by the police into the private property of an individual.

Id.

In analyzing the government's interest in a warrantless inventory search of an automobile, the *Mozzetti* court observed, "[I]tems of value left in an automobile to be stored by the police may be adequately protected merely by rolling up the windows, locking the vehicle doors and returning the keys to the owner." *Id.* at 412, 484 P.2d at 89. Turning to the issue of protecting the defendant or the police against theft or tort claims, the court noted if the article was either stolen before the inventory or perhaps innocently omitted when the inventory was taken, the inventory documentation would be of little use. *Id.* at 412, 484 P.2d at 89–90; *see also People v. Nagel*, 17 Cal.App.3d 492, 95 Cal.Rptr. 129, 133 (1971) (holding warrantless inventory search of impounded car after red light violation invalid, as there was no apparent reason why driver could not have driven vehicle to nearby place for safekeeping); *Virgil v. Super. Ct.*, 268 Cal.App.2d 127,

73 Cal.Rptr. 793, 795 (1968) (holding warrantless inventory search of impounded car invalid since there was no reason why passengers in the car could not have taken charge of the vehicle and driver was not consulted with respect to his automobile); Charles E. Moylan, Jr., *The Inventory Search of an Automobile: A Willing Suspension of Disbelief*, 5 U. Balt. L. Rev. 203, 216–20 (1976) [hereinafter Moylan].

The *Mozzetti* court's skepticism about the efficacy of an inventory search protecting police against false claims was repeated by an Arizona court of appeals in *In re One 1965 Econoline*, 17 Ariz.App. 64, 495 P.2d 504, 508 (1972), *rev'd*, 109 Ariz. 433, 511 P.2d 168 (1973) (en banc). The Arizona appellate court observed,

> We fail to see how the taking of an inventory will insulate the police against false accusations of theft and assure the property owner that his property will not be taken. Unscrupulous persons who desire to steal articles will simply not list them on the inventory. Owners who wish to assert spurious claims against law enforcement officers or the garage owners can simply claim that the officers did not list them on the inventory.

Id. at 508–09; *see* Moylan, 5 Balt. L. Rev. at 217–18.

Some early state court cases held law enforcement must explore the possibility of making alternate arrangements for a vehicle with an owner or driver before impoundment occurs. *See, e.g.*, *Miller v. State*, 403 So.2d 1307, 1314 (Fla. 1981) (analyzing search under Fourth Amendment and search and seizure provisions of Florida Constitution), *overruled by State v. Wells*, 539 So.2d 464, 469 (Fla. 1989); *Strobhert v. State*, 165 Ga.App. 515, 301 S.E.2d 681, 682 (1983) (discussing search and seizure generally, not indicating specific ***803** constitutional provisions); *State v. Fortune*, 236 Kan. 248, 689 P.2d 1196, 1203 (1984) (ruling under Fourth Amendment and search and seizure provisions of Kansas Constitution).

There are also a number of early state court cases holding containers may not be opened pursuant to a warrantless inventory search. For example, the Alaska Supreme Court held a warrantless search of luggage, containers, or packages in an automobile violated the search and seizure provisions of the Alaska Constitution. *Daniel*, 589 P.2d at 417–18. Similarly, the Alaska Supreme Court also held closed containers taken from a person before incarceration may not be further opened or searched except pursuant to a warrant unless there is a recognized exception to the warrant requirement. *Reeves v. State*, 599 P.2d 727, 735–36 (Alaska 1979). A number of other state cases similarly held warrantless inventory searches of closed containers invalid under the Fourth Amendment and/or state constitutional search and seizure provisions. *See State v. Gwinn*, 301 A.2d 291, 296 (Del. 1972) (finding search of satchel during warrantless inventory of automobile not necessary for protection of owner and risk satchel might contain explosives or dangerous substance too conjectural to justify search under Fourth Amendment); *People v. Dennison*, 61 Ill.App.3d 473, 18 Ill.Dec. 756, 378 N.E.2d 220, 224 (1978) (holding warrantless inventory search may not extend to toolbox under Fourth Amendment); *State v. Jewell*, 338 So.2d 633, 639–40 (La. 1976) (holding under Fourth Amendment and search and seizure provisions of Louisiana Constitution, warrantless search of an over-the-counter pill bottle was not conducted pursuant to a legitimate inventory search, but even if it had been, a true inventory search would never involve examining contents of a pill bottle); *State v. Downes*, 285 Or. 369, 591 P.2d 1352, 1354 (1979) (en banc) (holding exigent circumstances must exist to justify warrantless inventory search of closed container under Fourth Amendment); *State v. Prober*, 98 Wis.2d 345, 297 N.W.2d 1, 12 (1980) (search of purse pursuant to warrantless inventory search unlawful under Fourth Amendment and search and seizure provisions of Wisconsin Constitution), *overruled by State v. Weide*, 155 Wis.2d 537, 455 N.W.2d 899, 904 (1990) (holding *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), requires rejection of *Prober* in Fourth Amendment analysis and declining to adopt independent standard under Wisconsin Constitution).

There are early warrantless inventory search and seizure cases, however, that provided more leeway to law enforcement. For example, in *Cabbler v. Commonwealth*, the Virginia Supreme Court upheld a warrantless inventory search of an automobile under the Fourth Amendment pursuant to a police department policy to protect the property of an arrested citizen. 212 Va. 520, 184 S.E.2d 781, 783 (1971). In *Warrix v. State*, the Wisconsin Supreme Court held a warrantless inventory search of a car in police custody was proper under the Fourth Amendment in order to protect police from claims of theft of personal property. 50 Wis.2d 368, 184 N.W.2d 189, 194 (1971). The Minnesota Supreme Court held a warrantless inventory search pursuant to a standard procedure was a reasonable measure under the Fourth Amendment to protect the car and its contents after it was impounded by the police. *City of St. Paul v. Myles*, 298 Minn. 298, 218 N.W.2d 697, 699, 701 (1974); *see also State v. Tully*, 166 Conn. 126, 348 A.2d 603, 609–10 (1974) (holding warrantless search of motor vehicle was acceptable

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under the Fourth Amendment); *People v. Sullivan*, 29 N.Y.2d 69, 323 N.Y.S.2d 945, 272 N.E.2d 464, 469 (1971) (holding warrantless ***804** search was reasonable within the Fourth Amendment); *State v. Criscola*, 21 Utah 2d 272, 444 P.2d 517, 519–20 (1968) (upholding warrantless search under the Fourth Amendment). As will be seen below, cases like *Cabbler* foreshadowed the later approach of the United States Supreme Court to warrantless inventory search and seizure involving automobiles.

3. *Approach to warrantless inventory searches and seizures involving automobiles in recent cases of the United States Supreme Court*. In recent years, the United States Supreme Court has narrowly construed the search and seizure protections contained in the Fourth Amendment. In particular, it has placed less emphasis on the warrant requirement and embarked on an ever-increasing expansion of exceptions to the warrant requirement. While the traditional touchstone of Fourth Amendment law under prior Supreme Court cases was the warrant requirement, *see, e.g.*, *Coolidge v. New Hampshire,* 403 U.S. 443, 454–55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971); *Katz v. United States*, 389 U.S. 347, 356–57, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958), the new innovative touchstone under the more recent Supreme Court cases is a free-floating and open-ended concept of "reasonableness" that is unhinged from the warrant requirement expressly contained in the Fourth Amendment, *see, e.g.*, *Maryland v. King*, 569 U.S. 435, 448, 133 S.Ct. 1958, 1970, 186 L.Ed.2d 1 (2013); *Wilson v. Arkansas*, 514 U.S. 927, 931, 115 S.Ct. 1914, 1916, 131 L.Ed.2d 976 (1995); *O'Connor v. Ortega*, 480 U.S. 709, 728–29, 107 S.Ct. 1492, 1503, 94 L.Ed.2d 714 (1987).

The field of warrantless inventory search and seizure has been no exception to this general revisionist trend away from the traditional Fourth Amendment warrant requirement. *See* Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 Am. Crim. L. Rev. 119, 127, 148 (1989). The recent approach of the United States Supreme Court is to allow warrantless inventory searches and seizures of automobiles by law enforcement authorities, provided they are conducted pursuant to generally applicable local policy requirements that are "reasonable." *Bertine*, 479 U.S. at 371–72, 107 S.Ct. at 741.

Under the United States Supreme Court cases, the nature and scope of the warrantless search must be conducted pursuant to a standardized local policy. *See Wells*, 495 U.S. at 4, 110 S.Ct. at 1635; *Bertine*, 479 U.S. at 376, 107 S.Ct. at 743 (Blackmun, J., concurring); *South Dakota v. Opperman*, 428 U.S. 364, 383, 96 S.Ct. 3092, 3104, 49 L.Ed.2d 1000 (1976) (Powell, concurring). If the warrantless impoundment of the vehicle and the warrantless search of the vehicle are authorized by reasonable local policy, the warrantless inventory search passes constitutional muster. *See Wells*, 495 U.S. at 4, 110 S.Ct. at 1635. Under the Supreme Court approach, there is no requirement that local police inventory policies use the least intrusive means to advance the goals of law enforcement. *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983). A warrantless inventory search and seizure might be invalid if the accused can show the government action was "in bad faith or for the sole purpose of investigation," a very high bar. *Bertine*, 479 U.S. at 372, 107 S.Ct. at 741 (majority opinion).

Because of its emphasis on local policy determined by law enforcement, constitutionally permissive warrantless searches pursuant to an inventory process may vary from jurisdiction to jurisdiction. It allows local law enforcement culture to be ***805** brought to bear in expanding or contracting the scope of Fourth Amendment rights through adoption of broad or narrow warrantless inventory search and seizure policies. Thus, under the Fourth Amendment, whether a container may be searched as part of a warrantless inventory process may turn on the policies of the jurisdiction where the search occurred. Plainly, the Supreme Court's approach accommodates, and was no doubt animated by, federalism concerns.

Under the federal approach, local law enforcement, and not independent and impartial judges, may set the contours of the substantive protections for liberty under the Fourth Amendment in the field of warrantless inventory searches through the crafting of local policy. This empowerment of local law enforcement to determine the substance of Fourth Amendment protections in the context of warrantless inventory searches and seizures of automobiles is rich with irony, as the Fourth Amendment was explicitly designed as a bulwark to restrain law enforcement in the context of searches and seizures. Under the United States Supreme Court precedent, local law enforcement is authorized to restrict itself, a process unlikely to provide robust protections to persons drawn into the warrantless inventory search and seizure net and more likely to reflect law enforcement convenience.

The United States Supreme Court also has not required a warrantless inventory search and seizure policy be in writing, but instead the policy may be established by custom and practice. *See Bertine*, 479 U.S. at 373 n.5, 107 S.Ct. at 742 n.5 (discussing testimony of other police officer regarding the vehicle inventory procedures); *United States v. Betterton*, 417 F.3d 826, 830 (8th Cir. 2005) ("While a written policy may be preferable, testimony can be sufficient to establish police impoundment procedures."). When policies are not in writing, there may be evidentiary difficulties regarding whether a policy is, in fact, in place, and if so, what exactly is the policy.

There is irony here, too, in the lack of a requirement that the warrantless inventory search policy be in writing. One of the requirements of a traditional Fourth Amendment law is that a warrant be in writing. The writing requirement ensures there is no dispute regarding the showing of probable cause made by law enforcement officers or regarding the scope of the warrant itself. It prevents after-the-fact justifications by law enforcement. The notion that an *ex ante* writing prevents post hoc judgments has been an important part of search and seizure law for a long time. *See, e.g.*, *United States v. Sharpe*, 470 U.S. 675, 694, 105 S.Ct. 1568, 1580, 84 L.Ed.2d 605 (1985); *United States v. Martinez-Fuerte*, 428 U.S. 543, 565, 96 S.Ct. 3074, 3086, 49 L.Ed.2d 1116 (1976); *Opperman*, 428 U.S. at 383, 96 S.Ct. at 3104; *United States v. Cazares-Olivas*, 515 F.3d 726, 729 (7th Cir. 2008). The United States Supreme Court's approach to unwritten policies in the field of warrantless inventory searches lacks these important disciplining features.

In considering whether to adopt the evolving enabling of warrantless inventory searches and seizures of automobiles espoused by the United States Supreme Court into our interpretation of article I, section 8 of the Iowa Constitution, it is important to recognize the United States Supreme Court's approach in its warrantless inventory search and seizure caselaw has been highly contested. The nature and scope of the disputed law may be seen in an overview of the majorities and dissents in the warrantless inventory search and seizure cases. In several of the United States Supreme Court warrantless inventory search cases, the Court reversed decisions ***806** of state supreme courts limiting and regulating warrantless inventory searches under the Fourth Amendment. *See Bertine*, 479 U.S. at 376, 107 S.Ct. at 743; *Lafayette*, 462 U.S. at 648, 103 S.Ct. at 2610; *Opperman*, 428 U.S. at 376, 96 S.Ct. at 3100 (majority opinion). A more detailed look at the United States Supreme Court opinions in the warrantless inventory search and seizure cases illustrates some of the constitutional choices available to us in the interpretation of article I, section 8 of the Iowa Constitution.

The first case laying the foundations for warrantless inventory search and seizure, *Cady v. Dombrowski*, was a 5–4 decision. 413 U.S. 433, 450, 93 S.Ct. 2523, 2532, 37 L.Ed.2d 706 (1973). The owner of the vehicle, a police officer, was unable to arrange to have the vehicle towed and stored, and as a result, the police had it towed to a private garage. *Id.* at 446, 93 S.Ct. at 2530. The police searched the vehicle without a warrant pursuant to standard police department procedure, apparently to retrieve Dombrowski's service revolver, which was believed to be within the vehicle. *Id.* at 437, 93 S.Ct. at 2526. When searching for the weapon, police uncovered evidence in the vehicle incriminating Dombrowski in a murder. *Id.* The district court denied the motion to suppress, but the Seventh Circuit reversed. *Id.* at 434, 93 S.Ct. at 2525. A majority of the United States Supreme Court upheld the warrantless search as "reasonable" under the Fourth Amendment because the search was not part of a criminal investigation but was conducted pursuant to local police procedures for "community caretaking purposes." *Id.* at 447–48, 93 S.Ct. at 2531.

Writing for four justices, Justice Brennan dissented. *Id.* at 450, 93 S.Ct. at 2532 (Brennan, J., dissenting). He noted the "reasonableness" clause of the Fourth Amendment is "shaped by the warrant clause." *Id.* He rejected the majority's "fine-line" distinction between police intrusions for criminal and investigative functions. *Id.* at 453, 93 S.Ct. at 2534. Justice Brennan noted, "[T]he fact that the professed purpose of the contested search was to protect the public safety rather than to gain incriminating evidence does not of itself eliminate the necessity for compliance with the warrant requirement." *Id.* at 453–54, 93 S.Ct. at 2534. For Justice Brennan and the other dissenters, the formal labeling of a search and seizure as a criminal investigation or something else was of little significance: the resulting government intrusion into the privacy interests is the same. *See id.*

The United States Supreme Court was also highly divided in the next warrantless inventory search and seizure case. *Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000. In *Opperman*, the majority of the court upheld a warrantless inventory search of a locked automobile that had been lawfully impounded for failure to pay parking tickets. *Id.* at 375–76, 96 S.Ct. at 3100. The car in question was towed to the city impound lot for parking violations. *Id.* at 366,

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96 S.Ct. at 3095. A watch and other personal items were in the interior of the locked car but in plain view. *Id.* The police unlocked the car and conducted a warrantless inventory search, including opening an unlocked glove compartment where marijuana was discovered. *Id.* The owner of the car was subsequently charged with possession of marijuana and sought to suppress the evidence obtained by police in the search of the vehicle. *Id.* at 366, 96 S.Ct. at 3095–96. The South Dakota Supreme Court had found the search invalid under the Fourth Amendment because the warrantless search was not incident to a lawful arrest, based on probable cause to believe the vehicle contained contraband, justified by the nature of the police custody of the vehicle, or based on exigent circumstances. ***807** *State v. Opperman*, 89 S.D. 25, 228 N.W.2d 152, 158 (1975), *rev'd*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000.

A five-member majority of the United States Supreme Court upheld the warrantless inventory search under the Fourth Amendment. *Opperman*, 428 U.S. at 376, 96 S.Ct. at 3100. The majority opinion by Chief Justice Burger emphasized automobiles are entitled to less protection than the home under the Fourth Amendment because of the mobility of a car, the lessened expectation of privacy in a car compared to the home, and the pervasive and continuing government regulation and control of cars. *Id.* at 367–68, 96 S.Ct. at 3096. The majority explained that conducting a routine inventory after impoundment promoted three distinct needs: protecting the owner's property, protecting the police against claims or disputes over lost or stolen property, and protecting the police from potential danger. *Id.* at 369–70, 96 S.Ct. at 3097. In light of these purposes, the majority concluded, inventories pursuant to standard police procedures are "reasonable" under the Fourth Amendment. *Id.* at 372, 96 S.Ct. at 3098–99.

Writing for three justices, Justice Marshall dissented. *Id.* at 384, 96 S.Ct. at 3105 (Marshall, J., dissenting); *see also id.* at 396, 96 S.Ct. at 3110 (White, J., dissenting). The dissent emphasized the warrantless inventory search was conducted of a closed glove compartment in a locked vehicle. *Id.* at 384–85, 96 S.Ct. at 3105 (Marshall, J., dissenting). While the dissent noted the court had occasionally distinguished automobiles from homes for search and seizure purposes, the distinction was based in part on the mobility of the car, a consideration not present when the car is locked and impounded. *Id.* at 386, 96 S.Ct. at 3105–06. Further, the state's regulatory interest in the operation of automobiles is not implicated when the vehicle is immobilized in a police impoundment. *Id.* at 387, 96 S.Ct. at 3106.

The minority then considered the three justifications of the warrantless search presented in the majority opinion. *Id.* at 389, 96 S.Ct. at 3106–07. With respect to safety, the minority, citing a concurrence of Justice Powell, noted ordinarily "there is little danger associated with impounding unsearched automobiles," and in that case, there was no particularized concern over safety such as in *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). *Opperman*, 428 U.S. at 390, 96 S.Ct. at 3107 (quoting *id.* at 377, 96 S.Ct. at 3101 (Powell, J., concurring)). On protecting the police from lost property claims, Justice Marshall noted the majority ignored the South Dakota Supreme Court state law interpretation that police, as "gratuitous depositors," are absolved "from any obligation beyond inventorying objects in plain view and locking the car." *Id.* at 391, 96 S.Ct. at 3108 (Marshall, J., dissenting). Further, again citing Justice Powell's concurring opinion, the minority doubted that an inventory would "work significantly to minimize the frustrations of false claims." *Id.* Finally, with respect to conducting an inventory for the owner's benefit, Justice Marshall noted law enforcement cannot assume consent. *Id.* at 392, 96 S.Ct. at 3108. According to Justice Marshall, a warrantless inventory search without consent may be conducted only upon a showing of a specific reason for the search and only after "the exhaustion and failure of reasonable efforts ... to identity and reach the owner of the property in order to facilitate alternative means of security." *Id.* at 394, 96 S.Ct. at 3109.

Seven years after *Opperman*, the United States Supreme Court considered the validity of a warrantless preincarceration inventory search of a shoulder bag in ***808** *Lafayette*, 462 U.S. at 641–42, 103 S.Ct. at 2607. In *Lafayette*, police arrested the accused for disturbing the peace. *Id.* at 641, 103 S.Ct. at 2607. The *Lafayette* Court emphasized the practical necessities of jailhouse administration as supporting the search. *Id.* at 643–44, 103 S.Ct. at 2608. The Court emphasized the government's interest in preventing theft and false claims against employees and preserving the security of the stationhouse. *Id.* at 648, 103 S.Ct. at 2610. While the Illinois court found the search invalid because the government interest could have been advanced by the less intrusive means of sealing the container within another container and storing it in a secure locker, *People v. Lafayette*, 99 Ill.App.3d 830, 55 Ill.Dec. 210, 425 N.E.2d 1383, 1386 (1981), the Court rejected the less-intrusive-means rationale. *Lafayette*, 462 U.S. at 648, 103 S.Ct. at 2610. The *Lafayette* Court emphasized the need for a "single

familiar standard" in determining what may be searched and, to the *Lafayette* Court, that meant containers, bags, wallets—indeed everything. *Id.* at 648, 103 S.Ct. at 2610–11 (quoting *New York v. Belton*, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981)). Justices Marshall and Brennan concurred, but stressed the government's strong interest in jailhouse security when a person is being admitted to the facility. *Id.* at 649, 103 S.Ct. at 2611 (Marshall, J., concurring).

The United States Supreme Court next considered a warrantless inventory search of an automobile in *Bertine*, 479 U.S. at 369–70, 107 S.Ct. at 740. The *Bertine* Court considered a police search of a backpack after the defendant was arrested for driving under the influence of alcohol and a tow truck was called to impound the vehicle. *Id.* at 368–69, 107 S.Ct. at 739. The search of the backpack revealed controlled substances, cocaine paraphernalia, and a large amount of cash. *Id.* at 369, 107 S.Ct. at 739. The Colorado Supreme Court upheld a district court decision granting the motion to suppress. *Id.* at 370, 107 S.Ct. at 740.

The majority in *Bertine* reversed the Colorado Supreme Court and upheld the warrantless inventory search. *Id.* at 376, 107 S.Ct. at 743. The main opinion by Chief Justice Rehnquist recited the three rationales of warrantless inventory searches from *Opperman*. *Id.* at 372–73, 107 S.Ct. at 741–42. The majority rejected the approach of the Colorado Supreme Court, which held the search "was unreasonable because [the vehicle] was towed to a secured, lighted facility and because Bertine himself could have been offered the opportunity to make other arrangements for [the vehicle]." *Id.* at 373–74, 107 S.Ct. at 742. The *Bertine* Court also rejected the Colorado Supreme Court's balancing of the individual's privacy interest against the needs of law enforcement. *Id.* at 374–75, 107 S.Ct. at 742–43. According to the Court, there was a need for a single, familiar standard for police making the decision with limited time and expertise. *Id.* at 375, 107 S.Ct. at 743. The Court noted, however, a warrantless inventory search or seizure might be invalid if the owner or driver could show that the action was "in bad faith or for the sole purpose of investigation." *Id.* at 372, 107 S.Ct. at 742.[1]

A concurring opinion by Justice Blackmun, joined by Justices Powell and O'Connor, emphasized the opening of closed containers in a warrantless inventory search is acceptable only if conducted pursuant to standardized police procedures. *Id.* at 376, 107 S.Ct. at 743 (Blackmun, J., concurring). According to the concurring opinion, ***809** standardized procedures are required because police should not be vested "with discretion to determine the scope of the inventory search." *Id.*

Justice Marshall, joined by Justice Brennan, dissented. *Id.* at 377, 107 S.Ct. at 744 (Marshall, J., dissenting). While the majority emphasized the lack of discretion in implementing the inventory procedures, Justice Marshall noted the procedures themselves, in fact, vested substantial discretion in the officers to choose whether to park and lock the vehicle or impound it. *Id.* at 378–79, 107 S.Ct. at 744–45. Justice Marshall reprised the argument from earlier dissents that the alleged interests supporting warrantless inventory searches were not substantial. *Id.* at 382–85, 107 S.Ct. at 746–48. As to preservation of the owner's property, Justice Marshall emphasized in this case the owner was available to make other arrangements, yet the police made no effort to determine whether he wanted them to "safeguard" his property. *Id.* at 385, 107 S.Ct. at 748. Justice Marshall recognized *Lafayette* upheld a stationhouse inventory of a bag, but the case was justified by the compelling government interests unique to the stationhouse, preincarceration context where jail security is paramount. *Id.* at 385–86, 107 S.Ct. at 748–49.

The final warrantless inventory search and seizure case in the line of cases is *Wells*, 495 U.S. 1, 110 S.Ct. 1632. In *Wells*, a splintered Court considered a case in which police searched the trunk and a suitcase within it, after arresting the driver for driving while intoxicated. *Id.* at 2, 110 S.Ct. at 1634. The majority of the Supreme Court held the search offended the Fourth Amendment because law enforcement involved in the search had no policy whatsoever "with respect to the opening of closed containers encountered during an inventory search." *Id.* at 4–5, 110 S.Ct. at 1635. In dicta, however, the majority opinion suggested a law enforcement policy might allow law enforcement the discretion to determine whether to open closed containers in seized automobiles. *Id.* at 4, 110 S.Ct. at 1635.

Justice Brennan, joined by Justice Marshall, concurred. *Id.* at 5, 110 S.Ct. at 1635 (Brennan, J., concurring). Justice Brennan emphasized that under *Opperman* the procedures of law enforcement must limit the discretion of police. *Wells*, 495 U.S. at 8, 110 S.Ct. at 1637. Justice Brennan stressed that opening a closed container is a great intrusion into the privacy of the owner when the container is found in an automobile. *Id.* at 9, 110 S.Ct. at 1638. Justice Brennan repeated his view espoused in *Bertine* that absent consent or an emergency, police may not open a closed container found during an

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inventory search of an automobile. *Id.* at 8–9, 110 S.Ct. at 1637–38.

The United States Supreme Court has not revisited the issue of inventory searches since *Wells*. There is reason to think some of the rationale for the Supreme Court's inventory search approach has been undermined by later decisions. In *Arizona v. Gant*, the Court held where suspects are detained and away from a motor vehicle, officer safety is not a realistic basis for a warrantless search of the passenger compartment of an automobile. 556 U.S. 332, 344, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009). In light of *Gant*, it is unclear whether the Supreme Court would continue to find safety supports a warrantless search of a car that is securely impounded. *See* Jennifer Kirby-McLemore, Comment, *Finishing What* Gant *Started: Protecting Motorists' Privacy Rights by Restricting Vehicle Impoundments and Inventory Searches*, 84 Miss. L.J. 179, 196–97 (2014).

***810** As can been seen by the above cases, the question of the nature and scope of permitted warrantless inventory searches and seizures involving automobiles has been a highly contested issue. In three of the cases, the United States Supreme Court reversed state appellate decisions from Colorado, Illinois, and South Dakota. *Bertine*, 479 U.S. at 376, 107 S.Ct. at 743 (majority opinion); *Lafayette*, 462 U.S. at 649, 103 S.Ct. at 2611 (majority opinion); *Opperman*, 428 U.S. at 376, 96 S.Ct. at 3100–01 (majority opinion). The majority opinions in *Bertine* and *Opperman* were highly contested and provoked vigorous dissents. In construing our state constitutional provisions relating to search and seizure, we are free to consider the persuasive power of the prior state court opinions and the majority, concurring, and dissenting opinions in the United States Supreme Court cases.

4. *Post-*Bertine *alternative approaches of state supreme courts to inventory searches.* After *Bertine,* some state courts have followed lockstep with the United States Supreme Court precedent in considering warrantless inventory searches and seizures involving automobiles under their state constitutions. *See, e.g.*, *People v. Parks,* 370 P.3d 346, 351 (Colo. App. 2015) ("[T]he State and Federal constitutions are coextensive in the context of inventory searches."); *Weide*, 455 N.W.2d at 904 ("In light of *Bertine* [prior caselaw rejecting inventory searches of closed containers] is no longer a correct interpretation of state or federal constitutional law, and we overrule [prior caselaw] to the extent that it conflicts with *Bertine*."); *Johnson v. State*, 137 P.3d 903, 908–09 (Wyo. 2006) ("Consonant with the Fourth Amendment, the opening of closed containers during an inventory search is permissible if conducted in good faith, pursuant to a standardized police policy, and as long as the search is not a ruse for general rummaging for evidence of a crime.").

Other state supreme courts, however, have chosen alternative approaches reminiscent of state court cases prior to *Bertine*. Indeed, on remand from the United States Supreme Court, the South Dakota Supreme Court dug in its heels and adhered to its prior view that the inventory search was unlawful under the South Dakota Constitution. *State v. Opperman*, 247 N.W.2d 673, 675 (S.D. 1976). The South Dakota Supreme Court noted "logic and a sound regard for the purposes of the protection" of the search and seizure provision of the South Dakota Constitution "warrant a higher standard of protection for the individual ... than the United States Supreme Court found necessary under the Fourth Amendment." *Id.* The South Dakota Supreme Court observed that for a warrantless inventory search to be reasonable under the South Dakota Constitution there must be "minimal interference" with the individual's protected rights. *Id.* (quoting *United States v. Lawson*, 487 F.2d 468, 475 (8th Cir. 1973)). The South Dakota Supreme Court limited the warrantless inventory search under the search and seizure provision of article VI, section 11 of the South Dakota Constitution to articles within plain view. *Id.*

Appellate courts in the state of Washington have developed their own independent state constitutional analysis of the validity of warrantless inventory searches and seizures. In a pre-*Bertine* case, the Washington Supreme Court held before warrantless impoundment occurs pursuant to the police's community caretaking function, the police must first make an inquiry as to the availability of the owner or the owner's spouse or friends to move the vehicle under the Fourth Amendment. *State v. Williams*, 102 Wash.2d 733, 689 P.2d 1065, 1070–71 (1984) (en banc). The ***811** *Williams* court also noted, "[I]t is doubtful that the police could have conducted a routine inventory search without asking [the defendant] if he wanted one done." *Id.* at 1071. In another pre-*Bertine* case, the Washington Supreme Court held a closed container could not be opened pursuant to an inventory search, this time invoking both the Fourth Amendment and the search and seizure provisions of the Washington Constitution. *State v. Houser*, 95 Wash.2d 143, 622 P.2d 1218, 1226 (1980) (en banc). After *Bertine,* the Washington courts have continued to limit the scope of warrantless inventory searches and seizures under the search and seizure provisions of the Washington Constitution, holding when conducting an inventory, no closed, opaque containers should

be opened unless the container is designed to or likely to contain valuables. *State v. Wisdom*, 187 Wash.App. 652, 349 P.3d 953, 965 (2015). While Washington state courts recognize warrantless inventory searches may serve legitimate government interests, the courts have emphasized that warrantless searches are not limitless and do not outweigh the privacy interests of Washington citizens under the search and seizure provisions of the Washington Constitution. *State v. White*, 135 Wash.2d 761, 958 P.2d 982, 987 (1998). Further, the post-*Bertine* Washington Supreme Court has suggested warrantless inventory searches should be consent-based with the owner or driver able to refuse. *Id.* at 987 n.11.

Another post-*Bertine* state court approach to warrantless inventory searches may be found in the Oregon case of *Hite*, 338 P.3d 803. Under the Oregon court's approach, property is to be listed in an inventory only by its outward appearance. *Id.* at 809. Under the search and seizure provisions of the Oregon Constitution, closed, opaque containers may not be opened unless the container is designed or likely to contain valuables. *Id.* Similarly, in *State v. Atkinson*, an Oregon appellate court expressly departed from *Opperman* under the search and seizure provisions of the Oregon Constitution in holding there was no need for a warrantless inventory search of a vehicle that was in a locked shed where there was no evidence of past thefts. 64 Or.App. 517, 669 P.2d 343, 345–46 (1983) (en banc), *aff'd on other grounds*, 298 Or. 1, 688 P.2d 832, 838 (1984) (en banc).

The caselaw from Indiana is also instructive. Like Iowa precedent, Indiana precedent requires the search and seizure provision of the Indiana Constitution "be liberally construed in its application to guarantee that people will not be subjected to unreasonable search and seizure." *Lucas*, 859 N.E.2d at 1251; *see State v. Height*, 117 Iowa 650, 657, 91 N.W. 935, 937 (1902) (stating Iowa constitutional rights should be applied "in a broad and liberal spirit"). The Indiana appellate court applied a "totality of the circumstances" test under its state constitution to determine if the search was reasonable, an approach the United States Supreme Court expressly declined to follow in *Bertine*. *Compare Lucas*, 859 N.E.2d at 1251, *with Bertine*, 479 U.S. at 375, 107 S.Ct. at 743 (majority opinion) (emphasizing when a search is underway, a "single familiar standard is essential" as opposed to one that balances individual interests in specific circumstances). The Indiana Supreme Court determined opening a locked toolbox as part of an inventory search was unreasonable under article I, section 11 of the Indiana Constitution. *Lucas*, 859 N.E.2d at 1251.

There is authority in Texas that departs from the United States Supreme Court's approach to warrantless inventory searches of automobiles. In *Gords v. State*, a post-*Bertine* Texas court of appeals held there was no basis for impounding a vehicle ***812** that was parked in a private lot and locked, where there were other people at the arrest site who could have taken care of the vehicle and no contraband or visible evidence of crime was in plain view. 824 S.W.2d 785, 788 (Tex. Crim. App. 1992). The Texas court explicitly noted that *Bertine* was not binding authority in the interpretation of the search and seizure provisions of the Texas Constitution. *Id.* at 787.

Similarly, in *Autran v. State*, the Texas Court of Criminal Appeals concluded a warrantless inventory of contents of a vehicle, including a closed ice chest, a cardboard box, a shopping bag, and a closed plastic key box, did not violate the Fourth Amendment. 887 S.W.2d 31, 35–36 (Tex. Crim. App. 1994) (en banc). Noting it was imperative the court engage in an independent analysis under the search and seizure provisions of the Texas Constitution, the *Autran* court concluded under the Texas Constitution the owner or driver's privacy interest in closed containers is not overcome by the general policy considerations underlying a warrantless inventory search of closed containers in an automobile. *Id.* at 41–42. According to the *Autran* court, the state's interest in protecting the owner or driver's property, as well as protecting the police from danger and false claims of theft, may be satisfied by recording the existence of, or describing and or photographing the existence of, the closed or locked container. *Id.* at 42. The *Autran* court refused to "presume the search of a closed container reasonable" under the search and seizure provisions of the Texas Constitution "simply because an officer followed established departmental policy." *Id.*

Finally, cases from New Jersey also go in a different direction than the United States Supreme Court. In *State v. Slockbower*, the New Jersey Supreme Court held that before police impounded a vehicle, the driver either must consent or be given a reasonable opportunity to make other arrangements for custody of the vehicle. 79 N.J. 1, 397 A.2d 1050, 1051 (1979). The approach in *Slockbower* was affirmed in *Mangold*, 414 A.2d at 1318. In *Mangold*, the New Jersey Supreme Court held that before impounding a vehicle, the driver is entitled to an opportunity to utilize available alternative means to safeguard his or her property. *Id.* The *Slockbower–Mangold* reasoning has been applied in post-*Bertine* cases in *State v. One 1994 Ford Thunderbird*, 349 N.J.Super. 352, 793 A.2d 792, 801 (N.J. Super. Ct.

App. Div. 2002), and *Blacknall v. Simonetti*, 2010 WL 2089773 at *3 (N.J. Super. Ct. App. Div. 2010). *See also* *State v. Robinson*, 228 N.J. 529, 159 A.3d 373, 387 (2017) (citing *Slockbower* and *Mangold* for the standard of when an inventory search may be conducted under the New Jersey Constitution).

Many of the cases departing from federal precedent cite or are generally consistent with the Police Foundation's Rule 603B of the 1974 Model Rules[:] Searches Seizures and Inventories of Motor Vehicles. Rule 603B provides the arresting officer should be required to advise the arrested operator "that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner" and to tell the arrested operator that the arresting officer will "comply with any reasonable alternative disposition requested." *See* 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.3(c), at 820 (5th ed. 2012) [hereinafter LaFave, *Search and Seizure*] (quoting Model Rules[:] Searches Seizures and Inventories of Motor Vehicles (Project on Law Enf't Policy & Rulemaking 1974)).

5. *Iowa Supreme Court's approach to inventory searches*. The question of warrantless inventory searches and seizures ***813** involving automobiles was considered thirty-five years ago in *State v. Roth*, 305 N.W.2d 501, 502 (Iowa 1981). In a divided opinion, the court in *Roth* held that under the Fourth Amendment and article I, section 8 of the Iowa Constitution, police may open a closed container such as a paper bag but not a purse, suitcase, or briefcase that could be removed from the vehicle and inventoried as a unit. *Id.* at 507–08. In a dissenting opinion, Justice McCormick would have held the search of a paper bag found in the truck was invalid under both the Fourth Amendment and the Iowa Constitution. *Id.* at 510 (McCormick, J., dissenting). Notably, the privacy protections in *Roth* went considerably further than the United States Supreme Court ultimately afforded owners and drivers in *Bertine*. *Id.* at 508 (majority opinion); *see* *Bertine*, 479 U.S. at 375, 107 S.Ct. at 743. The difference between a searchable paper bag and a closed container not subject to search was not explored in depth. *Roth*, 305 N.W.2d at 508.

Three years later, another warrantless inventory case reached us in *State v. Kuster*, 353 N.W.2d 428, 430 (Iowa 1984), *overruled by* *State v. Huisman*, 544 N.W.2d 433, 440 (Iowa 1996). In *Kuster,* a Fourth Amendment case, we held there must be a "showing [of] some reasonable necessity" for the warrantless impoundment of an automobile. *Id.* at 432 (quoting *State v. McDaniel*, 156 N.J.Super. 347, 383 A.2d 1174, 1179 (1978)). We noted "the vehicle was locked, legally parked, and it presented no danger to the public." *Id.* Further, we emphasized there was no attempt "by the police to allow the defendant to provide for the care of the vehicle and apparently no inquiry was made of him as to what he wanted to have done with the vehicle." *Id.* In short, prior to *Bertine*, we adopted the view of a number of state courts, namely, that before a warrantless impoundment occurs, there must be some risk if impoundment does not occur and the driver or owner of the vehicle must be given a chance to make other arrangements.

After the United States Supreme Court decided *Bertine*, we considered a warrantless inventory search in *Huisman*, 544 N.W.2d at 435. In this case, police conducted a warrantless inventory search of a vehicle in a motel parking lot. *Id.* The defendant challenged the warrantless search under the Fourth Amendment. *Id.* at 436. In *Huisman*, we recognized the United States Supreme Court in *Bertine* rejected a case-by-case analysis of reasonable necessity of impoundment in favor of a broader approach that a warrantless inventory search and seizure may be conducted pursuant to generally applicable police policy. *Id.* at 437. Although our view in *Kuster* of the requirements of the Fourth Amendment was different from the *Bertine* decision, we were obliged to abandon *Kuster* and follow *Bertine* by operation of the Supremacy Clause of the United States Constitution. *Id.* at 438–39. While we might have stood our ground as enunciated in *Kuster* under article I, section 8 of the Iowa Constitution, no state constitutional claim was raised in *Huisman*. *Id.* at 435.

Similarly, in *State v. Aderholdt*, we considered a Fourth Amendment challenge to a warrantless inventory search where the initial stop was made because of a seatbelt violation and excessively tinted windows. 545 N.W.2d 559, 563 (Iowa 1996). Citing *Bertine*, we upheld the search as being conducted according to standardize procedures and not in bad faith. *Id.* at 564–66. As with *Huisman*, no state constitutional claim was presented in the case, and we were thus obliged by the Supremacy Clause to follow the United States Supreme Court warrantless inventory search and seizure precedents. *See* *id.* at 565.

***814 B. Discussion.**

1. *The convergence of search and seizure cases geometrically undermines privacy in automobile searches.* This case must be considered in the context of a disturbing trend related to traffic stops in the federal caselaw. At the outset, as noted

by Justice Kennedy, just about anyone if followed for a few blocks may be arrested for traffic infractions. *Maryland v. Wilson*, 519 U.S. 408, 423, 117 S.Ct. 882, 890, 137 L.Ed.2d 41 (1997) (Kennedy, J., dissenting). The United States Supreme Court has held that in making the discretionary choice to make a traffic stop, law enforcement's subjective motivation is not subject to review. *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996). Once the police have made the virtually unreviewable discretionary decision to stop a vehicle, the driver may be arrested for a minor traffic violation, even if the violation is not punishable by a jail term. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 1557, 149 L.Ed.2d 549 (2001). Then, pursuant to an impoundment under a written or even unwritten policy, law enforcement may engage in a thorough search of the vehicle, including opening closed containers. *Bertine*, 479 U.S. at 375, 107 S.Ct. at 743.

The end result of *Whren*, *Atwater*, and *Bertine* is law enforcement has virtually unlimited discretion to stop arbitrarily whomever they choose, arrest the driver for a minor offense that might not even be subject to jail penalties, and then obtain a broad inventory search of the vehicle —all without a warrant. When considered in context, the inventory search does not emerge as something for the benefit of the owner or driver, but instead is a powerful unregulated tool in crime control.[2] *See* David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. & Criminology 544, 559 (1997); Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 Mich. L. Rev. 1843, 1902–05 (2004); Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 St. John's L. Rev. 535, 544–45 (2002) [hereinafter Loewy] (noting an inventory search, "[w]hen coupled with an unchanneled power to arrest for traffic offenses, ... powerfully contributes to the broken balance between police and citizens" (footnote omitted)); William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. Mich. J.L. Reform 551, 564 (1984).[3] A warrantless ***815** inventory search and seizure seems more like a law enforcement weapon than a benign service to citizens.

An essentially unregulated legal framework allowing wide police discretion in stopping, arresting, and conducting warrantless inventory searches of the driver's automobile amounts to a general warrant regime that is anathema to search and seizure law. *See* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669, 115 S.Ct. 2386, 2398, 132 L.Ed.2d 564 (1995) (O'Connor, J., dissenting) (explaining how the warrant requirement was chosen by the framers of the Constitution to curb the abuses of the general warrant); *Ochoa*, 792 N.W.2d at 271–72 (describing the hated general warrants in England and the American colonies); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 256–58 (1989) (comparing unfettered discretion to arrest for traffic violations to general warrants and writs of assistance in the revolutionary era). Such an unregulated atmosphere leads to a real risk that persons subject to stops, arrest, and searches may be selected arbitrarily or based upon impermissible criteria such as racial profiling. *See* *State v. Tyler*, 830 N.W.2d 288, 297 n.4 (Iowa 2013) (noting "the possibility for racial profiling requires us to carefully review the objective basis for asserted justifications behind traffic stops"); *Pals*, 805 N.W.2d at 772 & n.5 (discussing racial profiling claims in traffic stops).

2. *Independent interpretation of search and seizure cases under article I, section 8 of the Iowa Constitution*. The warrantless inventory search and seizure cases involving automobiles are consistent with a recent departure of the United States Supreme Court from the traditional warrant preference to an open-ended and free-floating "reasonableness requirement." *See* *Illinois v. Rodriguez*, 497 U.S. 177, 198, 110 S.Ct. 2793, 2806–07, 111 L.Ed.2d 148 (1990) (Marshall, J., dissenting) ("Where this free-floating creation of 'reasonable' exceptions to the warrant requirement will end, now that the Court has departed from the balancing approach that has long been part of our Fourth Amendment jurisprudence, is unclear."); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 Vand. L. Rev. 473, 474–80 (1991). The Supreme Court used to say that the touchstone to the Fourth Amendment was the warrant requirement, subject to very limited exceptions. *See* *Katz*, 389 U.S. at 356–57, 88 S.Ct. at 514; *Johnson v. United States*, 333 U.S. 10, 14–15, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). Under the innovations introduced in recent years, the United States Supreme Court has now downgraded and demoted the warrant requirement and declared the touchstone to Fourth Amendment analysis is a general, free-floating reasonableness standard which has no relationship to the warrant requirement of the Fourth Amendment and may, in fact, override it. *Rodriguez*, 497 U.S. at 198, 110 S.Ct. at 2806; Jack Wade Nowlin, *The Warren Court's House Built on Sand: From Security in Persons,*

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Houses, Papers, and Effects to Mere Reasonableness in Fourth Amendment Doctrine, 81 Miss. L.J. 1017, 1057–60 (2012). ***816** As a result, litigants have looked to state supreme courts to adjust the balance, with some notable success.[4] *See* Loewy, 76 St. John's L. Rev. at 579; *see generally* Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 Cath. U.L. Rev. 373 (2006).

While the United States Supreme Court has departed from the traditional warrant preference approach under the Fourth Amendment, we have declined to do so under the search and seizure provision of article I, section 8 of the Iowa Constitution. Our recent cases repeatedly embrace what can only be characterized as a strong warrant preference interpretation of article I, section 8. *Gaskins*, 866 N.W.2d at 9 (" 'A warrantless search is presumed unreasonable' unless an exception applies." (quoting *State v. Moriarty*, 566 N.W.2d 866, 868 (Iowa 1997))); *Short*, 851 N.W.2d at 502 ("We have little interest in allowing the reasonableness clause to be a generalized trump card to override the warrant clause in the context of home searches."); *Baldon*, 829 N.W.2d at 791 ("It is well-settled that warrantless searches are virtually 'per se unreasonable ....' "); *Ochoa*, 792 N.W.2d at 269 ("[T]he Reasonableness Clause cannot be used to override the Warrant Clause."). Thus, while the United States Supreme Court in recent years has relaxed the grip of the traditional warrant requirement to advance the claimed interests of law enforcement, we have held firm in protecting privacy interests through a robust warrant requirement.

Further, to the extent open-ended standards like reasonableness are applicable to search and seizure law, we have tended to apply open-ended standards more stringently than federal caselaw. This principle is illustrated in *Pals*, 805 N.W.2d at 767. In that case, Pals was stopped for a minor civil infraction. *Id.* at 769. When Pals was in the squad car awaiting an uncertain fate after being subjected to a *Terry*-type pat-down, the officer extracted consent to conduct a warrantless search of Pals' truck, which yielded drugs. *Id.* at 770. On the issue of consent, we reserved for another day the issue of whether we should abandon the fuzzy, multifactored approach to consent endorsed by the United States Supreme Court in *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047–48, 36 L.Ed.2d 854 (1973), in favor of a bright-line rule that police must advise an individual of his right to refuse a search in order for the consent to be knowing and voluntary. *Pals*, 805 N.W.2d at 782; *see Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (advocating a bright-line consent rule). Instead, we applied the *Schneckloth* factors stringently and found the consent could not be considered voluntary. *Pals*, 805 N.W.2d at 782–83.

3. *Evaluation of privacy interest in closed containers in automobiles.* In addition to emphasizing the traditional warrant requirement and more stringently applying open-ended reasonableness concepts in search and seizure law, we have also departed ***817** from federal precedent in the evaluation of the strength of competing interests involved in warrantless inventory searches of automobiles. Federal caselaw has tended to minimize the strength of the privacy interest in the interior of automobiles, but in *Gaskins*, we took a different approach. 866 N.W.2d at 13–14. In *Gaskins*, we held a warrantless search of a container in a validly stopped automobile was not a search incident to arrest and therefore violated article I, section 8 of the Iowa Constitution. *Id.* at 16–17. We noted in that context article I, section 8 protected reasonable expectations of privacy and that the Iowa framers placed considerable value on the sanctity of private property. *Id.* at 16.

As noted by a special concurrence in *Gaskins*, "there is a split of authority on the question of whether there is a broad automobile exception" to search and seizure provisions under state constitutions. *Id.* at 38 (Appel, J., concurring specially). The *Gaskins* concurrence explained that automobiles are used for more than mere transportation. *Id.* at 37. The concurring opinion noted that "[g]love compartments and consoles are pretty good places to keep 'papers and effects.' " *Id.* The concurrence pointed out that automobiles are often used as mobile offices and may contain all manner of private materials. *Id.* Professor LaFave has emphasized that a party's personal effects stored in an automobile are entitled to constitutional protection. LaFave, *Search and Seizure* § 7(2)(b), at 734–38. While it may be that the home is entitled to greater protection because of enhanced privacy concerns, we think that owners and drivers have a substantial privacy interest in "papers and effects" that may be found within the passenger compartment, glove compartment, or trunk of an automobile.

4. *Evaluation of law enforcement interests supporting warrantless inventory searches and seizures of automobiles.* We have not recently examined the weight of the state's interest in protecting the property in impounded vehicles or of protecting the police from false claims. *Cf. Lafayette*,

462 U.S. at 646, 103 S.Ct. at 2609 (suggesting that arrested persons "have been known" to make false claims of theft). It may be true, as stated in *Lafayette*, that "[i]t is not unheard of for persons employed in police activities to steal property taken from arrested persons," *id.*, but the remote possibility by itself does not establish a strong government interest. We think the interest is insubstantial for several reasons.

First, the risk of a false-claim loss is not very great. Any false claim would have to overcome difficult facts if the automobile is locked and stored in a secure impoundment facility. *See Atkinson*, 669 P.2d at 345–46 (noting shed where police placed impounded vehicles was locked and there was no evidence of past thefts at the location). The State has not cited, and we have not found, any empirical evidence that false claims are a serious problem. Indeed, in *Lafayette*, the minimal and not very convincing observation was made that such claims "were not unheard of." 462 U.S. at 646, 103 S.Ct. at 2609. The mere theoretical possibility of a rare and in almost all cases unsuccessful claim of theft cannot overcome the substantial expectation of privacy an owner or driver has in the contents of an automobile.

Second, to the extent there is a minimal false-claim problem, a written inventory of property by police is not a very effective way of dealing with it. *See Opperman*, 428 U.S. at 391, 96 S.Ct. at 3108 (Marshall, J., dissenting) ("[I]t may well be doubted that an inventory procedure would in any event work significantly to minimize the frustrations ***818** of false claims."). A party determined to make a false claim may simply allege that the valuables were not included in the written inventory, either through mistake or design. Or, as Justice Powell pointed out in his *Opperman* concurrence, claimants could allege that the missing items were stolen prior to the inventory. *Id.* at 378–79, 96 S.Ct. at 3102 (Powell, J., concurring).

Third, there are other equally or more effective methods in securing property other than a warrantless inventory search. Containers inside the vehicle may simply be sealed and stored. *Mozzetti*, 94 Cal.Rptr. 412, 484 P.2d at 89. Such a process would provide at least as much protection to the remote threat as a warrantless inventory search of containers. *United States v. Bloomfield*, 594 F.2d 1200, 1203 (8th Cir. 1979).

Finally, under Iowa law, involuntary or gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. *Siesseger v. Puth*, 213 Iowa 164, 177–78, 239 N.W. 46, 52 (1931); *Sherwood v. Home Sav. Bank*, 131 Iowa 528, 536, 109 N.W. 9, 12 (1906); *Estate of Martin*, No. 11-0690, 2012 WL 1431490 at *4–5 (Iowa Ct. App. 2012); *Khan v. Heritage Prop. Mgmt.*, 584 N.W.2d 725, 730 n.4 (Iowa Ct. App. 1998). It is striking that while the South Dakota Supreme Court emphasized the limited exposure of law enforcement to theft claims as a gratuitous bailee, *Opperman*, 228 N.W.2d at 159, the majority of the United States Supreme Court in *Opperman* ignored the limitation, *see* 428 U.S. at 369, 96 S.Ct. at 3097 (majority opinion). The very limited exposure of police when serving as an involuntary or gratuitous bailee has been cited as undercutting the liability rationale for a warrantless inventory search. *See, e.g.*, *United States v. Lyons*, 706 F.2d 321, 334 n.21 (D.C. Cir. 1983) (questioning in dicta the reliance in *Opperman* on the rationale of protecting the police from false claims because the police would be involuntary bailees of the automobile who would have a slight duty of care); *Reeves v. State*, 599 P.2d 727, 736–37 (Alaska 1979) ("[T]he state, as an involuntary bailee, has 'only a slight duty of care' with respect to property in its possession because of the arrest of the property owner and this 'duty could easily be met without extensive inventory.' " (quoting *Daniel*, 589 P.2d at 415)); *Mozzetti*, 94 Cal.Rptr. 412, 484 P.2d at 89–90 (holding police as involuntary bailees are not liable for ordinary negligence and have a duty to use only slight care in protecting the bailment); *State v. Ching*, 67 Haw. 107, 678 P.2d 1088, 1093 (1984) (holding in evaluating constitutionality of inventory search, it is important that gratuitous bailee is liable only for gross negligence or bad-faith loss); *Herring v. State*, 43 Md.App. 211, 404 A.2d 1087, 1091–92 (1979) (discussing the duty owed by the police to safeguard the contents of an impounded vehicle and rejecting the argument that an inventory search was necessary to protect the contents of the car because the police are gratuitous or involuntary bailees); *White*, 958 P.2d at 986 n.9 ("When the police impound a vehicle they become involuntary bailees."); *State v. Singleton*, 9 Wash.App. 327, 511 P.2d 1396, 1400 (1973) (holding that when the police impound a car, they thereby become involuntary bailees); *see also* 3 LaFave, *Search and Seizure* § 7.4(a), at 842 & n.47 (noting "[a]s for the protection-against-claims argument, certainly security measures short of inventory will suffice to protect against tort claims" and citing *Mozzetti*, 94 Cal.Rptr. 412, 484 P.2d 84, for the proposition that as involuntary bailees, police adequately fulfill their duty by rolling up the windows and locking the doors of impounded vehicles). The fact that state law minimized ***819** the liability exposure of involuntary or gratuitous bailees was a factor when the South Dakota

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Supreme Court declined to follow the United States Supreme Court on remand in the *Opperman* case. *See Opperman*, 247 N.W.2d at 675 (rejecting search under South Dakota Constitution); *Opperman*, 228 N.W.2d at 159 (explaining that police act as "gratuitous depositors" when in possession of impounded car and state law requires "slight care for the preservation of the thing deposited").

Based on the above reasons—the minimal risk, the limited effectiveness of inventories, the availability of other equally effective but less intrusive options, and the limited exposure of gratuitous bailees—the State's interest in protecting itself from false claims is at best insubstantial.

We now turn to an examination of the second justification of inventory searches, police safety.[5] Where the driver or owner is separated from the vehicle, and the vehicle is securely impounded, there is little risk. In *Gant*, the United States Supreme Court clarified that when an automobile is stopped, the risk of harm is not a basis for search of the passenger compartment when the driver is secure in the backseat of a police vehicle. 556 U.S. at 344, 129 S.Ct. at 1719. Justice Scalia characterized the assertion of officer safety supporting automatic searches of automobiles regardless of the proximity of the driver and others to the interior of the car as a "charade of officer safety." 556 U.S. at 353, 129 S.Ct. at 1725 (Scalia, J., concurring).

In *Gaskins*, we applied the *Gant* principles in the context of an automobile search, rejecting a safety rationale when the driver was separated from the vehicle. *Gaskins*, 866 N.W.2d at 16–17 (majority opinion). An impounded vehicle is similarly remote from the owner or driver. If the police may engage in warrantless searches of automobiles in inventory to protect the police, the same reasoning would allow a warrantless search of any locked and parked automobile to protect the public. *See* 3 LaFave, *Search and Seizure* § 7(a), at 843. A search of all cars that happen to be impounded without any showing at all regarding potential safety issues is akin to a general warrant. *See* Gerald S. Reamy, Michael H.J. Bassett, & John A. Molchan, *The Permissible Scope of Texas Automobile Inventory Searches in the Aftermath of* Colorado v. Bertine*: A Talisman Is Created*, 18 Texas Tech L. Rev. 1165, 1183 (1987). Further, where containers are involved, it is difficult to see danger arising by a requirement that containers not be searched but stored as a unit without specific knowledge of their contents for safekeeping. *Bloomfield*, 594 F.2d at 1203. With respect to the danger justification for inventory searches, Professor LaFave has observed that "it is difficult to take this contention seriously." 3 LaFave, *Search and Seizure* § 7.4(a) n.18, at 835. We agree with Professor LaFave and decline to put much weight in the alleged safety rationale.

The remaining interest cited by the United States Supreme Court for warrantless inventory searches is the benign purpose of assisting the owner in the protection of valuables. *See Opperman*, 428 U.S. at 369–70, 96 S.Ct. at 3097. According to this rationale, the police inventory the contents of a vehicle for the benefit of the owner or operator of the vehicle to protect the owner's property. *See id.* Of course, if the risk of theft is at best insubstantial, ***820** the benefit to the owner is also at best insubstantial. Further, we doubt that many motorists would regard a thorough inventory search as something helpful. If the warrantless inventory search is really for the benefit of the owner or driver, law enforcement should not object to allowing an owner the option to opt out of the state's beneficence. *See, e.g.*, *Virgil*, 268 Cal. App. 2d at 132, 73 Cal.Rptr. 793; *Miller*, 403 So.2d at 1314; *Fortune*, 689 P.2d at 1203. Further, if the warrantless inventory search is for the benefit of the owner, there should be no difficulty with the notion that the owner or driver should have the option to make alternate arrangements to protect property in the vehicle or consent to the warrantless search. *See Williams*, 689 P.2d at 1071.

5. *Status of warrantless inventory searches under article I, section 8 of the Iowa Constitution*. With respect to the decision to impound, there is merit to the notion that the police should explore alternative arrangements short of impoundment. This was our approach in *Kuster*, 353 N.W.2d 428. If the police goal is truly not investigative but to protect property and avoid false claims, the owner or driver of the vehicle should have the ability to opt for alternatives that do not interfere with public safety other than police impoundment. These options could include park-and-lock options on nearby streets or parking lots or calling a friend or third party to drive the vehicle away. Impoundment of a vehicle should be permitted only if these options have been adequately explored. This is the view endorsed by Professor LaFave. 3 LaFave, *Search and Seizure* § 7.3(c), at 820.

In addition, where impoundment is necessary, the next question is whether the police may conduct an inventory search of the vehicle and, if so, what is its scope. First, when impoundment is contemplated, law enforcement should ask the driver whether there is any property in the vehicle the driver wishes to retain. If so, the driver should be allowed to

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retrieve it. Second, with respect to property left behind, law enforcement may ask the driver whether there is anything of value requiring safekeeping and make a record of the response in order to protect law enforcement from a later claim of theft of valuables.

Absent specific consent to search them, however, police must inventory closed containers left behind in the vehicle as a unit, an approach that vindicates the policies of protecting property and avoiding false claims. *See Hite*, 338 P.3d at 809; *Wisdom*, 349 P.3d at 965. It is important to note, however, that to the extent that consent is a factor, it should not be pursuant to an open-ended, multifactored *Schneckloth* test. *See* 412 U.S. at 227, 93 S.Ct. at 2047–48. Such an approach should be anathema to those who favor "bright line" approaches. Instead, any consent must follow *Zerbst* to be knowing and voluntary. 304 U.S. at 464, 58 S.Ct. at 1023. Specifically, the police should advise the owner or operator of the options to impoundment; personal items may be retrieved from the vehicle; and if the vehicle is impounded, containers found within the vehicle will not be opened but stored for safekeeping as a unit unless the owner or operator directs otherwise.

None of these requirements for warrantless inventory search and seizure occurred in this case. Even if it could be argued that in light of the registration problems, the police were entitled to seize the car, the scope of the search, however, which included a search of the black bag—a closed container—was impermissible under the principles outlined above absent a knowing and voluntary consent. As a result, ***821** the motion to suppress in this case should have been granted because the warrantless inventory search violated article I, section 8 of the Iowa Constitution.

We note that our holding in this case does not mean that a warrantless impoundment of a vehicle is never appropriate. The state may develop a policy on impoundment and inventory searches consistent with the constitutional requirements embraced in this opinion. For example, a policy might provide that the police may impound a vehicle when the motorist agrees to such impoundment and has had an opportunity to retrieve his or her belongings. And a policy might provide for impoundment of vehicles when the motorist is not present to give consent. Under these circumstances, law enforcement may implement a policy that allows officers to properly secure closed containers found in plain view at the police station. The impoundment and search in this case, however, was outside the bounds of any constitutionally permissible local impoundment and inventory policy.

V. Conclusion.

For the above reasons, we reverse the ruling of the district court denying the motion to suppress and remand the matter to the district court.

REVERSED AND REMANDED.

Cady, C.J., Wiggins and Hecht, JJ., concur. Cady, C.J., files a separate concurring opinion. Mansfield, J., files a separate concurring opinion in which Waterman and Zager, JJ., join.

CADY, Chief Justice (concurring specially).

I concur in the majority opinion and the holding that closed containers located in an impounded vehicle may not be opened by police solely for the purpose of inventorying the contents, absent consent by the owner or operator.

As this case illustrates, the problem with the inventory search doctrine is it gives law enforcement officers free rein to conduct a warrantless investigatory search and to seize incriminating property, despite the doctrine's genesis as a means of protecting private property, guarding against false theft claims, and protecting officers from potential harm. *See South Dakota v. Opperman*, 428 U.S. 364, 369–70, 96 S.Ct. 3092, 3097, 49 L.Ed.2d 1000 (1976). Yet, the three rationales that have allowed police to inventory the personal property located in an impounded vehicle may also be upheld by applying the more balanced doctrines of consent, plain view, *Terry*,[6] and probable cause. Indeed, officers may protect private property by invoking the consent exception, and officers concerned about safety when handling requested items within a vehicle may apply the existing doctrines of plain view, *Terry*, and probable cause that currently exist to protect police in all encounters with citizens. This approach strikes a better balance between the interests of citizens and the needs of government.

MANSFIELD, Justice (concurring specially).

I concur in the result only. I would decide this case under established Fourth Amendment law rather than under a new interpretation of article I, section 8 of the Iowa Constitution.

In the present case, law enforcement conducted a roadside inventory search of an impounded vehicle and found methamphetamine and a glass pipe inside a drawstring cloth bag on the floorboard by ***822** the gas pedal. I would find this search did not comply with Fourth Amendment standards. The State failed to offer any evidence of an inventory search policy regarding closed containers and thus fell short of what the United States Supreme Court required, unanimously, in *Florida v. Wells*, 495 U.S. 1, 4–5, 110 S.Ct. 1632, 1635, 109 L.Ed.2d 1 (1990).

I. The Inventory Search Violated the Fourth Amendment.

In *Wells*, the Court found the opening of a locked suitcase stored in a trunk pursuant to an inventory search violated the Fourth Amendment. *Id.* at 2, 5, 110 S.Ct. at 1634–35. Critically, "the record contained no evidence of any Highway Patrol policy on the opening of closed containers found during inventory searches." *Id.* at 3, 110 S.Ct. at 1634. The Court went on,

> Our view that standardized criteria, or established routine, must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into "a purposeful and general means of discovering evidence of crime."

Id. at 4, 110 S. Ct. at 1635 (citations omitted) (quoting *Colorado v. Bertine*, 479 U.S. 367, 376, 107 S.Ct. 738, 743, 93 L.Ed.2d 739 (1987) (Blackmun, J., concurring)).

We have not had difficulty applying *Wells* in the past. *See, e.g.*, *State v. Huisman*, 544 N.W.2d 433, 440–41 (Iowa 1996) (upholding an inventory search conducted under a standard policy which stated that "[a]ll vehicles impounded at the direction of a member of the Department will be fully inventoried, and the proper Impound Form will be prepared. This includes all containers which may hold valuables or other personal property, even if closed"); *State v. Jackson*, 542 N.W.2d 842, 845–46 (Iowa 1996) (upholding an inventory search under the Fourth Amendment where there was "ample, uncontroverted testimony that the patrol department in the present case had standardized inventory criteria that included opening all locked and unlocked containers and inventorying the containers' contents"). We can apply *Wells* today.

The majority recites the facts correctly, though with insufficient detail for my purposes. On October 30, 2015, around 6:30 a.m., Jasper County Deputy John Burdt was stationed in his patrol car along Highway 14 in Newton. He had received a report of a vehicle being driven recklessly. As the vehicle passed, Deputy Burdt noticed its rear license plate was not illuminated. Deputy Burdt initiated a stop for this traffic violation.

While making the stop, Deputy Burdt determined the vehicle's registration sticker did not match its license plate and the plate had expired in 2013. The driver, Bion Ingram, was also unable to produce a copy of the registration or proof of insurance for the vehicle. Deputy Burdt informed Ingram, who was on his way to work, that the vehicle was going to be impounded and towed due to the improper use of a registration.

Deputy Burdt did not arrest Ingram. Instead, he offered to give him a ride to the nearest gas station so he could be picked up and taken to work. Ingram accepted this arrangement and called for a ride on his cell phone. Ingram asked about getting his work tools out of the vehicle. Deputy Burdt informed Ingram this could be done after the citations were completed.

***823** Meanwhile, Newton Police Officer Bernard Eckert had arrived on the scene. Deputy Burdt informed Ingram that the vehicle was going to be inventoried and inquired if there was anything in it of high value "as a protection to all individuals involved." Ingram said there wasn't.

Because Deputy Burdt wanted Ingram to be able to get to work as quickly as possible, Deputy Burdt asked Officer Eckert to remove the license plates and perform an inventory of the vehicle while Deputy Burdt worked on the citations.

Officer Eckert completed his inventory on a Newton Police Department form. The form had spaces to fill in the name of the officer performing the inventory; the date, place, and time of the inventory; descriptive information on the vehicle; the names and addresses of the owner and the driver;[7] and the locations where the vehicle was being secured and where the keys would be. The inventory form also had spaces for listing "items of value." Additionally, there were spaces to list "criminal evidence found," the "location" where each item of such evidence had been found, and where the evidence had been subsequently "placed."

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In the course of the inventory, Officer Eckert found a drawstring cloth bag on the floorboard of the driver's seat by the gas pedal. The bag was of a size that could have contained a small gun or valuables. Instead, it held a glass pipe and what a field test determined to be approximately one gram of methamphetamine. Officer Eckert wrote down these items under "criminal evidence found." On the inventory form, he also identified a "power converter" and "various tools" as "items of value."

Deputy Burdt testified at the suppression hearing. His testimony indicated the Jasper County Sheriff's Office has "an actual manual or policy on inventorying towed vehicles." However, the policy itself was not introduced into evidence. Instead, Deputy Burdt explained,

> It's common policy—or common any time a vehicle is towed that we do a vehicle inventory for documentation of the vehicle being towed, where it's going, what's the contents of the vehicle, and where—where is it being towed to.

Notably, no evidence was presented that the sheriff's office policy addressed closed containers either directly or by implication.

Furthermore, Officer Eckert of the Newton Police Department was the one who actually performed the inventory using the police department's form. Officer Eckert did not testify at the suppression hearing. No evidence was presented at the suppression hearing as to the Newton Police Department's inventory search policy, let alone as to a policy regarding closed containers.

In *Wells*, the Court emphasized there had to be an actual policy on closed containers. 495 U.S. at 4–5, 110 S.Ct. at 1635. The search there was invalid because the policy manual that had been introduced into evidence "fail[ed] to address the question." *State v. Wells*, 539 So.2d 464, 469 (Fla. 1989) (discussing the contents of the policy manual that made "no mention of opening closed containers"); *see also* *Wells*, 495 U.S. at 5, 110 S.Ct. at 1635 (indicating "absent such a policy, the instant search was not sufficiently regulated").[8]

***824** The State has the burden of proving that a warrantless search falls within a recognized exception. *State v. Watts*, 801 N.W.2d 845, 850 (Iowa 2011). What the State presented here fell substantially short of the level of proof required in *Wells*. Deputy Burdt's testimony was—if anything—less specific than the manual provision deemed unsatisfactory in *Wells*. *See* *Wells*, 539 So.2d at 469 (noting the manual required "an [i]nventory of all articles in the vehicle ... such as articles of clothing, equipment and tools" (second alteration in original)). Deputy Burdt's testimony established only that the inventory covered "the contents of the vehicle." This simply restates what an "inventory" is and neither states nor implies anything about closed containers. Moreover, the inventory was actually conducted by an officer belonging to a different law enforcement agency, and there was no evidence as to the policy he followed.

Thus, I would simply find that the opening of the cloth bag as part of the inventory search of the vehicle violated the Fourth Amendment. *See* *Tyler v. State*, 185 So.3d 659, 661, 663–64 (Fla. Dist. Ct. App. 2016) (invalidating the search of a suitcase in a trunk during an inventory search where "the state provided no evidence of the department's inventory policy, other than the officer's testimony that one existed and that the contents of the impounded vehicle were required to be inventoried and logged for liability purposes"); *Sams v. State*, 71 N.E.3d 372, 375, 378–79, 383 (Ind. Ct. App. 2017) (overturning an inventory search of a fast-food bag and a hamburger box where the written policy was to "list all personal property" whereas the practice in the field was to look for anything "valuable," thus resulting in too much discretion); *State v. Baker*, 306 Kan. 585, 395 P.3d 422, 428 (2017) ("The failure to present any evidence of standardized criteria or an established routine governing the opening of closed containers during inventory searches is fatal to the State's inevitable discovery claim."); *People v. Mead*, 320 Mich.App. 613, 908 N.W.2d 555, 563–64 (2017) (noting the search of a backpack in a vehicle was not justified as an inventory search because the officer merely "testified that he searches vehicles to 'check for valuables or any damage to the vehicle, anything that may be in there' " but "offered no further explanation of police department policies, did not explain department policy for the search of a container, and did not explain how his search complied with department policy"); *Commonwealth v. West*, 937 A.2d 516, 529 (Pa. Super. Ct. 2007) (determining an inventory search that uncovered cocaine in a motorcycle seat was invalid because "the suppression transcript simply [did] not contain testimony showing the department had in place and employed a standard, reasonable policy when searching the vehicle" and when "[t]he Commonwealth had the burden to demonstrate the particulars of that policy and to show the search was done in accordance therewith"); *State v. Molder*, 337 S.W.3d 403, 410 (Tex. Ct. App. 2011) (finding the search results should be suppressed where the state failed to introduce

the actual inventory policy and "Trooper Gillum's concise testimony establishe[d] that [the department of public safety] ha[d] a general policy to inventory vehicles associated with defendants' arrests, but the testimony relate[d] nothing about the scope of the policy or how it affect[ed] closed containers such as appellee's roped blue bag"). I would end the opinion at this point.

II. The Majority's Iowa Constitutional Analysis Is Flawed.

Instead of following the foregoing path, which seems to me not in the least difficult to follow, the majority decides to "stake ***825** out higher constitutional ground" and "restore the balance between citizens and law enforcement." As it is the end of our term, I will not debate these broader themes with the majority. But I will explain where I disagree with the substance of the majority's ruling.

First, I do not believe the majority's ruling will promote "stability and finality in law." Instead, it will create uncertainty and unneeded burdens.

Take Deputy Burdt's decision to impound the vehicle. I thought that was an easy call in this case. The vehicle had no valid registration and could not be legally driven. Nor could it be left where it was on the side of the highway. However, the majority now requires that "the owner or driver ... have the ability to opt for alternatives other than police impoundment that do not interfere with public safety." So the first thing law enforcement must do is develop a list of options and provide it to the motorist. What options? For example, must the motorist be offered the chance to arrange his or her own tow? Does law enforcement need to wait around while this is happening? Suppose the motorist says, "I don't know what to do about the vehicle. You should check with the owner." What if the motorist is being arrested? What if law enforcement wants to impound the vehicle and consult with the county attorney's office on whether a warrant is appropriate? What if no driver is present?

Next, the contents of the vehicle. The majority says the driver should have the opportunity to retrieve items from the vehicle. This means, of course, the officer must wait while items are retrieved. But again, what if the driver is being arrested or asks to check with the owner? Can the officer watch while items are being retrieved? If not, what about the officer's safety?

Regarding closed containers, the majority indicates not only that they may not be opened, but also that the motorist must be *told* they won't be opened "but stored for safekeeping as a unit unless the owner or operator directs otherwise." Does this mandatory disclaimer prevent law enforcement from getting a warrant?

Law enforcement needs clear rules, not elaborate, partly developed decision trees. We should not be converting roadside stops into episodes from Plato's *Dialogues*. Respectfully, I believe the *Wells* standard works better than the majority's approach.

Second, despite what the majority may suggest, its approach is not supported by constitutional precedents from other states. The majority directs us to precedents from Indiana, New Jersey, Oregon, South Dakota, Texas, and Washington.

In reality, three of those six states do not now limit closed container searches when conducted pursuant to a bona fide inventory search policy. The majority has this caselaw wrong.

The Indiana Court of Appeals in *State v. Lucas* did invalidate the search of a locked box under both the state and federal constitutions. 859 N.E.2d 1244, 1251 (Ind. Ct. App. 2007). However, this ruling was not based on a blanket prohibition against opening closed containers but instead on the fact that the inventory policy was silent on the issue of locked boxes. *Id.* at 1250–51. In *George v. State*, the court concluded that a search of the contents of a pill bottle found in a lidless condom box was permissible. 901 N.E.2d 590, 592, 597 (Ind. Ct. App. 2009).

Also, South Dakota has backed down from its earlier views on inventory searches. Under the South Dakota Constitution, "so long as there is a good faith, noninvestigatory inventory search conducted pursuant to reasonable, standardized ***826** and uniform policies, it need not be restricted to articles which are within the plain view of the officers' vision." *State v. Flittie*, 425 N.W.2d 1, 5–6 (S.D. 1988); *see also State v. Hejhal*, 438 N.W.2d 820, 821–22 (S.D. 1989) (holding the inventory search of the wallet was conducted according to "reasonable[,] standardized[,] and uniform policies").

In *Autran v. State*, a plurality of the Texas Court of Criminal Appeals found that the inventory search of the contents of a vehicle's trunk—including a box containing large sums of money and drug residue—violated the Texas Constitution but not the Fourth Amendment. 887 S.W.2d 31, 33, 36, 42 (Tex.

Crim. App. 1994) (en banc) (plurality opinion). The plurality noted its decision was "not to say that officers may never search a closed or locked container, only that the officers may not rely upon the inventory exception to conduct such a warrantless search." *Id.* at 42.

Only two years later, though, another Texas appellate court "decline[d] ... to follow the plurality opinion in *Autran* because [it did] not believe that *Autran* constitutes either binding precedent or sound law." *Hatcher v. State*, 916 S.W.2d 643, 645 (Tex. Ct. App. 1996). The court thus concluded that the state constitution does *not* afford greater rights than the Fourth Amendment in this area and therefore determined that the inventory search of the defendant's closed container—in this instance, her purse—did not violate her constitutional rights. *Id.* at 644, 646; *see also Hankston v. State*, 517 S.W.3d 112, 120 (Tex. Crim. App. 2017) (rejecting the reasoning of the *Autran* plurality and instead finding the court was "free to adopt the Supreme Court's interpretation of the Fourth Amendment, and apply it in this case, simply because it 'makes more sense' " (quoting *Crittenden v. State*, 899 S.W.2d 668, 673 (Tex. Crim. App. 1995) (en banc))).

Two other states cited by the majority appear not to forbid *all* opening of closed containers but focus on the type of container. In *State v. Hite*, the Oregon Court of Appeals overturned an inventory search of a backpack, not because of a strict rule against searches of closed containers, but because the backpack was "*not* designed to contain or objectively likely to contain valuables or even dangerous items." 266 Or.App. 710, 338 P.3d 803, 811 (2014). Later, in *State v. Cleland*, the same court upheld an inventory search of a black nylon case that appeared to be designed for holding small electronics. 289 Or.App. 379, 410 P.3d 386, 387–88 (2017).

In *State v. Wisdom*, the Washington Court of Appeals found that the opening of a defendant's shaving kit under an inventory search was a violation of the defendant's state constitutional rights. 187 Wash.App. 652, 349 P.3d 953, 955, 965 (2015). The court's focus, though, was on the nature of the container and not whether it was open or closed:

> A person does not rummage through a woman's purse, because of secrets obtained therein. A man's shaving kit bag can be likened to a woman's purse. The kit bag could obtain prescription drugs, condoms, or other items the owner wishes shielded from the public. The bag is intended to safeguard the privacy of personal effects. Literature, medicines, and other things found inside a bag may reveal much about a person's activities, associations, and beliefs.

Id. at 961.

A cloth drawstring bag is the type of container that often *does* contain valuables, such as jewelry or money, but usually *does not* contain personal or health information. I am not persuaded that Oregon—or perhaps Washington—would forbid inventorying ***827** the contents of such a bag pursuant to an otherwise valid inventory search policy.

This leaves New Jersey as the remaining jurisdiction discussed by the majority. New Jersey departs from federal precedent but uses a balancing test under the state constitution that considers "the scope of the search, the procedure used, and the availability of less intrusive alternatives." *State v. Hummel*, 232 N.J. 196, 179 A.3d 366, 373 (2018) (quoting *State v. Mangold*, 82 N.J. 575, 414 A.2d 1312, 1317 (1980)). Whatever the merits of this approach, it differs considerably from the approach taken by the majority today.

Nor can the majority find nourishment in pre-*Wells* Iowa caselaw. *State v. Roth* upheld the inventory search that included the opening and examination of the contents of a bag. 305 N.W.2d 501, 507–08 (Iowa 1981). In *State v. Kuster*, our court struck down the impoundment of a *vehicle* that had been locked and legally parked. 353 N.W.2d 428, 432 (Iowa 1984), *overruled by Huisman*, 544 N.W.2d at 440. Here, however, the vehicle was not legally parked and could not have been legally driven.

Inventory searches are subject to abuse. Thus, it is important to limit law enforcement discretion in this area. Everyone agrees on this point. The relevant question, though, is how to limit that discretion. I think *Wells* is a sounder approach than the majority's. It allows law enforcement to develop the policy, so long as it is an actual policy, rather than having nonexpert judges develop the policy. I've already discussed what I believe to be the practical flaws in the majority's approach.

Overall, I think the majority understates the legitimate need for inventory searches, understates the willingness of defendants to make false claims of missing property, and understates the potential risk to law enforcement of transforming vehicle impoundments into lengthy, interactive Q-and-A sessions.

III. Conclusion.

I would reverse the denial of Ingram's motion to suppress without embarking on a novel interpretation of article I, section 8 of the Iowa Constitution.[9]

Waterman and Zager, JJ., join this special concurrence.

All Citations

914 N.W.2d 794

Footnotes

1 *But see* *United States v. Judge*, 864 F.2d 1144, 1147 n.5 (5th Cir. 1989) (observing there are “mixed motives in the vast majority of inventory searches” and noting the difficulty of establishing bad faith).

2 There is empirical evidence police disproportionately focus on minorities in street encounters and traffic stops. *See* Charles R. Epp, et al., *Pulled Over: How Police Stops Define Race and Citizenship* 155, 167 (2014) (surveying random sampling of adult drivers in Kansas City metro area, finding African-Americans more than three times as likely to be stopped in investigatory, as opposed to safety enforcement, police stops); Frank R. Baumgartner, et al., *Racial Disparities in Traffic Stop Outcomes*, 9 Duke Forum for L. & Soc. Change 21, 34 (2017) (using publicly available information from 132 police agencies across sixteen states, finding nationally, on average, Hispanic and African-American drivers were searched at more than double the rate of white drivers during routine traffic stops); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Miami L. Rev. 425, 431–32 (1997) (citing statistics from New Jersey, Maryland, and Florida indicating approximately 70% of the motorists stopped were African-American, and, in the case of Florida, African-American or Hispanic); Peter Hanink, *Don't Trust the Police: Stop Question Frisk, COMPSTAT, and the High Cost of Statistical Over-Reliance in the NYPD*, 2013 J. Inst. Just. Int'l Stud. 99, 102–03 (2013) (examining data collected by NYPD, finding racial minorities are stopped at a disproportional rate).

3 There is good reason to believe law enforcement may see warrantless inventory searches as an end run around usual warrant requirements. For example, after *Gant*, the Federal Law Enforcement Training Center issued a ten-page report that, among other things, emphasized while the entire passenger compartment could no longer be searched under the previous *Belton* rule, a full search of the interior may be accomplished through an inventory search*. See* Jennifer G. Solari, *The United States Supreme Court's Ruling in* Arizona v. Gant: *Implications for Law Enforcement Officers*, May 2009 Fed. L. Enf't Informer 3, 8 (2009).

4 *See, e.g.*, *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215, 222 (2002) (declining to follow United States Supreme Court approach on remand from *Arkansas v. Sullivan*, 532 U.S. 769, 121 S.Ct. 1876, 149 L.Ed.2d 994 (2001)); *Sitz v. Dep't of State Police*, 443 Mich. 744, 506 N.W.2d 209, 224–25 (1993) (declining to follow *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990)); *State v. Robinette*, 80 Ohio St.3d 234, 685 N.E.2d 762, 771–72 (1997) (declining to follow *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996)); *Opperman*, 247 N.W.2d at 675 (declining to follow *Opperman*, 428 U.S. 364, 96 S.Ct. 3092).

5 In *Opperman*, the safety rationale was advanced in Justice Burger's plurality opinion. 428 U.S. at 370, 96 S.Ct. at 3097. The dissenters, as well as Justice Powell in concurrence, did not agree with the rationale. *Id.* at 378, 96 S.Ct. at 3101–02 (Powell, J., concurring); *id.* at 389, 96 S.Ct. at 3107–08 (Marshall, J., dissenting).

6 *See* *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968).

7 The vehicle was owned by Ingram's girlfriend.

8 The Florida Supreme Court's decision was affirmed on appeal by the United States Supreme Court in *Wells*, 495 U.S. 1, 110 S.Ct. 1632.

9 I do not follow why the majority believes it need not reach the sufficiency of the evidence to sustain Ingram's conviction. In my view, the evidence of guilt was sufficient, although as a practical matter the reversal of the ruling on the motion to suppress may end this case.

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227 So.3d 602
District Court of Appeal of Florida, Fourth District.

STATE of Florida, Appellant,
v.
Charles Wiley WORSHAM, Jr., Appellee.

No. 4D15–2733
|
[March 29, 2017]

Synopsis

Background: Defendant, who was charged with driving under the influence (DUI) manslaughter and vehicular homicide, moved to suppress. The 15th Judicial Circuit Court, Palm Beach County, Jack Schramm Cox, J., granted motion. Defendant appealed.

As a matter of first impression, the District Court of Appeal, Gross, J., held that warrantless search of "black box" in defendant's impounded vehicle violated the Fourth Amendment.

Affirmed.

Forst, J., dissented and filed opinion.

***603** Appeal of a non-final order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jack Schramm Cox, Judge; L.T. Case No. 2013CF012609AMB.

Attorneys and Law Firms

Pamela Jo Bondi, Attorney General, Tallahassee, and Mitchell A. Egber, Assistant Attorney General, West Palm Beach, for appellant.

Jack A. Fleischman of Fleischman & Fleischman, P.A., West Palm Beach, for appellee.

Opinion

Gross, J.

The state challenges an order granting appellee Charles Worsham's motion to suppress. Without a warrant, the police downloaded data from the "event data recorder" or "black box" located in Worsham's impounded vehicle. We affirm, concluding there is a reasonable expectation of privacy in the information retained by an event data recorder and downloading that information without a warrant from an impounded car in the absence of exigent circumstances violated the Fourth Amendment.

Worsham was the driver of a vehicle involved in a high speed accident that killed his passenger. The vehicle was impounded. Twelve days after the crash, on October 18, 2013, law enforcement downloaded the information retained on the vehicle's event data recorder. The police did not apply for a warrant until October 22, 2013. The warrant application was denied because the desired search had already occurred.

Worsham was later arrested and charged with DUI manslaughter and vehicular homicide. He moved to suppress the downloaded information, arguing the police could not access this data without first obtaining his consent or a search warrant. The state defended the search on the sole ground that Worsham had no privacy interest in the downloaded information, so that no Fourth Amendment search occurred.[1] The trial court granted Worsham's motion.

"A motion to suppress evidence generally involves a mixed question of fact and law. The trial court's factual determinations will not be disturbed if they are supported by competent substantial evidence, while the constitutional issues are reviewed de novo." *State v. K.C.*, 207 So.3d 951, 953 (Fla. 4th DCA 2016) (internal citation omitted). An appellate court is bound by the trial court's findings of fact unless they are clearly erroneous. *Id.* The burden is on the defendant to show the search was invalid, "[h]owever, a warrantless search constitutes a prima facie showing which shifts to the State the burden of showing the search's legality." *Id.* (internal citation omitted).

In Florida, citizens are guaranteed the right to be free from unreasonable searches and seizures by the Fourth Amendment to the Unites States Constitution and section 12 of Florida's Declaration of Rights. *Smallwood v. State*, 113 So.3d 724, 730 (Fla. 2013). "The most basic constitutional rule" in the area of Fourth Amendment searches

> ***604** is that "*searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-*

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> *delineated exceptions.*" The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." "*[T]he burden is on those seeking the exemption to show the need for it.*"

Id. at 729 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)).

"A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *State v. Lampley*, 817 So.2d 989, 990 (Fla. 4th DCA 2002) (quoting *Kyllo v. United States*, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)). This principle has been applied "to hold that a Fourth Amendment search does *not* occur ... unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.' " *Lampley*, 817 So.2d at 990–91 (quoting *Kyllo*, 533 U.S. at 33, 121 S.Ct. 2038)).

Katz v. United States explained "the Fourth Amendment protects people, not places," so "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). One example is a car's exterior, which "is thrust into the public eye, and thus to examine it does not constitute a 'search.' " *New York v. Class*, 475 U.S. 106, 114, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986); *see also Cardwell v. Lewis*, 417 U.S. 583, 592, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (permitting warrantless search of an automobile's exterior).

Nevertheless, information someone seeks to "preserve as private," even where that information is accessible to the public, "may be constitutionally protected." *Katz*, 389 U.S. at 351, 88 S.Ct. 507. This is why "a car's interior as a whole is ... subject to Fourth Amendment protection from unreasonable intrusions by the police." *Class*, 475 U.S. at 114–15, 106 S.Ct. 960; *see also United States v. Ortiz*, 422 U.S. 891, 896, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) ("A search, even of an automobile, is a substantial invasion of privacy.").

A car's black box is analogous to other electronic storage devices for which courts have recognized a reasonable expectation of privacy. Modern technology facilitates the storage of large quantities of information on small, portable devices. The emerging trend is to require a warrant to search these devices. *See Riley v. California*, ––– U.S. ––––, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (requiring warrant to search cell phone seized incident to arrest); *Smallwood*, 113 So.3d 724 (requiring warrant to search cell phone in search incident to arrest); *State v. K.C.*, 207 So.3d 951 (requiring warrant to search an "abandoned" but locked cell phone).

Noting that cell phones can access or contain "[t]he most private and secret personal information, *Smallwood*, 113 So.3d at 732, the Florida Supreme Court has distinguished these computer-like electronic storage devices from other inanimate objects:

> [A]nalogizing computers to other physical objects when applying Fourth Amendment law is not an exact fit because computers hold so much personal and sensitive information touching on many private aspects of life.... [T]here is a far greater potential for the "inter-mingling" ***605** of documents and a consequent invasion of privacy when police execute a search for evidence on a computer.

Id. (quoting *United States v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011)). Because of the "very personal and vast nature of the information" they contain, cell phones are "materially distinguishable from the static, limited-capacity cigarette packet in *Robinson*."[2] *Smallwood*, 113 So.3d at 732. "[T]he search of a static, non-interactive container, cannot be deemed analogous to the search of a modern electronic device cell phone." *Id.* The *Smallwood* court made clear that the opinion was "narrowly limited to the legal question and facts with which [it] was presented." *Id.* at 741. Nonetheless, the court reiterated its desire to protect Fourth Amendment precedent "by ensuring that the exceptions to the warrant requirement remain 'jealously and carefully drawn.' " *Id.* at 740.

The United States Supreme Court drew a similar distinction between a cell phone and other tangible objects in *Riley v. California*. The Court held that the search incident to arrest exception did not apply because neither rationale-the interest in protecting officer safety or preventing destruction of evidence-justified the warrantless search of cell phone data. *Riley*, 134 S.Ct. at 2486–88. "Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers ...." *Id.* at 2489.

Searches of these "minicomputers," with their "immense storage capacity," are far more intrusive than searches prior to the "digital age," which were "limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy." *Id.* The capacity of these devices

"allows even just one type of information to convey far more than previously possible." *Id.* The Court concluded, "[t]he fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." *Id.* at 2495.

It is an issue of first impression in Florida whether a warrant is required to search an impounded vehicle's electronic data recorder or black box.[3] An event data recorder is a device installed in a vehicle to record "crash data" or technical vehicle and occupant information for a period of time before, during, and after a crash. NHTSA, Event Data Recorders, 49 C.F.R. § 563.5 (2015). Approximately 96% of cars manufactured since 2013 are equipped with event data recorders. *Black box 101: Understanding event data recorders*, Consumer Reports, http://www.consumerreports.org/cro/2012/10/black-box-101-understanding-event-data-recorders/index.htm, (published Jan. 2014).

Most of these devices are programmed either to activate during an event or record information in a continuous loop, writing over data again and again until the vehicle is in a collision. Michelle V. Rafter, *Decoding What's in Your Car's Black* Box, ***606** Edmunds, https://www.edmunds.com/cartechnology/car-black-box-recorders-capture-crash-data.html (updated July 22, 2014). However, if triggered, the device can record multiple events. 49 C.F.R. § 563.9.

The National Highway Traffic Safety Administration has standardized the minimum requirements for electronic data recorders, mandating that the devices record 15 specific data inputs, including braking, stability control engagement, ignition cycle, engine rpm, steering, and the severity and duration of a crash. 49 C.F.R. § 563.7. Along with these required data inputs, the devices may record additional information like location or cruise control status and some devices can even perform diagnostic examinations to determine whether the vehicle's systems are operating properly. *See Decoding 'The Black Box' with Expert Advice*, American Bar Assoc. GP Solo Law Trends & News, http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/decodingblackbox.html (May 2005); *Vehicular Data Recorder Download, Collection, and Analysis*, Collision Research and Analysis Inc., http://collisionresearch.com/services/event-data-recorder-0.

The information contained in a vehicle's black box is fairly difficult to obtain. The data retrieval kit necessary to extract the information is expensive and each manufacturer's data recorder requires a different type of cable to connect with the diagnostic port. Rafter, *supra.* The downloaded data must then be interpreted by a specialist with extensive training. *Id.*; *see also* Melissa Massheder Torres, *The Automotive Black Box*, 55 Rev. Der. P.R. 191, 192 (2015).

The record reflects that the black box in Worsham's vehicle recorded speed and braking data, the car's change in velocity, steering input, yaw rate, angular rate, safety belt status, system voltage, and airbag warning lamp information.

Extracting and interpreting the information from a car's black box is not like putting a car on a lift and examining the brakes or tires. Because the recorded data is not exposed to the public, and because the stored data is so difficult to extract and interpret, we hold there is a reasonable expectation of privacy in that information, protected by the Fourth Amendment, which required law enforcement in the absence of exigent circumstances to obtain a warrant before extracting the information from an impounded vehicle.

Although electronic data recorders do not yet store the same quantity of information as a cell phone, nor is it of the same personal nature, the rationale for requiring a warrant to search a cell phone is informative in determining whether a warrant is necessary to search an immobilized vehicle's data recorder. These recorders document more than what is voluntarily conveyed to the public and the information is inherently different from the tangible "mechanical" parts of a vehicle. Just as cell phones evolved to contain more and more personal information, as the electronic systems in cars have gotten more complex, the data recorders are able to record more information.[4] The difficulty in extracting such information buttresses an expectation of privacy.

***607** Recently enacted federal legislation enhances the notion that there is an expectation of privacy in information contained in an automobile data recorder. The Driver Privacy Act of 2015 states that "[a]ny data retained by an event data recorder ... is the property of the owner ... of the motor vehicle in which the event data recorder is installed." § 24302(a), 49 U.S.C. § 30101 note (2015). The general rule of the statute is that "[d]ata recorded or transmitted by an event data

recorder ... *may not be accessed by a person other than an owner ... of the motor vehicle in which the event data recorder is installed.*" § 24302(b) (emphasis added). There are only five exceptions to this rule, which include authorization from a court or administrative authority or consent of the owner. § 24302(b)(1)–(5).

A state court in California has addressed the Fourth Amendment's application to a vehicle's data recorder. That authority is not persuasive or controlling and was decided prior to the passing of the Driver Privacy Act of 2015.

People v. Diaz, held that the defendant lacked a privacy interest in his vehicle's speed and braking data, obtained from the "sensing diagnostic module" after a fatal accident, 213 Cal.App.4th 743, 153 Cal.Rptr.3d 90 (2013). It was undisputed the search was conducted without a warrant, over a year after the accident. *Id.* at 96. There was testimony about the defendant's speed at the time of the accident, but the officer conceded this was based on the information downloaded from the vehicle's sensing diagnostic module. *Id.* at 94.

The court concluded that the defendant failed to demonstrate "a subjective expectation of privacy in the SDM's recorded data because she was driving on the public roadway, and others could observe her vehicle's movements, braking, and speed, either directly or through the use of technology such as radar guns or automated cameras." *Id.* at 102. Since the diagnostic module "merely captured information defendant knowingly exposed to the public," downloading that information without a warrant was not a violation of the Fourth Amendment. *Id.* (citing *Smith v. Maryland* 442 U.S. 735, 741–45, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) (holding installation of a pen register did not violate the Fourth Amendment because it only recorded information "voluntarily conveyed ... in the ordinary course of business.")).

Diaz is unpersuasive. It relied on *Smith v. Maryland*, which found no expectation of privacy in information "voluntarily conveyed" to a third party. 422 U.S. at 745, 99 S.Ct. 2577. However, when addressing digital devices, the Supreme Court has moved away from the *Smith* rationale. In *United States v. Jones*, the Court could have relied on *Smith* when considering the constitutionality of placing a GPS tracking device on a vehicle without a warrant, since the vehicle's position "had been voluntarily conveyed to the public." 565 U.S. 400, 132 S.Ct. 945, 951, 181 L.Ed.2d 911 (2012). Instead, the Court relied on a trespass theory to find that while "mere visual observation does not constitute a search," attaching a device to the vehicle or reaching into a vehicle's interior constitutes "encroach[ment] on a protected area." *Id.* at 952–53.

Additionally, the *Diaz* court's reliance on *Smith v. Maryland* seems misplaced because, as the opinion acknowledged, sensory diagnostic modules can record much more information than what is observable to the public, including "the throttle, steering, suspension, brakes, tires, and wheels." 213 Cal.App.4th at 748, 153 Cal.Rptr.3d 90. We disagree with *Diaz* that all black box data is "exposed to the public."

Although the issue was not before the Court, the majority in *Jones* acknowledged ***608** that acquiring data "through electronic means, without an accompanying trespass," could still be "an unconstitutional invasion of privacy." *Id.* at 953.

In his concurring opinion, Justice Alito expressed a preference for analyzing the case by "asking whether [Jones's] reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." 132 S.Ct. at 958. Justice Alito observed that the *Katz* expectation-of-privacy test,

> rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the trade off worthwhile.

Id. at 962. Under Justice Alito's approach, the constant, unrelenting black box surveillance of driving conditions could contribute to a reasonable expectation of privacy in the recorded data. Considering that the data is difficult to access and not all of the recorded information is exposed to the public, Worsham had a reasonable expectation of privacy, and we agree with the trial court that a warrant was required before police could search the black box.

Affirmed.

Klingensmith, J., concurs.

Forst, J., dissents with opinion.

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Forst, J., dissenting.

I respectfully dissent. There are not many court opinions addressing a warrantless search of the "black box" event data recorder ("EDR") attached to an individual's motor vehicle.[5] An opinion by a "Justice Court" in New York (similar to a circuit court in Florida)[6] and an appellate court in California[7] appear to be the only published precedent addressing the instant matter. Obviously, searches of EDRs in motor vehicles were not on the minds of the first United States Congress when the Fourth Amendment was introduced in 1789, and the United States Constitution's right to privacy sheds no light on the subject (particularly since there is no provision actually describing such a right to privacy).[8]

***609** Thus, there is no definitive answer to the question posed in this case—whether the warrantless search of Appellee's car's EDR constituted a violation of his Fourth Amendment protection against unreasonable searches. Nonetheless, contrary to the well-reasoned majority opinion, I conclude that the "search" of the EDR attached to Appellee's vehicle was not a search or seizure protected by the Fourth Amendment, as Appellee did not have a reasonable expectation of privacy with respect to the data in this particular EDR.

Background

The relevant facts are set forth in the majority opinion.

Analysis

As noted in the majority opinion, "[a] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *State v. Lampley*, 817 So.2d 989, 990 (Fla. 4th DCA 2002) (quoting *Kyllo v. United States*, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)). The reverse is also true: "a Fourth Amendment search does *not* occur ... unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.' " *Id.* at 991 (alterations in original) (quoting *Kyllo*, 533 U.S. at 33, 121 S.Ct. 2038).

In contrast to a cellular phone, an EDR does not contain "a broad array of private information" such as photos, passwords, and other "sensitive records previously found in the home." *Riley v. California*, ––– U.S. ––––, 134 S.Ct. 2473, 2491, 189 L.Ed.2d 430 (2014). Significantly, the EDR in the instant case did not contain GPS information relative to the vehicle's travels, which may be subject to privacy protection. *See* *United States v. Jones*, 565 U.S. 400, 415–17, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (Sotomayor, J., concurring) (expressing concern with GPS information which "reflects a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations"). As noted in the majority opinion, the EDR in this case was only recording speed and braking data, the car's change in velocity, steering input, yaw rate,[9] angular rate, safety belt status, system voltage, and airbag warning lamp information. Moreover, this data had not been knowingly inputted by Appellee; in fact, it is likely that Appellee did not even know that the vehicle he was driving had an EDR. Therefore, it would be quite a stretch to conclude that Appellee sought to preserve this information as "private."

The majority opinion references the United States Supreme Court's *Riley* decision as well as this Court's recent opinion in *State v. K.C.*, 207 So.3d 951 (Fla. 4th DCA 2016). Both cases involved cell phones. As distinguished from an EDR attached to an undercarriage of a motor vehicle, cell phones are usually carried close to an individual's body, generally in a pants or shirt pocket or in a purse or belt case. The database of the EDR in this case carries extremely non-private, non-confidential information, such as the vehicle's yaw rate; a cell phone, on the other hand, "collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record." *Riley*, 134 S.Ct. at 2489. ***610** A reasonably prudent seller of his/her used cellphone or personal computer would clear the hard drive of all personal information; the seller of a used vehicle would be unlikely to take similar action with respect to the vehicle's EDR.

In our *K.C.* opinion, we emphasized that, though abandoned by the phone's owner, "[the] contents [of the cell phone] were still protected by a password, clearly indicating an intention to protect the privacy of all of the digital material on the cell phone or able to be accessed by it." *K.C.*, 207 So.3d at 955. The private data in a cell phone is, for the most part, created by the owner and is password protected by the owner for his/her own benefit and privacy. The data on the EDR, however, was not created by the owner and was not protected by a

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password by or for the benefit of the owner (even though there apparently was a password-like encryption on the data). This data is collected and stored in the interest of public safety, including the safety of the vehicle's driver.

In the aforementioned New York *Christmann* decision which involved a prosecution for speeding and failing to exercise due care, the court held that the motorist had only a diminished expectation of privacy following an accident with respect to the vehicle's mechanical areas, and therefore retrieval by law enforcement of data stored in the vehicle's SDM did not constitute an unreasonable search and seizure. *Christmann*, 776 N.Y.S.2d at 441–42; *see also People v. Quackenbush*, 88 N.Y.2d 534, 647 N.Y.S.2d 150, 670 N.E.2d 434, 439–40 (1996) (similar, and specifically referring to the diminished expectation of privacy yielding to the overwhelming state interest in investigating fatal accidents).

The California case of *Diaz* involved a situation similar to the instant case. *Diaz*, 153 Cal.Rptr.3d 90. There was a motor vehicle accident and, as part of their investigation, law enforcement personnel, without a warrant, downloaded the SDM. *Id.* at 96. The California Court of Appeal affirmed the trial court's ruling that there was no reasonable expectation of privacy with respect to the data in the SDM, finding the defendant failed to demonstrate "a subjective expectation of privacy in the SDM's recorded data because she was driving on the public roadway, and others could observe her vehicle's movements, braking, and speed, either directly or through the use of technology such as radar guns or automated cameras." *Id.* at 102. "[T]echnology merely captured information defendant knowingly exposed to the public—the speed at which she was travelling and whether she applied her brakes before the impact." *Id.*

The majority opinion discounts the reasoning in *Diaz*, finding it neither "persuasive [n]or controlling." Certainly, it is not controlling. However, it is persuasive, as the trial court's decision denying the defendant's motion to suppress, quoted in the District Court's opinion, is particularly logical:

> "Assuming the defendant had such knowledge [that there was an SDM in the car] and also had an expectation of privacy, it does not seem that such expectation would be reasonable. These computer modules were placed in cars as safety devices to gather information such as braking and speed, so as to be able to deploy the air bag at an appropriate time. They were not designed to gather any personal information nor designed or developed by the government to gather incrimination evidence from a driver. One cannot record communication of any kind on them. Indeed, they are not under the control of the individual driver at all."
>
> The trial court further held: "[Defendant] had no reasonable expectation of ***611** privacy in her speed on a public roadway or when and if she applied her brakes shortly before the crash. If a witness observed those actions and testified to them, the evidence would be admitted. If an expert in accident reconstruction testified to them, that evidence would be admitted. There is no difference in an electronic witness whose memory is much more accurately preserved, both to exonerate and implicate defendants."

Id. at 97.

The majority opinion maintains that *Diaz* inappropriately relied on *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), and implies that *Jones* is the operative Supreme Court precedent for this issue. Actually, the *Diaz* opinion discusses *Jones* at some length, noting that the Supreme Court decision was based "on the common law theory of trespass in placing the GPS on the defendant's personal property, combined with the police attempt to obtain information," and the "trespass theory underlying *Jones* has no relevance [in this SDM search case] and, as the trial court aptly pointed out, the purpose of the SDM was not to obtain information for the police." *Diaz*, 153 Cal.Rptr.3d at 101. The majority in the instant case suggests that the *Jones* opinion's reliance on this trespass theory when it could have relied on the *Smith* theory means that *Smith* is no longer binding precedent. But the fact that the Supreme Court chose to resolve *Jones* on the narrower trespass grounds rather than to wade into the waters of voluntary conveyance of information from *Smith* means only that trespass is *a* viable Fourth Amendment consideration, not that trespass is the *only* consideration remaining.

Furthermore, in *Jones*, the government placed a GPS tracking device on the defendant's car to monitor the vehicle's movement *and location. Jones*, 565 U.S. at 403, 132 S.Ct. 945. By contrast, an EDR is installed on vehicles before they are sold/leased to a driver and the purpose is not to track the vehicle's location or route. Moreover, although the EDR is placed under the vehicle and most vehicle owners and drivers are unaware that there is such a black box attached to the vehicle, there is no attempt on the part of the government to secretively attach the EDR and have it record this information. Unlike the situation in *Jones*, the attachment of the EDR is not directed at any individual; as noted in the majority opinion, "[a]pproximately 96% of cars manufactured since 2013 are

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equipped with event data recorders" and they are installed prior to the conveyance of the vehicle to any individual.

Finally, I take issue with the majority opinion's holding that the Driver Privacy Act of 2015 "enhances the notion that there is an expectation of privacy in information contained in an automobile data recorder." What actually happened is that Congress took note that most vehicles were being sold with EDRs installed by the manufacturer; it determined that the data collected may be sensitive and/or private but not to the extent that extraction of this data by the government would be limited by the Constitution; and it thus chose to fill the void, just as seventeen state legislatures had previously done. Filling the void, where authorized by the Constitution, is a power properly delegated to the legislature, not the judiciary.

Conclusion

The data that the government extracted from the vehicle that was owned and driven by Appellee in this case was not information for which Appellee or any other owner/driver had a reasonable expectation of privacy. The data was not personal to Appellee, was not password protected by Appellee, and was not being collected and maintained solely for the benefit of Appellee. ***612** The EDR was installed by the vehicle's manufacturer at the behest of the National Highway Traffic Safety Administration and, as distinct from *Jones*, the purpose of the data collection is highway and driver safety. *See New York v. Class*, 475 U.S. 106, 113, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986) ("[A]utomobiles are justifiably the subject of pervasive regulation by the State [and e]very operator of a motor vehicle must expect the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy.").

Accordingly, as the extraction of data from the vehicle's EDR in the instant case was not a search or seizure protected by the Fourth Amendment, I would reverse the trial court's suppression of this evidence. Thus, I respectfully dissent.

All Citations

227 So.3d 602, 42 Fla. L. Weekly D711

Footnotes

1 The state raises inevitable discovery and good faith in its brief. We do not reach these issues because they were not preserved in the circuit court. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So.2d 925, 928 (Fla. 2005).

2 *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (permitting the warrantless search of an arrestee's person incident to arrest if the officer had probable cause for the arrest).

3 As of this writing, 17 states have laws addressing event data recorders, which provide under what circumstances the data may be downloaded. *Privacy of Data From Event Data Recorders: State Statutes*, National Conference of State Legislatures, http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-of-data-from-event-data-recorders.aspx (Jan. 4, 2016). Florida does not have similar legislation.

4 *See* U.S. Gov't Accountability Off., Report to Chairman, Subcomm. on Privacy, Tech. and the Law, Comm. on the Judiciary, U.S. Senate, (Dec. 2013), http://www.gao.gov/assets/660/659509.pdf; Peter Gareffa, *Senate Committee Approves Black Box Privacy Bill*, Edmunds, (Apr. 18, 2014), https://www.edmunds.com/car-news/senate-committee-approves-black-boxprivacy-bill.html.

5 In General Motors vehicles, the EDR is also referred to as the "Sensing Diagnostic Module (SDM)." *People v. Diaz*, 213 Cal.App.4th 743, 153 Cal.Rptr.3d 90, 92 n.2 (2013); *People v. Christmann*, 3 Misc.3d 309, 776 N.Y.S.2d 437, 438 (Just. Ct. 2004). "The SDM ... has multiple functions: (1) it determines if a severe enough impact has occurred to warrant deployment of the air bag; (2) it monitors the air bag's components; and (3) it permanently records information." *Bachman v. Gen. Motors Corp.*, 332 Ill.App.3d 760, 267 Ill.Dec. 125, 776 N.E.2d 262, 271–72 (2002).

6 *Christmann*, 776 N.Y.S.2d 437.

7 *Diaz*, 153 Cal.Rptr.3d 90. *Diaz* is discussed in this opinion. Another California appellate court decision, *People v. Xinos*, 192 Cal.App.4th 637, 121 Cal.Rptr.3d 496 (Ct. App. 2011), which held that the downloading of data from the vehicle's

EDR following an accident violated the driver's Fourth Amendment rights, is not discussed as it predates *Diaz* and was ordered not to be officially published. *Id.* at 507–12.

8 Appellee does not rely upon the Florida Constitution's Right of Privacy, Article I, Section 23. Further, that provision yields to Article I, Section 12 with respect to "searches and seizures," with the Florida Constitutional right "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

9 "A yaw rotation is a movement around the yaw axis of a rigid body that changes the direction it is pointing, to the left or right of its direction of motion. The yaw rate or yaw velocity of a car, aircraft, projectile or other rigid body is the angular velocity of this rotation ...." *Yaw (rotation)*, Wikipedia (Mar. 13, 2017, 2:37 PM), https://en.wikipedia.org/wiki/Yaw_(rotation) (emphasis omitted). Yes, I also didn't know what this was.

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968 F.3d 123
United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellee,
v.
Rafael Antonio DEL ROSARIO-Acosta, Defendant, Appellant.

No. 17-1736
|
August 3, 2020

Synopsis
Background: Following denial of motion to suppress, defendant was convicted in the United States District Court for the District of Puerto Rico, Jay A. Garcia-Gregory, Senior District Judge, of possession of marijuana and unlawful possession of firearm by prohibited person. Defendant appealed.

Holdings: The Court of Appeals, Kayatta, Circuit Judge, held that:

community-caretaking exception to warrant requirement did not apply to warrantless seizure of defendant's vehicle;

police officers did not have probable cause to seize vehicle pursuant to Puerto Rico Uniform Forfeiture Act; and

inevitable discovery doctrine did not apply.

Reversed in part, vacated in part, and remanded.

***124** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO [Hon. Jay A. García-Gregory, U.S. District Judge]

Attorneys and Law Firms

Eleonora C. Marranzini, Assistant Federal Public Defender, with whom Eric A. Vos, Federal Public Defender, Vivianne M. Marrero-Torres, Assistant Federal Public Defender, Supervisor, Appeals Section, and Franco L. Pérez-Redondo, Research & Writing Specialist, were on brief, for appellant.

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Before Howard, Chief Judge, Torruella and Kayatta, Circuit Judges.

Opinion

KAYATTA, Circuit Judge.

Rafael Antonio Del Rosario-Acosta was convicted of possession of marijuana and unlawful possession of a firearm by a prohibited person. Because we find that the district court erred by not suppressing evidence obtained through an unlawful search and seizure of his vehicle, we reverse the district court's denial of his motion to suppress, vacate his conviction, and remand for further proceedings.

***125 I.**

Responding to a call from a gas station cashier reporting an armed person on the premises, three Puerto Rico Police Department officers found a sizable crowd at a gas station on July 5, 2014. After the officers ordered the crowd to disperse, Officer Luis Osorio-Acosta ("Osorio") observed Del Rosario walk to a red Toyota Corolla parked nearby. As he departed, Del Rosario momentarily stopped his car and appeared to drop something onto the ground. Del Rosario then drove onto nearby Street No. 7, where he parked and then walked back toward the gas station and the officers. When the officers asked him questions, he turned and ran back down Street No. 7, with the officers in pursuit on foot and by car.

As Del Rosario ran, the officers saw him: remove, tear open, and discard a plastic bag containing what appeared to be marijuana; stop by his car and place a key in the lock; and begin running again, discarding a pill bottle. At that point, the officers caught up with Del Rosario and arrested him.

After the officers retrieved the plastic bag and the pill box (which contained eight Xanax pills and three Percocet pills), Officer Osorio took Del Rosario's car key and confirmed that it operated the lock on the car door. The affidavit in support of the criminal complaint, executed by Alcohol, Tobacco, Firearms & Explosive (ATF) Special Agent Charles

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Fernández, who was not at the scene, but who interviewed the officers afterwards, states that the officers then opened and searched the car with Del Rosario's consent. At the suppression hearing, the officers denied opening the car. The government attributed the contrary account in Agent Fernández's affidavit to translation error, notwithstanding the fact that he seemingly spoke both Spanish and English. The magistrate judge believed the officers, prompting an apparently incredulous district judge to hold a de novo hearing. After that hearing, the district judge also found himself persuaded by the translation error explanation.

Having been so persuaded, the district court then found as fact that the officers first opened the car after they had it towed back to headquarters. Upon inventory examination, the car was found to contain a revolver in the front cabin and ten small bags of marijuana under the carpet of the trunk. In due course, after unsuccessfully moving to suppress the evidence found in his car, Del Rosario was tried, convicted, and sentenced to ten months' imprisonment. He now appeals, pressing two arguments: The district court clearly erred as factfinder in deciding that the officers did not open and search his car at the scene of the arrest; and in any event, the officers had no right to seize and tow his car, thereby setting it up for an inventory search. As we will explain, we need only consider the latter argument, which puts at issue the possible application of the community-caretaking exception to the warrant requirement. Ultimately siding with Del Rosario,[1] we reverse his sentence and conviction, and remand for a new trial.

II.

A.

"Generally, a law enforcement officer may only seize property pursuant to a warrant based on probable cause describing the place to be searched and the property ***126** to be seized." United States v. Coccia, 446 F.3d 233, 237-38 (1st Cir. 2006) (citing Horton v. California, 496 U.S. 128, 133 n.4, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)). The officers having obtained no warrant in this instance, the government relies primarily on the community-caretaking exception to the warrant requirement. See Cady v. Dombrowski, 413 U.S. 433, 441-43, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). This exception is based on the fact "that the police perform a multitude of community functions apart from investigating crime," Coccia, 446 F.3d at 238, and traditionally have been "expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety," id. (quoting United States v. Rodriguez-Morales, 929 F.2d 780, 784–85 (1st Cir. 1991)); see also id. (describing the community-caretaking function as "encompass[ing] law enforcement's authority to remove vehicles that impede traffic or threaten public safety and convenience" (citing South Dakota v. Opperman, 428 U.S. 364, 368-69, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976))).

As applied to the seizure of an automobile, the community-caretaking function turns in great part on the police officer's reasons for seizing the vehicle. The officer must have "solid, noninvestigatory reasons for impounding a car." Rodriguez-Morales, 929 F.2d at 787; see also Colorado v. Bertine, 479 U.S. 367, 375, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987) (holding that the decision to seize need be "on the basis of something other than suspicion of evidence of criminal activity"). Impoundment may not be a "mere subterfuge for investigation." Rodriguez-Morales, 929 F.2d at 787. Of course, if the officer has a proper noninvestigatory reason, she may act on it even if she also has (as will often be the case) a belief that impoundment and inventorying will find evidence of a crime. Id.; see also Coccia, 446 F.3d at 240-41.

Some circuits require that the noninvestigatory reasons for seizing property be manifest in a police department policy, protocol, or criteria guiding when a car is seized and when it is not. See, e.g., United States v. Petty, 367 F.3d 1009, 1012 (8th Cir. 2004) (holding that "[s]ome degree of 'standardized criteria' or 'established routine' must regulate these police actions ... to ensure that impoundments and inventory searches are not merely 'a ruse for general rummaging in order to discover incriminating evidence' " (quoting Florida v. Wells, 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990)), but also not "requir[ing] that ... a decision to impound or inventory must be made in a totally mechanical fashion"); United States v. Duguay, 93 F.3d 346, 351 (7th Cir. 1996) (requiring standardization of the "circumstances in which a car may be impounded"). But see United States v. Lyle, 919 F.3d 716, 731 (2d Cir. 2019) (looking to the "totality of the circumstances" to conclude that the impoundment was "reasonable under the Fourth Amendment even absent standardized procedures"); United States v. McKinnon, 681 F.3d 203, 208 (5th Cir. 2012) (per curiam) (evaluating the "reasonableness" of the community-caretaking impoundment "in the context of the facts and circumstances encountered

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by the officer" without reference to any standard criteria); United States v. Smith, 522 F.3d 305, 314 (3d Cir. 2008) (assessing the "reasonableness of the vehicle impoundment for a community caretaking purpose" and declining to require standardized police procedures).

In Coccia, we held that the presence of a department protocol spelling out when there existed noninvestigatory reasons to impound a vehicle would be a significant factor cutting in favor of blessing a seizure ***127** done pursuant to such an objective protocol. See 446 F.3d at 238 (explaining that "an impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment"). We also held, nevertheless, that the absence of such a protocol did not necessarily preclude reliance on the community-caretaking exception. Id. at 238-39. Rather, we held out the possibility that an examination of other factors in a given case might justify application of the exception even with no explicit, standardized protocol for noninvestigatory seizures. Id. Possible factors supporting the reasonableness of a seizure include: (1) a rental company owned the car, Petty, 367 F.3d at 1012-13 ; (2) the car could not legally be driven, United States v. Zapata, 18 F.3d 971, 978 (1st Cir. 1994); (3) the potential presence of dangerous materials in the vehicle, Coccia, 446 F.3d at 240; (4) the car was on the property of another, id.; (5) the defendant would be indisposed for a long time, id.; (6) the car was packed full of personal property that might be stolen, id.; (7) the car was in an area known for criminal activity, United States v. Ramos-Morales, 981 F.2d 625, 626-27 (1st Cir. 1992); (8) there was no one else immediately available to take the vehicle, Coccia, 446 F.3d at 240; and (9) the car was parked illegally or dangerously and might be best not left behind, Rodriguez-Morales, 929 F.2d at 785-86.

The record in this case contains no copy of any written protocol pertinent to the seizure of Del Rosario's car. When asked why they had the car towed, Officer Osorio testified that they did so "for an investigation." Asked why they needed the car to do an investigation, Osorio replied, "[b]ecause [Del Rosario] was in that vehicle and it was said that he had a weapon and it wasn't found on him." Officer Osorio did mention an unwritten protocol, apparently triggered by notifying a supervisor: "Once a supervisor is notified, then the whole protocol has to be followed" by taking the arrestee and the vehicle to the station. When asked, "Why was the vehicle going to be transported to the division?" Officer Osorio replied: "Because that was for investigation." This apparent "protocol" is not the type of formal and verifiable protocol that might provide comfort that the officers are not seizing the vehicle simply to search it. To the contrary, the apparently unwritten protocol as described by Officer Osorio seems to be nothing more than a practice designed to facilitate investigation of the crime by putting in motion an inventory search of the vehicle whether or not there is any need to protect the vehicle or the public.

So, we turn our attention to the other factors we identified in Coccia. No rental company or other third party owned the car. The car was parked legally on a quiet residential street one street over from where Del Rosario lived with his family.[2] It created no more danger than did any other car lawfully parked on that street. No evidence suggests personal property was visible inside the car, and the officers do not claim that the car faced any greater threat than that faced by any other car lawfully parked in the neighborhood. There is no claim that the car was unregistered or uninsured, or in an unsafe condition. Nor is there any suggestion that the driver would be held for long on the minor drug possession offense for which he was arrested.

***128** Officer Osorio's claim that Del Rosario was reported by someone to have had a weapon that was no longer on his person, if true, certainly may have supported either a search or at least a seizure. See Coccia, 446 F.3d at 240 ("Pursuant to the community caretaking function, police may conduct warrantless searches and seizures to take possession of dangerous material that is not within anyone's control." (citing Cady, 413 U.S. at 447-48, 93 S.Ct. 2523)). There is, though, no evidence at all that anyone said or even hinted that Del Rosario had a weapon at the time of the seizure.[3] The fact that an officer would use such an unsubstantiated claim to invoke the community-caretaking exception at a subsequent suppression hearing heightens our concern that the exception is advanced here as an after-the-fact justification for a warrantless investigatory search. The district court made no finding to the contrary, concluding instead that the officer's subjective intentions were not relevant.

The only Coccia factor favoring the government is that ostensibly there was no one else to move the car. But the relevance of that factor only arises when there is a need to move the car. In other words, when the other factors reasonably call for the vehicle to be moved, impoundment might still be unnecessary if there is another person able and willing to move and care for the car (e.g., a relative or friend of the arrestee). See, e.g., United States v. Infante-Ruiz, 13 F.3d 498, 503-04 (1st Cir. 1994) (finding impoundment of rental

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car not justified where another driver was available); Duguay, 93 F.3d at 353-54 (holding impoundment unconstitutional when another occupant of the vehicle was present at the arrest and could "provide for the speedy and efficient removal of the car from public thoroughfares or parking lots"). Nor is this a case in which a car was located in a random spot at the side of the road only because its driver was pulled over by the police. Rather, Del Rosario parked his car entirely of his own accord exactly where he wanted it parked. As best the officers knew, the car would have remained right where it was had they not decided to question or approach Del Rosario. We are not persuaded either by the government's passing suggestion that perhaps the officers were justified in seizing the vehicle because Del Rosario had left his keys in the door. Surely the officers could have secured the keys (just as they would have at the station had the keys been on Del Rosario's person).

All in all, it seems inescapable that the officers seized Del Rosario's car so that they could search it for evidence of a crime, and that they later sought to justify the search by invoking the community-caretaking exception. And while that exception might well apply even if there were also other motives for seizing the car, here the exception fits so poorly that it does not suffice to lift our eyes from the obvious conclusion that the seizure served no purpose other than facilitating a warrantless investigatory search under the guise of an impoundment inventory.

To be clear, we are not saying that an improper subjective motive renders the community-caretaking exception inapplicable. United States v. Hadfield, 918 F.2d 987, 993 (1st Cir. 1990) (explaining that "an officer's state of mind or subjective intent ***129** in conducting a search is inapposite as long as the circumstances, viewed objectively, justify the action taken"). Rather, we hold that, with no objective criteria supplied by a department protocol policy that furthers a noninvestigatory purpose, and with the factors listed in Coccia and our other case law weighing against any noninvestigatory need to move the car, the officers' testimony provides no basis for gaining comfort that invoking the exception serves as anything other than a subterfuge. See Rodriguez-Morales, 929 F.2d at 787. Such a search actually exceeds the invasiveness of a search at the scene of the arrest, as it both intrudes on the arrestee's limited privacy interests and in some cases may saddle the arrestee with a substantial and unwarranted towing and storage bill, in effect fining the person for being arrested.

B.

The government argues that, even if the community-caretaking exception cannot apply, the impoundment was permissible because the seizure and impoundment of the car was authorized under the Puerto Rico Uniform Forfeiture Act of 2011. P.R. Laws Ann. tit. 34, § 1724f.[4] To rely on section 1724f to justify the warrantless seizure of the vehicle, the officers must have had "probable cause to believe that all the conditions imposing forfeiture had been met" at the time when they made the decision to impound. United States v. One 1975 Pontiac Lemans, Vehicle I.D. No. 2F37M56101227, 621 F.2d 444, 449 (1st Cir. 1980); see also Florida v. White, 526 U.S. 559, 564-65 & n.3, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999); United States v. Gaskin, 364 F.3d 438, 458 (2d Cir. 2004) ("[L]aw enforcement officers who have probable cause to believe an automobile is subject to forfeiture may both seize the vehicle from a public place and search it without a warrant."); United States v. Brookins, 345 F.3d 231, 235 (4th Cir. 2003) ("[T]he police may seize an automobile without first obtaining a warrant when they have probable cause to believe that it is forfeitable contraband.").

Section 1724f authorizes the forfeiture of property "constituting or derived from any proceeds of, or used to commit, a felony and misdemeanor for which the law authorizes forfeiture, when said felonies and misdemeanors are classified by ... controlled substances laws." P.R. Laws Ann. tit. 34, § 1724f. The officers made no claim that the impounded vehicle constituted the proceeds of any crime, or that the vehicle was obtained with any such proceeds. Nor did the government ever try to substantiate below a claim that the car was "used" to commit the crime of merely possessing illegal drugs. See United States v. Jones, 565 U.S. 400, 413, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (declining to consider an alternative justification for the search under the Fourth Amendment where the government did not raise that argument below); cf. Gaskin, 364 F.3d at 458 (finding forfeiture where the vehicle had been used to meet with a drug couriers and transport a load of marijuana); White, 526 U.S. at 561, 119 S.Ct. 1555 (noting that officers had observed the defendant using the vehicle to deliver cocaine on three separate occasions prior to its seizure by police). However, there is no claim here that Del Rosario was using the car to, for example, sell drugs or make deliveries. The government claimed in the district court only that Del Rosario was "in possession of the vehicle ***130** while he was being arrested" for possessing controlled substances. Possessing

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one thing while also possessing another thing does not mean that one uses the former to possess the latter. Nor has the government developed any argument or presented any precedent suggesting that driving a car while carrying drugs in one's pocket constitutes a "use" of the car to commit the offense of drug possession. Common sense suggests otherwise, just as one would not say that he used a bus to commit the offense had he taken a ride on public transit with the drugs in his pocket.[5] Without more, the government has not convinced us that it had probable cause to seize the vehicle pursuant to this forfeiture statute.

C.

The government also relies on the doctrine of inevitable discovery. The argument seems to be (although it is not entirely clear) that the officers would have lawfully searched the car at the scene had they not opted to seize and impound the car. But, the doctrine of inevitable discovery means what it says; it requires reference to "demonstrated historical facts," shown by a preponderance of the evidence, to show that the evidence would have come to light through lawful means. Nix v. Williams, 467 U.S. 431, 444–45 & n.5, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); see also Zapata, 18 F.3d at 978 ("Evidence which comes to light by unlawful means nonetheless can be used at trial if it ineluctably would have been revealed in some other (lawful) way ...."). At trial, the officers fervently disavowed any intent to search the car at the scene. And the government does not develop from the record any reason to think that the officers inevitably could have lawfully conducted such a search.

With no further argument advanced to justify the warrantless seizure of Del Rosario's vehicle or the decision not to suppress the results of that seizure, the failure to grant Del Rosario's motion to suppress the evidence found in the inventory search was error.[6]

III.

For the reasons stated above, we **reverse** the denial of the motion to suppress, **vacate** Del Rosario's conviction, and **remand** for further proceedings.

All Citations

968 F.3d 123

Footnotes

1 At oral argument, the government agreed that Del Rosario raised and preserved this argument in the district court.

2 In its brief, the government contends that the car was parked unlawfully, on a yellow line in front of a fire hydrant. But there was no testimony to this effect and the district court made no finding that the car was illegally parked.

3 The cashier who made the call to police stated that there was an armed man on the premises of the gas station. However, there is no evidence suggesting that Del Rosario was the putative armed person. The cashier neither provided a description of the armed man nor supplied other identifying details, such as the person's name, age, or the type of firearm he possessed. The district court's conclusion that no such description was given was not clearly erroneous, nor does the government challenge it as such.

4 The government relies on "Puerto Rico Law 119," entitled the "Puerto Rico Uniform Impoundment Law," in its briefing. We understand P.R. Laws Ann., tit. 34, § 1724f to be the codification of this law. The parties have not provided us with reason to believe there is a material difference between these sources relevant to this case.

5 In filling out the inventory forms at the station, the officers did not claim that the vehicle was seized due to involvement with a crime.

6 Having found that suppression was required for this reason, we need not address Del Rosario's alternative argument that the officers in fact searched the car unlawfully at the scene before impounding it.

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812 F.2d 578
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Ricardo BERAUN–PANEZ, Defendant-Appellee.

No. 86–3047.
|
Argued and Submitted Sept. 5, 1986.
|
Decided March 13, 1987.

Synopsis
Defendant moved to suppress his statements to two law enforcement officials who failed to provide *Miranda* warnings before questioning him. The United States District Court for the District of Idaho, Harold L. Ryan, J., granted the motion, and Government appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) defendant who was not physically bound was subjected to psychological restraints and thus, was in custody during interrogation, and (2) issue of trial court's refusal to admit evidence concerning defendant's previous contacts with law enforcement officials was not preserved for review.

Affirmed.

Attorneys and Law Firms

***579** Warren S. Derbidge, Boise, Idaho, for plaintiff-appellant.

Jeffrey J. Hepworth, and John C. Hohnhorst, Twin Falls, Idaho, for defendant-appellee.

Appeal from the United States District Court for the District of Idaho.

Before FLETCHER, FERGUSON, and REINHARDT, Circuit Judges.

Opinion

FLETCHER, Circuit Judge:

Ricardo Beraun-Panez was charged with setting fire to vegetation on property owned by the United States, in violation of 18 U.S.C. § 1855. Upon Beraun-Panez's motion, the district court suppressed his statements to two law enforcement officials who failed to provide the warnings required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before questioning him. The government appeals on the ground that Beraun-Panez was not in custody during the interrogation. We affirm.

FACTS

On September 5, 1985, Beraun-Panez was herding cattle in a remote rural area of Idaho. He was approached by Twin Falls Deputy Sheriff Webb and Bureau of Land Management Special Investigator Hughes, who were investigating a range fire.

The officers stopped their truck on a dirt road about two hundred yards from Beraun-Panez. Deputy Webb shouted for Beraun-Panez, who was on horseback on the hillside, to come over to the truck. Beraun-Panez rode down the hill, and on reaching the truck was shown Agent Hughes' badge and official identification, and was asked if he would answer a few questions.

An interrogation followed, conducted primarily by Agent Hughes, which was estimated variously to have lasted between half an hour and an hour and a half. The interrogation took place at the front of the sheriff's pickup, with the defendant, having dismounted from horseback, positioned between the Deputy and Agent Hughes.

Beraun-Panez was asked at least three times whether he started the fire. The officers demanded to know why he was lying and said they knew the truth. They told him that witnesses had placed him at the scene, even though their two witnesses had in fact stated only that they had seen a tan truck, like that Beraun-Panez used, within several miles of where the fire was started. Beraun-Panez testified that at one point, the officials resorted to a good guy/bad guy routine. Beraun-Panez initially denied involvement, but finally admitted that he had set the fire.

Before the interrogation, the officials had investigated Beraun-Panez's alien status. According to Hughes, he told the suspect that, if convicted, he could be deported but if he cooperated, Hughes would tell the United States Attorney of his cooperation. Beraun-Panez testified that he was told that if he continued to lie, he would be deported and separated from his family.

Although during the interrogation he was positioned between the two officers, Beraun-Panez was not held or handcuffed. He was not told that he was under arrest. The parties dispute whether he was told he could leave. The district court did not make an explicit finding on this point. The parties also dispute whether the defendant was asked if he needed to tend the cattle.

At one point in the interrogation Beraun-Panez's co-worker, Mike Ruffing, rode towards the pickup on horseback. Ruffing had been herding cattle in the same vicinity ***580** as Beraun-Panez and went to look for him when he failed to arrive at a prearranged meeting point. Hughes directed Webb to intercept Ruffing. Ruffing was stopped about sixty feet from the pickup by Webb, and after a brief conversation, returned to his work.

The interrogation lasted about fifteen minutes longer before Beraun-Panez returned to work. He was arrested in December 1985.

DISCUSSION

In *Miranda v. Arizona,* the Supreme Court held that statements that are the product of interrogation not preceded by appropriate warnings are inadmissible, where the accused was questioned while "in custody or otherwise deprived of his freedom of action in a significant way." *Miranda,* 384 U.S. at 444, 86 S.Ct. at 1612. Whether an accused is in custody is measured by an objective standard. *Berkemer v. McCarty,* 468 U.S. 420, 442, 104 S.Ct. 3138, 3152, 82 L.Ed.2d 317 (1984); *United States v. Crisco,* 725 F.2d 1228, 1231 (9th Cir.), *cert. denied,* 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2d 832 (1984). Accordingly, we must determine, based on the totality of the circumstances, whether " 'a reasonable person in such circumstances would conclude after brief questioning [that] he or she would not be free to leave.' " *United States v. Hudgens,* 798 F.2d 1234, 1236 (9th Cir.1986) (quoting *United States v. Booth,* 669 F.2d 1231, 1235 (9th Cir.1981)). Factors relevant to whether an accused is in custody include (1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual. *United States v. Wauneka,* 770 F.2d 1434, 1438 (9th Cir.1985) (citations omitted).

The district court's findings and its determination that Beraun-Panez was in custody are essentially factual. *Wauneka,* 770 F.2d at 1438 (citations omitted). We review them under a clearly erroneous standard. *Id.*

As stated in Judge Friendly's oft cited decision in *United States v. Hall,* 421 F.2d 540, 545 (2d Cir.1969), *cert. denied,* 397 U.S. 990, 90 S.Ct. 1123, 25 L.Ed.2d 398 (1970), for a suspect to be in custody "in the absence of actual arrest something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so." Although not physically bound, Beraun-Panez was subjected to psychological restraints just as binding. Accusing Beraun-Panez repeatedly of lying, confronting him with false or misleading witness statements, employing good guy/bad guy tactics, taking advantage of Beraun-Panez's insecurities about his alien status, keeping him separated from his co-worker in a remote rural location, insisting on the "truth" until he told them what they sought, the officers established a setting from which a reasonable person would believe that he or she was not free to leave. *See e.g., Wauneka,* 770 F.2d at 1439; *United States v. Lee,* 699 F.2d 466, 468 (9th Cir.1982); *United States v. Bekowies,* 432 F.2d 8, 13 (9th Cir.1970). The power of these tactics to force a person questioned to succumb to the will of the interrogators and forego his or her constitutional rights was vividly described in *Miranda. See* 384 U.S. at 455–58, 86 S.Ct. at 1617–19. The officers' relentlessness gave rise to a psychological coercion beyond that inherent in a typical noncustodial interrogation. *See Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977); *see also Berkemer,* 468 U.S. at 442, 104 S.Ct. at 3152 (unlike traffic stops which generally do not require *Miranda* warnings, stationhouse interrogations may be expected to continue until the detainee provides the answers sought and present an opportunity to employ devices designed to elicit confessions through trickery).

The district court found that the officers' mention of the possibility that he would be deported and separated from his family was a specific factor that restricted Beraun-

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Panez's freedom. Both officers testified ***581** that before the interrogation they had investigated Beraun-Panez's alien status. The exact content of the discussion, however, is disputed. Beraun-Panez testified that Hughes told him that he could be deported if he did not tell the truth. Hughes testified that he told Beraun-Panez that he could be deported if found guilty, but that if he cooperated, Hughes would tell the United States Attorney of his cooperation. Against a backdrop of continued accusations of lying and presentation of false evidence, either version suggests that a reasonable person could interpret the remarks as requiring him to confess before the officers left if he was to avoid deportation.

The government contends, however, that the applicable objective test precludes the district court and our court from taking into consideration Beraun-Panez's status as an alien. An objective standard avoids imposing upon police officers the often impossible burden of predicting whether the person they question, because of characteristics peculiar to him, believes himself to be restrained. *See United States v. Moreno,* 742 F.2d 532, 537 (9th Cir.1984) (Wallace, J., concurring) (citing *People v. P.,* 21 N.Y.2d 1, 9–10, 286 N.Y.S.2d 225, 232, 233 N.E.2d 255, 260 (1967)); *see also Hall,* 421 F.2d at 544. Because the officers knew that Beraun-Panez was an alien and, had in fact, taken pains to determine his status before questioning him, and may even have used the information to their own advantage, considering Beraun-Panez's status does not charge the officers, in this case, with an impossible prescience. We note further that the district court did not determine how Beraun-Panez perceived and reacted to the remarks; rather the court focused on how a reasonable person who was an alien would perceive and react to the remarks. We conclude that the court properly applied a "refined" objective standard. *See e.g., United States v. Scharf,* 608 F.2d 323, 325 (9th Cir.1978) (considering fact that suspect was questioned earlier in applying objective standard); *see also Moreno,* 742 F.2d at 537–38 (Wallace, J., concurring) (inability to speak and understand English may have place in reasonable person standard where DEA agent could quickly ascertain this fact).

Although Beraun-Panez was not held or handcuffed, he was positioned between the two officers beside the hood of the truck. Beraun-Panez may have had some difficulty in understanding English. He was not told he was under arrest, but the district court appeared to believe Beraun-Panez's testimony that he also was not told he was free to leave. The officers testified that they asked Beraun-Panez whether he needed to tend his cattle. Beraun-Panez denied that they asked him and the district court did not resolve the dispute. We note that even if the officers' testimony is accurate, determining whether Beraun-Panez needed to do his work, is not equivalent to inviting him to stay or leave at his option.

The physical environment in which the questioning took place also lends weight to the conclusion that it was a custodial interrogation. Beraun-Panez was interrogated in a remote part of the Idaho range. Although the district court found that the physical environment was not inherently oppressive, as it was familiar to the defendant, its conclusion ignores the Supreme Court's statements in *Berkemer* concerning the significance of whether an interrogation is conducted publicly or privately. 468 U.S. at 438, 104 S.Ct. at 3150. In declining to extend the requirement of *Miranda* warnings to traffic stops, the Court in *Berkemer* noted that the circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. The Court explained:

> Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear ***582** that, if he does not cooperate, he will be subjected to abuse.

Id.

By contrast, the interrogation of Beraun-Panez took place well away from the public view, in a remote area where no passersby would likely be present. Further, when Beraun-Panez's co-worker approached on horseback, Agent Hughes told Deputy Webb to intercept him. Webb stopped the co-worker about sixty feet from the pickup, and after a brief conversation, the co-worker returned to his work. The Supreme Court in *Miranda* noted that isolating a subject from others, who might lend moral support to the person questioned and thereby prevent inculpatory statements, was a technique of psychological coercion. 384 U.S. at 449–50, 455, 86 S.Ct. at 1614–15, 1617. By sending away the co-worker the officers asserted their dominion over the interrogation site and eliminated any last vestige of a public interrogation. Thus, the questioning occurred in a police-dominated atmosphere where Beraun-Panez was effectively isolated. The physical surroundings support the conclusion that the interrogation was custodial.

The government ascribes error to the district court's reliance on the interrogators' admission that their purpose was to

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elicit inculpatory statements from the defendant. In *Berkemer,* the Supreme Court held that a "policeman's *unarticulated* plan has no bearing on the question whether a suspect was 'in custody' at a particular time." 468 U.S. at 442, 104 S.Ct. at 3152 (emphasis added). The district court considered the admission when addressing whether Beraun-Panez was confronted with evidence of guilt. The comment was followed by a sentence in which the court noted a technique the officers used to elicit an incriminating statement. Although the court might have drafted its opinion with more precision, we conclude that the district court's focus was on the manifestations of the interrogators' intent, rather than on the intent itself. This does not offend *Berkemer.*

The government also contends that the district court erred in refusing to admit evidence concerning Beraun-Panez's previous contacts with law enforcement officials. The government, however, failed to preserve this issue on appeal by making an offer of proof pursuant to Fed.R.Evid. 103. Because at no time did counsel identify the content of the evidence he sought to introduce, we decline to consider the government's contention. *See United States v. Fritts,* 505 F.2d 168, 169 (9th Cir.1974), *cert. denied,* 420 U.S. 992, 95 S.Ct. 1428, 43 L.Ed.2d 673 (1975).

CONCLUSION

Based upon our consideration of the totality of the circumstances, we conclude that the district court's determination that Beraun-Panez was in custody when he was interrogated was not clearly erroneous.

We AFFIRM.

All Citations

812 F.2d 578, 55 USLW 2550

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410 F.3d 137
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
TYRONSKI JOHNSON, Defendant–Appellant.

No. 04–4376.
|
Argued Feb. 2, 2005.
|
Decided June 8, 2005.

Synopsis
Background: Defendant was convicted, pursuant to guilty plea, in the United States District Court for the District of Maryland, Richard D. Bennett, J., of possession of a firearm by a convicted felon and operation of a motor vehicle while under the influence of drugs. Defendant appealed, challenging denial of his suppression motions and seeking to vacate his sentence.

Holdings: The Court of Appeals, Diana Gribbon Motz, Circuit Judge, held that:

community-caretaking exception to the warrant requirement applied to police officer's search of glove compartment of defendant's car;

search of glove compartment was not a pretext for a criminal investigation;

even if blood test performed at the Armed Forces Institute of Pathology to test defendant's impairment was performed by military personnel in violation of the Posse Comitatus Act, suppression of test results was not an appropriate remedy; and

Supreme Court's issuance of *Booker* after plea agreement containing appeal waiver was reached did not render defendant's guilty plea unknowing or involuntary.

Affirmed in part and dismissed in part.

Attorneys and Law Firms

***140 ARGUED:** Paresh S. Patel, Office of the Federal Public Defender, Greenbelt, ***141** Maryland, for Appellant. Hollis Raphael Weisman, Assistant United States Attorney, Office of the United States Attorney, Greenbelt, Maryland, for Appellee. **ON BRIEF:** James Wyda, Federal Public Defender, Daniel W. Stiller, Assistant Federal Public Defender, Greenbelt, Maryland, for Appellant. Thomas M. DiBiagio, United States Attorney, Greenbelt, Maryland, for Appellee.

Before MOTZ, TRAXLER, and SHEDD, Circuit Judges.

Affirmed in part and dismissed in part by published opinion. Judge MOTZ wrote the opinion, in which Judge TRAXLER and Judge SHEDD joined.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge.

Pursuant to a plea agreement, Tyronski Johnson pled guilty to possession of a firearm by a convicted felon and operation of a motor vehicle while under the influence of drugs. Although the agreement contained a standard appeal waiver provision, Johnson retained the right to appeal the denial of his suppression motions, which he does now. He also seeks to have his sentence vacated. We affirm in part and dismiss in part.

I.

A.

On July 22, 2003, at approximately 11 a.m., United States Park Police Officer Ken Bentivegna heard a radio report of a crash on the Baltimore–Washington Parkway. He arrived at the accident scene to find a Toyota with substantial front-end damage stopped in the far right traffic lane of a three-lane segment of the parkway. The car's badly crumpled hood obscured visibility through the front windshield. A second car sat on the right shoulder some distance ahead of the Toyota. Officer Bentivegna neither witnessed the accident nor was told how it occurred.

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The officer approached the Toyota and saw Tyronski Johnson seated in the driver's seat, although he did not know Johnson's name at the time. A deputy sheriff at the scene told Officer Bentivegna that the driver was conscious but unresponsive. The officer walked to the driver's side door, which was open, and asked Johnson "if he was okay, if he had been injured, if anything hurt." Johnson stared straight ahead and did not respond. Officer Bentivegna continued to ask Johnson if he was alright; obtaining no response, the officer called for an ambulance.

While the officer waited for the ambulance, he asked Johnson if he was okay "[a] couple more times." The officer testified that he then walked around the car to the front passenger compartment to see if he could "see anything else in the car that might give [him] some kind of an idea as to what was wrong" with Johnson. He wanted to determine whether Johnson had been injured in the accident, was intoxicated, or was suffering from an unrelated medical condition. As Officer Bentivegna walked around the car, Johnson said his chest hurt. The officer asked Johnson whether he hit the steering wheel and what had happened, but Johnson responded only that his chest hurt.

Officer Bentivegna opened the passenger door and noticed a prescription bottle in the center console of the car. He cursorily looked around the passenger compartment of the car for any more prescription bottles or narcotics—"anything that might give me an indication as to what happened to this individual."

Officer Bentivegna thought he might get a response from the defendant if he could ***142** call him by name, so the officer opened the glove compartment to find identification. Inside, he found a nine millimeter handgun. The officer confiscated the weapon and, with the help of a Prince George's County deputy sheriff, removed Johnson from the car and placed him in handcuffs for possessing a gun on federal property. Other park police took custody of Johnson while Officer Bentivegna moved Johnson's vehicle out of the traffic lane, where it had blocked traffic, to the shoulder; the car was too damaged to be driven from the scene and was eventually towed.

Because Johnson was conscious but unresponsive, Park Police Officer Robert Stratton tried to administer a field sobriety test to him. When Johnson refused to cooperate, Officer Raymon Valencia took Johnson to the hospital to have his blood drawn to test for illegal substances. As Johnson sat handcuffed in the reception area of the emergency room with Officers Valencia and Bentivegna, Johnson stated repeatedly, without prompting, "[I]t's only for my protection." He also stated: "You know, there's crazy people out there. That's why I carry a gun. It's for protection. I'm not a violent dude. Can I get my baby back? And I just beat a charge. Now I got a gun charge with the Feds." Officer Bentivegna obtained a sheet of paper from a nurse and wrote down these statements.

Officer Valencia asked Johnson whether he had been drinking or taken any drugs, to which Johnson responded that he had smoked a "dipper." As the district court noted, a "dipper" is a cigarette dipped in liquid phencyclidine or PCP. When Johnson asked if his gun could be returned, Officer Valencia asked whether he had registration for the gun, and Johnson said he did not and only carried it for protection.

Johnson's blood was drawn at the hospital. Pursuant to a contract between the U.S. Park Police and the Army's Armed Forces Institute of Pathology, the toxicology analysis of Johnson's blood was performed at the Institute. Johnson's blood tested positive for PCP and a derivative of marijuana.

B.

Johnson sought to suppress the fruits of the search of his glove compartment, the statements he made to the police at the hospital, and the results of the blood test. He filed three motions to suppress. In the first, Johnson argued that the Park Police violated the Fourth Amendment by conducting a warrantless search of his glove compartment; in the second, he maintained that the officers questioned him at the hospital without reading him his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), or obtaining a knowing, intelligent, and voluntary waiver of those rights; in the third, he contended that the drug test performed on his blood at the Armed Forces Institute violated the prohibition on military intervention in civilian law enforcement codified in the Posse Comitatus Act, 18 U.S.C. § 1385 (2000).

The district court conducted an evidentiary hearing at which Johnson conceded that the unsolicited statements he made at the hospital regarding the gun were admissible, and the Government conceded that Johnson's "statement that he had smoked a 'dipper' must be suppressed because it was the result of custodial interrogation by Officer Valencia without advisement of *Miranda* rights." The court therefore granted his second suppression motion in part; the court denied

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Johnson's first and third motions in their entirety. *See United States v. Johnson,* No. CR–03–0364 (D.Md. Dec. 16, 2003).

***143** Johnson then entered into a plea agreement with the Government. In exchange for Johnson's conditional guilty plea to Count 1, possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), and Count 3, operating a motor vehicle while under the influence of drugs in violation of 36 C.F.R. § 4.23(a)(1), the Government agreed to dismiss Count 2, possession of marijuana in violation of 21 U.S.C. § 844, and to recommend that the court order Johnson's sentence for Count 3 to run concurrently with his sentence for Count 1. Johnson signed a standard waiver of appellate rights but expressly retained the right to appeal the district court's denial of his suppression motions. Consistent with the then mandatory United States Sentencing Guidelines, the district court sentenced Johnson to forty months imprisonment on Count 1 and six months imprisonment on Count 3 to run concurrently with the sentence on Count 1.

Johnson appeals the district court's denial of his first and third motions to suppress. He also seeks to challenge his sentence as contrary to *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). We consider each of these three arguments in turn.

II.

First, Johnson contends that the district court erred in upholding the search of the glove compartment of his car.

A.

The Supreme Court has recognized that "[t]he Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant.' " *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (quoting *Illinois v. Gates,* 462 U.S. 213, 236, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant." *Cady v. Dombrowski,* 413 U.S. 433, 439, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) (internal quotation marks and citation omitted).

Searches of cars are one class of situations to which the warrant requirement does not apply. *Maryland v. Dyson,* 527 U.S. 465, 466, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999). Under the automobile exception, the police can search a vehicle without first obtaining a warrant if they have probable cause to believe the car contains contraband or evidence of illegal activity. *Id.* at 467. Officer Bentivegna, however, lacked probable cause to believe the car or, more specifically, the glove compartment, contained contraband or evidence of wrongdoing. The district court erred in accepting a variant of the automobile exception created by other district courts and concluding that it permitted Officer Bentivegna's warrantless search. As articulated by the district court, this variant would allow the police to search a driver's car for his registration and identification absent a warrant *and* probable cause whenever a driver did not readily provide registration and identification information at the scene of an accident. The Supreme Court has never construed the automobile exception so broadly, and we decline to do so today.

But the Court has recognized a narrow exception to the warrant requirement that permits a search even if the police lack probable cause to suspect criminal activity. Indeed, the exception only applies when the police are *not* engaged in a criminal investigation, that is, it only applies when they are "engage[d] in what, for want of a better term, may be described ***144** as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Dombrowski,* 413 U.S. at 441, 93 S.Ct. 2523. The police do not need probable cause when engaged solely in community caretaking since "[t]he standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures." *South Dakota v. Opperman,* 428 U.S. 364, 370 n. 5, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). The Court has recognized the need for this community-caretaking exception because police often come into "contact with vehicles for reasons related to the operation of vehicles themselves" and this "often noncriminal contact with automobiles will bring local officials in plain view of evidence, fruits, or instrumentalities of a crime, or contraband." *Dombrowski,* 413 U.S. at 441–42, 93 S.Ct. 2523 (internal quotation marks omitted).

In *Dombrowski,* for example, the Supreme Court concluded that the officer did not act unreasonably when, absent a warrant or probable cause "to believe that the vehicle contained fruits of a crime," *Opperman,* 428 U.S. at 374, 96 S.Ct. 3092, he searched the trunk of a towed car that had been "disabled as a result of [an] accident, and constituted a nuisance along the highway." *Dombrowski,* 413 U.S. at 443,

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93 S.Ct. 2523. Although the police officer found evidence of a murder, the Supreme Court concluded the search was reasonable because at the time he searched the trunk, he was "ignorant of the fact that a murder, or any other crime, had been committed," and he engaged in the search only to secure the service revolver of the car's hospitalized driver, a Chicago police officer, out of "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." *Id.* at 447, 93 S.Ct. 2523. In upholding the search, the Court emphasized that the officer simply was "reacting to the effect of an accident —one of the recurring practical situations that results from the operation of motor vehicles and with which local police officers must deal every day." *Id.* at 446, 93 S.Ct. 2523.

We agree with the Government that Officer Bentivegna was similarly "reacting to the effect of an accident" and performing a community-caretaking function when he opened Johnson's glove compartment. Officer Bentivegna arrived at the accident scene to find Johnson sitting unresponsively in his car, which was blocking one of only three traffic lanes on a major thoroughfare. As the Supreme Court has noted, "[t]o permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities." *Opperman,* 428 U.S. at 368, 96 S.Ct. 3092. Officer Bentivegna testified, without contradiction,[1] that he ***145** opened the glove compartment in hopes that he would find identifying information he could use to communicate more effectively with Johnson so that he could assess Johnson's medical condition and get his car out of the traffic lane. These efforts fall squarely within the parameters of the community-caretaking exception.

B.

Nevertheless, Johnson argues that the exception should not apply to Officer Bentivegna's search because the officer's stated reasons for opening Johnson's passenger-side door and the glove compartment are mere pretext for what was really a criminal investigation.

If Officer Bentivegna's stated reasons for the search were pretextual, the community-caretaking exception would not apply. The exception applies only to conduct that is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," *Dombrowski,* 413 U.S. at 441, 93 S.Ct. 2523, and not when community-caretaking functions are used as "a subterfuge for criminal investigations." *Opperman,* 428 U.S. at 370 n. 5, 96 S.Ct. 3092. The Supreme Court emphasized that the exception applied in *Dombrowski* because "there [was] no suggestion whatever" that the public-safety rationale for the search "was a pretext concealing an investigatory police motive." *Opperman,* 428 U.S. at 376, 96 S.Ct. 3092. We have similarly emphasized that "an essential premise for our application of [an] exception [related to community-caretaking] ... [wa]s the fact that nothing in the record suggest[ed] that [the officer's] reason for the reentry was pretextual or that he acted in bad faith." *United States v. Gwinn,* 219 F.3d 326, 335 (4th Cir.2000).

Although the district court made *no* finding that Officer Bentivegna's stated reasons for the glove compartment search were pretextual, Johnson points to two facts from which, he contends, we must infer that the officer's true intent was to search for proof of criminal wrongdoing. The first is that Officer Bentivegna opened the glove compartment rather than examining the prescription bottle in plain view, which contained Johnson's name and suggested a possible medical explanation for his condition. The second is that the officer removed Johnson from his car and handcuffed him without waiting for the ambulance to arrive, which allegedly demonstrates that the officer had no concern for Johnson's medical condition. We do not believe either fact supports a reasonable inference that Officer Bentivegna used Johnson's impaired condition and the need to move his disabled vehicle as a pretext for a search for evidence of a crime.

First, while it is true that the officer could have learned Johnson's name and medical condition by examining the prescription bottle, looking in the glove compartment for identification was an equally plausible—and possibly more reliable—method of learning Johnson's name. The fact that Officer Bentivegna did not choose the least intrusive means of obtaining Johnson's name does not mean that learning Johnson's identity was not the officer's true intention.

We continue to adhere to our view that a "warrantless entry for emergency reasons ... cannot be used as the occasion for a general voyage of discovery unrelated to the purpose of the entry." *United States v. Moss,* 963 F.2d 673, 678 (4th Cir.1992) (citation omitted); *see also* ***146** *United States v. Presler,* 610 F.2d 1206, 1211 (4th Cir.1979) (finding that although officer who entered apartment without a warrant to address a medical emergency could seize evidence in

plain view, he did not have "an unlimited right extending 'to the interiors of every discrete enclosed space capable of search within the area' "). However, the community-caretaking exception is not limited to the least intrusive means of protecting the public. As the Court explained in *Dombrowski,* "[t]he fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the search unreasonable." *Dombrowski,* 413 U.S. at 447, 93 S.Ct. 2523 (internal quotation marks and citation omitted).

Of course, a search that is far more intrusive than necessary to accomplish its purpose may raise questions as to whether the proffered explanation for the search is the true one. For example, in *Moss* we explained that the officer's general rummaging through the defendant's personal effects *after* learning the defendant's name "belie[d]" the officer's claim that he had conducted the search to learn the defendant's identity so that he could look for him in a forest preserve to make sure he was neither lost nor injured. *Moss,* 963 F.2d at 679. But when, as here, two narrowly tailored methods of arguably equal reliability exist for obtaining the same information, and one method is only slightly more intrusive than the other, no reasonable inference of bad faith follows from the officer's choice of the slightly more intrusive method.

Similarly, we reject Johnson's claim that by arresting him before the paramedics had examined him, Officer Bentivegna showed that he had never been concerned about Johnson's medical condition. When Officer Bentivegna found the gun in Johnson's glove compartment, his role changed from community caretaker to investigator of illegal activity. That Officer Bentivegna's role changed does not mean he was never truly engaged in "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Dombrowski,* 413 U.S. at 441, 93 S.Ct. 2523. Although it might have been prudent for Officer Bentivegna to wait for paramedics to examine Johnson before removing him from the vehicle, we do not believe the failure to do so suggests the officer sought to arrest Johnson all along.

Therefore, we affirm the district court's denial of Johnson's motion to suppress the fruits of the search of his glove compartment, but we do so on the basis of the community-caretaking exception and *not* on the basis of the variant of the automobile exception fashioned by the district court.

III.

Johnson next argues that the district court should have excluded his blood test results to remedy an asserted violation of the Posse Comitatus Act.

A.

The Posse Comitatus Act states in full:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (2000).

"The purpose of th[e] Act is to uphold the American tradition of restricting military intrusions into civilian affairs, ***147** except where Congress has recognized a special need for military assistance in law enforcement." *United States v. Al–Talib,* 55 F.3d 923, 929 (4th Cir.1995) (citing *United States v. Walden,* 490 F.2d 372, 375 (4th Cir.1974)). A blood test constitutes a search under the Fourth Amendment, *Schmerber v. California,* 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and thus falls under the rubric of law enforcement activities. Therefore, a blood test to test the impairment of civilian drivers can only be conducted by military personnel at the Armed Forces Institute of Pathology, pursuant to a contract with the United States Park Police, if "Congress has recognized a special need for military assistance" in performing such searches, *Al–Talib,* 55 F.3d at 929, and has "expressly authorized" it. *See* 18 U.S.C. § 1385.

The Government argues that the Military Support for Civilian Law Enforcement Agencies Act, codified at 10 U.S.C. § 371 *et seq.,* authorizes the contract at issue here. Concerned that "[t]he Posse Comitatus Act, 18 U.S.C. 1385, is sufficiently ambiguous to cause some commanders to deny aid, even when such assistance would in fact be legally proper," Congress enacted the Act in 1981 to outline the types of aid the military can provide to civilian law enforcement agencies without running afoul of the Posse Comitatus Act. H.R.Rep. No. 97–71, pt. 2, at 3 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1785, 1785. The legislation attempted to "maximize the degree of cooperation between the military and civilian law

enforcement" in dealing with drug trafficking and smuggling while "maintain [ing] the traditional balance of authority between civilians and the military." *Id.* The Act permits the Secretary of Defense to "make available any equipment ..., base facility, or research facility of the Department or Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes." 10 U.S.C. § 372(a). Thus, Congress clearly has authorized the use of the *equipment* and *facilities* of the Armed Forces Institute of Pathology to perform blood tests for civilian law enforcement agencies like the U.S. Park Police.

But this does not mean that § 372(a) authorizes military *personnel* to perform "searches" of blood in furtherance of misdemeanor DUI prosecutions. Generally, Congress has placed strict limitations on the use of military equipment by military personnel for civilian law enforcement purposes. Military personnel may provide certain expert advice, equipment maintenance, and training to civilian law enforcement officers, *see* 10 U.S.C. §§ 373, 374(a), but the blood tests at issue in this case concededly do not constitute the provision of expert advice or equipment maintenance.

Nor, notwithstanding the Government's contrary arguments, do we believe that the performance of ordinary DUI blood tests by military personnel for civilian law enforcement constitutes permissible training of civilians. Congress did not intend for the training exception to condone routine participation by military personnel in civilian law enforcement activities. Rather, Congress emphasized that the training and expertise exceptions "would not alter the traditional separation of the military from civilian law enforcement." 1981 U.S.C.C.A.N. at 1792. Congress further explained that "[n]othing in [§ 373] contemplates the creation of large scale or elaborate training programs. Neither does the authority to provide expert advice create a loophole to allow regular or direct involvement of military personnel in what are fundamentally civilian law enforcement operations." *Id.*

***148** In addition to permitting military personnel to train, advise, and maintain equipment for civilian authorities, Congress has authorized military personnel to engage in specific activities related to the enforcement of a handful of criminal laws. *See* 10 U.S.C. § 374(b). The blood test here neither falls within one of the categories of activities that can be performed by military personnel under § 374(b)(1)-(2) nor relates to the enforcement of any of the laws specified in § 374(b)(4).

Nor does the general catch-all provision in 10 U.S.C. § 374(c) aid the Government here. In that statute, Congress has authorized the Defense Secretary to

> make Department of Defense personnel available to any Federal, State, or local civilian law enforcement agency to operate equipment for purposes other than described in subsection (b)(2) only to the extent that such support does not involve *direct* participation by such personnel in a civilian law enforcement operation unless such direct participation is otherwise authorized by law.

10 U.S.C. § 374(c) (emphasis added).

In *Al–Talib* we had occasion to consider whether military participation was "direct" enough to violate the Posse Comitatus Act. There, the Air Force transported from Nebraska to Virginia a car and drugs, which the Drug Enforcement Administration planned to use as bait in a drug sting. We concluded that this "use of military resources ... had no direct impact on the defendants whatsoever" and so did not constitute a violation of the Act. *Al–Talib,* 55 F.3d at 930. In contrast to the logistical support in *Al–Talib,* which in no way engaged the military in an activity having a direct impact on the defendants, military personnel's performance of a blood test would have a direct impact on a defendant—it would, in and of itself, constitute a Fourth Amendment search. Furthermore, the test would yield the primary evidence of guilt of a DUI offense and, should the driver not plead guilty and go to trial, the serviceman who performed the test likely would be called to testify. The performance of a blood test to determine whether a motorist has driven under the influence of alcohol or drugs thus constitutes "direct participation in a civilian law enforcement operation." *See* 10 U.S.C. § 374(c). Because such participation is not "otherwise authorized by law," we conclude that Congress has not authorized military personnel to perform blood tests for civilian law enforcement agencies.

This holding accords with Congress's directive that the Secretary of Defense:

> prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

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10 U.S.C. § 375. It also comports with the legislature's explicit rejection of a proposed provision that would have permitted military personnel to make arrests and seizures in furtherance of civilian enforcement of drug laws. *See* 1981 U.S.C.C.A.N. at 1793.

In sum, we interpret the Posse Comitatus Act and authorizing statutes in keeping with "the traditional American insistence on exclusion of the military from civilian law enforcement, which some have suggested is lodged in the Constitution." *Walden,* 490 F.2d at 376. Although performance of blood tests by military personnel ***149** for civilian prosecutions may not be an egregious encroachment on civilian law enforcement efforts, it is up to Congress to authorize such searches, and it has yet to do so.

B.

For two reasons, however, this holding does not assist Johnson. First, we cannot conclude that the blood test at issue in this case violated the Posse Comitatus Act because the record does not establish that military personnel actually performed this blood test. We know only that the test was performed at the Armed Forces Institute. That alone does not suffice to prove a violation of the Posse Comitatus Act because Congress has expressly authorized the use of military equipment and facilities by civilian agencies. Absent proof that military personnel performed the test, we decline to find a violation—especially since it would be a violation of a criminal statute.

Furthermore, even if the blood test at issue here had been performed by military personnel in violation of the Posse Comitatus Act, we would affirm the district court's denial of Johnson's suppression motion. This is so because despite the important function of the Act in "uphold[ing] the American tradition of restricting military intrusions into civilian affairs," "[a]s a general matter, the exclusionary rule is not a remedy for violations of the [Act]." *Al–Talib,* 55 F.3d at 930.

Of course, "[s]hould there be evidence of widespread or repeated violations" of the Act, "or ineffectiveness of enforcement by the military, we will consider ourselves free to consider whether adoption of an exclusionary rule is required as a future deterrent." *Walden,* 490 F.2d at 377; *see also United States v. Griley,* 814 F.2d 967, 976 (4th Cir.1987); *Hayes v. Hawes,* 921 F.2d 100, 104 (7th Cir.1990) (noting the exclusionary rule does not apply "absent widespread and repeated violations"); *United States v. Wolffs,* 594 F.2d 77, 85 (5th Cir.1979) ("If this Court should be confronted in the future with widespread and repeated violations of the Posse Comitatus Act an exclusionary rule can be fashioned at that time.").

Johnson argues that we can infer repeated violations from the fact that the U.S. Park Police has contracted with the Armed Forces Institute for the latter to perform blood tests. We disagree; just because a contract exists does not necessarily mean the conduct complained of here occurs frequently. In fact, the record in this case contains no evidence that the alleged violation is widespread or has occurred repeatedly. Therefore, even if the Posse Comitatus Act had been violated here, i.e., military personnel had tested Johnson's blood, fashioning an exclusionary rule would not be appropriate in this case.

IV.

In the wake of the Supreme Court's decision in *United States v. Booker,* Johnson filed a supplemental brief arguing that his sentence should be vacated and the case remanded for resentencing because he was sentenced under a mandatory rather than an advisory regime. Because Johnson's plea agreement contained an appeal waiver, we requested supplemental briefing as to whether that provision of the plea agreement precludes Johnson from posing this challenge to his sentence on appeal.

A.

The plea agreement contains a standard appeal waiver, which states, in its entirety:

> Your client and the United States knowingly and expressly waive all rights conferred by 18 U.S.C. § 3742 to appeal ***150** whatever sentence is imposed, including any issues that relate to the establishment of the guideline range, reserving only the right to appeal from an upward or downward departure from the guideline range that is established at sentencing. Your client further reserves the right to appeal the Court's denial of the pretrial Motions to Suppress. Nothing in this agreement shall be construed to prevent either your client or the United States from invoking the provisions of Federal Rule of Criminal

> Procedure 35, and appealing from any decision thereunder, should a sentence be imposed that exceeds the statutory maximum allowed under the law or that is less than any applicable statutory minimum mandatory provision.

The district court engaged in a detailed plea colloquy with Johnson as required by Fed.R.Crim.P. 11. The court specifically asked Johnson whether he understood that he would be sentenced under the Guidelines, and Johnson answered that he did. The court engaged in a lengthy discussion about the parameters of Johnson's appeal waiver, which concluded:

> The Court: You have limited rights of appeal now and you have a conditional guilty plea where you're appealing the denial of your motion to suppress. But if you went to trial and were convicted by a jury, you would be able to appeal on any and all issues including your sentence. Do you understand that?
>
> The Defendant: Yes.
>
> The Court: Do you further understand that by entering a plea of guilty, if that plea is accepted by this Court, there will be no trial and you will have waived or given up your right to a trial as well as all those other rights that I advised you of? Do you understand that?
>
> The Defendant: Yes.

The district court held Johnson's sentencing hearing on April 16, 2004, two months before the Supreme Court decided *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). At the time of sentencing, the parties agreed that under United States Guidelines Manual § 2K2.1 the base offense level for possession of a firearm by a convicted felon was 20. The parties further agreed that a two point enhancement was appropriate under § 2K2.1(b)(4) because Johnson *admitted* in his plea agreement that the gun found in his automobile had been stolen. The court adjusted Johnson's offense level by two points pursuant to § 3E1.1 for acceptance of responsibility, giving him a total combined offense level of 20, the level predicted in the plea agreement. Based on a criminal history category of 2, Johnson faced a guidelines range of 37 to 46 months in prison. Driving under the influence is a class B misdemeanor to which the guidelines do not apply, *see* § 1B1.9, and carries a six month sentence. The court sentenced Johnson to a total of 40 months imprisonment; Johnson did not object to his sentence.

Nor did Johnson raise a *Blakely* challenge in his briefs in this court—presumably because he could not claim that his sentence exceeded "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," i.e., that his sentence was based on judge-found facts. *Blakely,* 124 S.Ct. at 2537 (citation and emphasis omitted). However, after the Supreme Court issued *Booker,* Johnson filed a motion seeking remand so that he could be resentenced under the new advisory guidelines regime. We must decide whether a pre-*Blakely* appeal waiver bars Johnson's post-*Booker* sentencing challenge.

***151** B.

Generally, we uphold the validity of appeal waivers. *United States v. Marin,* 961 F.2d 493, 496 (4th Cir.1992) (citation omitted). An appeal waiver does not always preclude an appeal by the signatories, however. A waiver has no binding effect if the defendant did not enter into it knowingly and voluntarily; and even a knowing and voluntary waiver of the right to appeal cannot prohibit the defendant from challenging a few narrowly-construed errors.

An appeal waiver "is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver." *Id.* (citation omitted). Even if the court engages in a complete plea colloquy, a waiver of the right to appeal may not be knowing and voluntary if tainted by the advice of constitutionally ineffective trial counsel. *United States v. Craig,* 985 F.2d 175, 178 (4th Cir.1993). This is because "[a] decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside 'the range of competence demanded of attorneys in criminal cases.' " *DeRoo v. United States,* 223 F.3d 919, 923–24 (8th Cir.2000) (quoting *Hill v. Lockhart,* 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

Furthermore, even a knowing and voluntary waiver of the right to appeal cannot bar the defendant from obtaining appellate review of certain claims. For example, because "a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court[,] ... a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess

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of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race." *Marin,* 961 F.2d at 496. Nor can a defendant "fairly be said to have waived his right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right to counsel, for a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations." *United States v. Attar,* 38 F.3d 727, 732 (4th Cir.1994). *See also United States v. Henderson,* 72 F.3d 463, 465–66 (5th Cir.1995); *cf. Jones v. United States,* 167 F.3d 1142, 1145 (7th Cir.1999) (addressing claim of ineffective assistance of counsel in post-trial negotiation of cooperation agreement that included a waiver of the rights to appeal and to file a habeas petition). And appellate courts "refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice." *United States v. Andis,* 333 F.3d 886, 891 (8th Cir.2003).

C.

Johnson does not claim that the district court failed to question him about the appeal waiver during the plea colloquy; the court demonstrably did so. Johnson does not allege that he entered into the appeal waiver on the advice of constitutionally ineffective counsel; and we have no reason to suspect defense counsel rendered constitutionally deficient assistance. Johnson does not contend that his sentence exceeded the statutory maximum or was based on a constitutionally impermissible factor such as race; quite clearly it was not. He does not challenge the constitutionality of his sentence; nor can he ***152** raise a Sixth Amendment claim because the district court imposed a sentence based only on facts Johnson admitted. He does not even argue that a *Booker* challenge falls within one of the explicit exceptions contained in his appeal waiver; and other circuits have refused to read identical waiver language to accommodate such a claim. *See, e.g., United States v. Rubbo,* 396 F.3d 1330, 1334–35 (11th Cir.2005).

Rather, Johnson contends that he did not knowingly and intelligently agree to waive an appeal under *Booker* because his *Booker* challenge exceeds the scope of his appeal waiver. He argues that he could not have knowingly and intelligently waived his right to challenge his sentence under *Booker* because at the time he pled guilty, "[n]either the [c]ourt, the Government, [n]or [he had] anticipated or had basis to anticipate" that the Supreme Court would subsequently hold the Guidelines advisory rather than mandatory. Supp. Brief of Appellant at 5. For this reason, according to Johnson, his *Booker* challenge exceeds the scope of his appeal waiver.[2]

Johnson's contention—that a defendant cannot waive the right to an appeal based on subsequent changes in the law—though reasonable, is foreclosed by Supreme Court precedent. Years ago in *Brady v. United States,* the Court held that "absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the *then applicable law* does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." 397 U.S. 742, 757, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (emphasis added; internal citation omitted). The Supreme Court has recognized that a defendant cannot be said to have intelligently entered a guilty plea if "neither he, nor his counsel, nor the court correctly understood the *essential elements of the crime,*" as those elements were interpreted by the Supreme Court after entry of the plea. *See Bousley v. United States,* 523 U.S. 614, 618–19, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (emphasis added) (invalidating guilty plea to use of a firearm, which was entered into five years before the Court held in *Bailey v. United States,* 516 U.S. 137, 144, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), that " § 924(c)(1) requires the Government to show 'active employment of the firearm' "). But *Brady* makes clear that post-plea legal changes to applicable *penalties* do not provide a basis for upsetting a guilty plea.

At the time Brady had pled guilty to kidnapping in violation of 18 U.S.C. § 1201(a), the statute specified that a jury-but not a judge—could impose the death penalty upon finding the defendant guilty. *Brady,* 397 U.S. at 745–46, 90 S.Ct. 1463. After Brady entered his guilty plea, in part to avoid the risk of capital punishment, the ***153** Supreme Court struck down the death penalty provision of § 1201(a) in *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), reasoning that it " 'impose[d] an impermissible burden upon the exercise of [the right to a jury trial].' " *Brady,* 397 U.S. at 746, 90 S.Ct. 1463 (quoting *Jackson,* 390 U.S. at 572, 88 S.Ct. 1209). The Court held that "[t]he fact that Brady did not anticipate *United States v. Jackson* ... d[id] not impugn the truth or reliability of his plea." *Id.* at 757, 90 S.Ct. 1463. The Court explained:

> [a] plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because

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> the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

Id.; see also United States v. Ruiz, 536 U.S. 622, 630, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002).

Although Johnson, unlike Brady, challenges the viability of only a provision of his plea agreement rather than his entire guilty plea, the *Brady* reasoning applies equally here. *See, e.g., United States v. Johnson,* 67 F.3d 200, 202 (9th Cir.1995) (finding "supervening changes in the law" did not fall beyond the scope of the appeal waiver). Indeed, every court to consider the matter, including this one, has expressly held that the precise change in the law at issue here—the *Booker* decision—does not invalidate a pre *Booker* appeal waiver. *See United States v. Blick,* 408 F.3d 162, 170 (4th Cir.2005); *United States v. Morgan,* 406 F.3d 135, 137 (2d Cir.2005); *United States v. Bownes,* 405 F.3d 634, 636–37 (7th Cir.2005); *United States v. Bradley,* 400 F.3d 459 (6th Cir.2005); *United States v. Grinard–Henry,* 399 F.3d 1294, 1296–97 (11th Cir.2005); *United States v. Killgo,* 397 F.3d 628, 629 n. 2. (8th Cir.2005). *Cf. United States v. Sahlin,* 399 F.3d 27, 31 (1st Cir.2005) (finding *Booker* did not invalidate guilty plea).

A plea agreement, like any contract, allocates risk. *See United States v. Ringling,* 988 F.2d 504, 506 (4th Cir.1993). "And the possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompan[ies] a guilty plea." *Sahlin,* 399 F.3d at 31; *United States v. Khattak,* 273 F.3d 557, 561 (3d Cir.2001) ("Waivers of the legal consequences of unknown future events are commonplace.") Johnson assumed this risk in exchange for the dismissal of the possession of marijuana count he faced and the Government's parallel waiver of the right to appeal Johnson's sentence unless it fell below a statutory mandatory minimum provision or the court granted a downward departure. Declining to enforce his appeal waiver because of a subsequent change in the law would deprive the Government of some of the benefits of its bargain, which might ultimately work to the detriment of defendants who may find the Government less willing to offer a plea agreement.

In sum, the issuance of *Booker* after the plea agreement was reached does not render Johnson's plea unknowing or involuntary, nor does Johnson's *Booker* challenge fall beyond the scope of his pre-*Booker* appeal waiver.

V.

For the reasons stated above, we affirm the judgment of the district court and dismiss Johnson's challenge to his sentence.

***154** *AFFIRMED IN PART AND DISMISSED IN PART*

All Citations

410 F.3d 137

Footnotes

1 We note that the district court found that Officer Bentivegna "opened the unlocked glove compartment in order to locate identification information, including vehicle registration, to assist with the investigation of the traffic accident," but did not specify the purpose of this "investigation." Of course, a traffic accident investigation could involve a search for evidence of criminal wrongdoing, in which case the community-caretaking exception would not apply. However, as the Supreme Court has explained, police also "frequently investigate vehicle accidents in which there is no claim of criminal liability," and the community-caretaking exception may apply in such situations. *Dombrowski,* 413 U.S. at 441, 93 S.Ct. 2523. In this case, Officer Bentivegna's testimony is clear that rather than "investigat[ing] ... the traffic accident" to assign criminal liability, his concern was aiding Johnson by ascertaining whether he was injured, intoxicated, or suffering from an unrelated medical condition and removing his car from the traffic lane, where it was creating a hazard.

2 Johnson also briefly argues that dismissal of his *Booker* challenge would result in a miscarriage of justice. The sole support offered for this contention is our statement in *United States v. Hughes,* 401 F.3d 540, 555 (4th Cir.2005), that failure to recognize the error in that case "would seriously affect the fairness, integrity, or public reputation of judicial proceedings." Johnson's reliance on *Hughes* is misplaced. The error we noticed in *Hughes* was the imposition of a sentence under a mandatory guidelines regime that "exceed[ed] the maximum allowed based only on the facts found by the jury" or admitted to by the defendant. *Hughes,* 401 F.3d at 547 (citing *Booker,* 125 S.Ct. at 756). Johnson does not—and could not—claim that his sentence exceeded the maximum authorized by the facts to which he admitted in his plea agreement. Rather,

he claims only that he should not have been sentenced under mandatory guidelines. We recently refused to find that this error even affected a defendant's substantial rights. *See* *United States v. White,* 405 F.3d 208, 217–24 (4th Cir.2005).

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292 F.3d 969
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellant,
v.
Insook KIM, aka In Sook Kim, Defendant–Appellee.

No. 01–30166.
|
Submitted March 7, 2002.*
|
Filed June 6, 2002.

Synopsis

Defendant, co-owner of store, was charged with federal offense of possession and distribution of pseudoephedrine with knowledge that it would be used to manufacture methamphetamine. The United States District Court for the District of Oregon, Ancer L. Haggerty, Chief District Judge, granted defendant's motion to suppress, and government appealed. The Court of Appeals, Berzon, Circuit Judge, held that defendant was "in custody" for *Miranda* purposes while being interrogated at store during execution of search warrant, despite fact that she initially came to store voluntarily to check on her son who worked there.

Affirmed.

O'Scannlain, Circuit Judge, filed dissenting opinion.

Attorneys and Law Firms

***971** John C. Laing, United States Attorney, District of Oregon, Portland, OR, for the plaintiff-appellant.

Kenneth Ricardo Perry, Portland, Oregon, for the defendant-appellee.

Appeal from the United States District Court for the District of Oregon; Ancer L. Haggerty, District Judge, Presiding.

Before: B. FLETCHER, O'SCANNLAIN and BERZON, Circuit Judges.

Opinion

BERZON, Circuit Judge.

The United States appeals the district court's order granting defendant-appellee Insook Kim's ("Kim") motion to suppress incriminating statements that she made during the execution of a search warrant at her store. The district court found that she was "in custody" for *Miranda* purposes, and therefore entitled to the familiar warnings before questioning began. The government appeals, contending that Kim was not in custody and therefore not entitled to the warnings. We affirm.

I.

Investigators obtained evidence that Kim's store, the "Lil' Brick Deli," was selling large quantities of pseudoephedrine, the main precursor chemical in the production of methamphetamine. A Drug Enforcement Agency (DEA) investigator and a Korean-speaking sheriff's deputy went to Kim's store in October 1999 to advise her about the connection between sales of large quantities pseudoephedrine and methamphetamine production.

Eight months later, an undercover officer purchased a case of pseudoephedrine at Kim's store from her employee Sang Kyun Kim. Soon thereafter, on August 3, 2000, police officers executed a search warrant at the Lil' Brick Deli, where they found Kim's 18–year–old son, Kevin, running the store. They read Kevin the search warrant, handcuffed him, and began to question him. Kevin's handcuffs were removed at some point during the search—before Kim entered the store—but the police continued to question him.

Kim and her husband, the store's co-owner, were at home the morning of the search. An officer came to their home looking for Sang Kyun Kim, who had previously been staying at their home. After the officer's visit, Kim tried to reach her son Kevin at the store. When no one answered the phone, Kim and her husband became alarmed and drove to the store to see if anything was wrong.

According to Kim, her husband, and her son, in consistent testimony credited by the district court, this is what happened next: When Kim and her husband arrived, they noticed many police cars in the parking lot and found the door locked. Kim knocked and shook the locked door. When an officer opened the door halfway, she explained that she and her husband were

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the owners of the store. The officer allowed Kim inside the store. When her husband tried to enter immediately behind her, the officer quickly shut the door in front of him and locked it from the inside. Kim's husband knocked on the door again, but no one answered, so he waited—for about three hours—in the parking lot outside the store.

Once inside, Kim called out in Korean for her son, asking if he was okay. The police, however, had told Kevin before his mother entered the store that he was not to communicate with her. One officer ordered Kim to speak English, not Korean, and another officer told her to "shut up." Kevin testified that while his mother was not crying or screaming when she entered the store, her face did look "really white." The officers directed her to an adjoining seating area, where she sat while the officers searched the store. Some time later, ***972** they sat her at another table, and Detective James G.W. Lilley began to question her.[1]

Kim told Detective Lilley that she did not speak English well but was taking lessons. Kevin too informed the officers that his mother did not speak English very well; he also advised them that she would be frightened because of all the police cars outside the store. The officers did not handcuff Kim at any point, but at least two officers sat and stood around her in such a way that, as she testified, she felt surrounded by them.

According to Kim, no one told Kim that she was free to leave. Kim estimated that she was questioned for about an hour before the interpreter arrived and for another 30 minutes once he did. Detective Lilley stated that he questioned Kim for 30 minutes before a Korean interpreter arrived, and that the interpreter questioned her for another 15 to 20 minutes; the district court based its findings on these shorter estimates. The government concedes that at no time did Kim receive *Miranda* warnings.

Detective Lilley's testimony differed from that of Kim and Kevin in two respects: Lilley stated that he sat Kim in such a way that she would have been able to exit without having to get around a police officer, and that he told Kim that she was not under arrest and could leave at any time.

During the course of the interview, Kim identified the sources of her pseudoephedrine supply. She explained how she sold the cases of pseudoephedrine and the markup she used for cases from the various suppliers. She also told police that the money stored in the store's safe came exclusively from sales of pseudoephedrine. When the officers completed their search and interrogation, they left the store without arresting either Kim or her son.

Kim was later indicted and arrested for possession and distribution of pseudoephedrine with knowledge and reasonable cause to believe that it would be used to manufacture methamphetamine, in violation of 21 U.S.C. § 841(d)(2). The indictment also included one count of forfeiture to the government of any and all property derived from the proceeds of pseudoephedrine sales.

Kim filed a pre-trial motion to suppress the incriminating statements she made while being questioned during the search, arguing that they were taken in violation of her Fifth Amendment rights. The district court granted the motion, basing its conclusion on the following factual findings:

> [W]hen defendant arrived at her store, she discovered a number of police cars and official-looking vehicles in the lot. She was denied access to the store initially, despite the presence of her son inside the store. When she was admitted inside by an officer, the door was immediately locked behind her, and she was separated from her husband, who had also arrived at the store. Once inside, her communication to her son was limited or denied, and she was directed to another area of the store, where at least two officers sat with her.

The district court also found that:

> [T]he officers knew defendant was Korean and may have difficulty in comprehending English (as evidenced by the facts that the police included a Korean- ***973** speaking official during the visit to defendant in October, 1999, and that defendant's son advised the police that his mother would likely be very confused or frightened by the circumstances). Accordingly, the police were aware that defendant could have significant difficulty understanding what was being said to her or comprehending what was happening at the store.

The district court specifically rejected the testimony that the officers told Kim that she was free to leave.

"After reviewing all pertinent facts and evaluating the testimony presented at the hearings," the district court found "that the circumstances during the questioning of defendant warranted advising defendant of her rights." "[A] reasonable person, after being separated from a spouse, precluded from speaking to a son, and having the store entry locked behind her," the court concluded, "would not believe she was free to leave." The court noted that its conclusion was "further

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bolstered by" the fact that the officers knew that Kim may have difficulty understanding English and that Kevin had "advised the police that his mother would likely be confused and frightened by the circumstances." The district court therefore granted the motion to suppress Kim's statements on the grounds that she indeed was in custody at the time of the interrogation and so should have been advised of her *Miranda* rights.

II.

A. Standard of Review

The parties dispute the proper standard of review of the district court's determination that Kim was in custody for *Miranda* purposes. Although some recent Ninth Circuit cases, it is true, have characterized the "in custody" determination for *Miranda* purposes as essentially a question of fact reviewed for clear error, *see, e.g., United States v. Butler,* 249 F.3d 1094, 1098 (9th Cir.2001), we recently recognized that the clear error standard of review for "in custody" determinations adopted by *People of the Territory of Guam v. Palomo,* 35 F.3d 368, 375 (9th Cir.1994), was rejected by the Supreme Court in *Thompson v. Keohane,* 516 U.S. 99, 112–13, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). *United States v. Galindo–Gallegos,* 255 F.3d 1154 (9th Cir.2001), *modifying* 244 F.3d 728 (9th Cir.). Now, "[w]hether a person is 'in custody' for purposes of *Miranda* is a mixed question of law and fact warranting *de novo* review." *Id.; see also United States v. Hayden,* 260 F.3d 1062, 1066 (9th Cir.2001). The factual findings underlying the district court's decision, however, are reviewed for clear error. *Keohane,* 516 U.S. at 112, 116 S.Ct. 457; *United States v. Andaverde,* 64 F.3d 1305, 1313 (9th Cir.1995).

B. Whether Kim Was "In Custody"

An officer's obligation to give a suspect *Miranda* warnings before interrogation extends only to those instances where the individual is "in custody." *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam). To determine whether an individual was in custody, a court must, after examining all of the circumstances surrounding the interrogation, decide "whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (internal quotation marks omitted). The inquiry focuses on the objective circumstances of the interrogation, not the subjective views of the officers or the individual being questioned. *Id.* at 323, 114 S.Ct. 1526. That is, we must determine whether "the officers established a setting from which a reasonable person would believe that he or ***974** she was not free to leave." *United States v. Beraun–Panez,* 812 F.2d 578, 580 (9th Cir.), *modified by* 830 F.2d 127 (9th Cir.1987); *see also Hayden,* 260 F.3d at 1066. The following factors are among those likely to be relevant to deciding that question: "(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual." *Hayden,* 260 F.3d at 1066 (citing *Beraun–Panez,* 812 F.2d at 580). Other factors may also be pertinent to, and even dispositive of, the ultimate determination whether a reasonable person would have believed he could freely walk away from the interrogators; the *Beraun–Panez/Hayden* factors are simply ones that recur frequently.

The district court's factual findings are not clearly erroneous, as they are supported by testimony in the record that the judge determined was credible. After reviewing the factual findings under all of the circumstances, including both the above factors and others, we conclude that Kim was "in custody" for *Miranda* purposes because a reasonable person in Kim's circumstances would not have felt free to leave. *See id*.

The police did not summon Kim to the store, or require her to enter the store once she arrived in the parking lot. Rather, she came to the store voluntarily because she was alarmed that her son did not answer the store's phone when she called to check on him. When she arrived to find the door locked, she knocked and asked that the police allow her and her husband inside because they were the store's owners.

In determining whether suspects were "in custody" for *Miranda* purposes, the Supreme Court has considered whether they voluntarily approached or accompanied law officers *understanding that questioning would ensue. See California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1982) (per curiam) (holding that defendant was not in custody when he agreed to accompany police to the station to answer questions and was allowed to leave immediately afterward); *Mathiason,* 429 U.S. at 495, 97 S.Ct. 711 (holding that defendant was not in custody when he came to the station voluntarily and left "without hindrance" after 30 minutes of questioning). We, too, have found

that suspects were not in custody where the circumstances included volunteering to answer law officers' questions. *See, e.g., Hayden,* 260 F.3d at 1066–67; *United States v. Hudgens,* 798 F.2d 1234, 1236–37 (9th Cir.1986).

There is a critical distinction, however, between voluntarily entering one's own place of business without any intention to present oneself for a police interview, and voluntarily accompanying the police to their station upon request for the very purpose, known in advance, of answering their questions. Here, Kim did not willingly agree to submit to an encounter with the police. Rather, she went to her store because an officer's visit to her home caused her to worry about her son when he did not answer the store's phone. Arriving at the store to find the place surrounded by police cars did not alleviate her concerns, so she sought to enter the store to check on her son's situation. Although Kim did arrive at the store voluntarily, she did not do so to speak to the police. That the police did not summon her to the store in the first place, imperatively or otherwise, is therefore entirely uninformative in determining the dispositive question —whether Kim would have felt free to leave once the questioning started.

If the police ask—not order—someone to speak to them and that person comes to ***975** the police station, voluntarily, precisely to do so, the individual is likely to expect that he can end the encounter. By contrast, someone who comes to her own store with no intention of submitting to questioning is not likely to harbor the same understanding once police interrogation nonetheless begins—especially if, as here, she is ordered to shut up, seated in isolation away from two other family members, and then questioned.

Voluntary initiation of contact with the police cannot be, under any circumstances, the end of the inquiry into whether a defendant was "in custody" during the encounter. If an individual voluntarily comes to the police station or another location and, once there, the circumstances become such that a reasonable person would not feel free to leave, the interrogation can become custodial. The Supreme Court cases relying on the voluntary initiation of the police encounter or on the location of the interrogation so indicate, as none rely *solely* on either factor. *See, e.g., Mathiason,* 429 U.S. at 495, 97 S.Ct. 711 (finding "no indication that the questioning took place in a context where [defendant's] freedom to depart was restricted in any way"); *Beheler,* 463 U.S. at 1125, 103 S.Ct. 3517 (finding that defendant's "freedom was not restricted in any way whatsoever" and that the prior identification of the defendant as a suspect and the fact that the interview was in a police station were not alone enough to create a custodial situation).

Our similar cases rely on the fact that the initial encounter with the police was voluntary only in the absence of other circumstances indicating that the interview later became coercive. *See Hayden,* 260 F.3d at 1066 (the defendant "was told explicitly that she was free to leave at anytime," her "ability to leave was [not] in any other way restrained," and "the duration of the interviews was [not] excessive[and] undue pressure was [not] exerted"); *United States v. Gregory,* 891 F.2d 732, 735 (9th Cir.1989) (the defendant "consented to be interviewed in his house, he was interviewed in the presence of his wife, the interview lasted only a brief time, and no coercion or force was used"); *Hudgens,* 798 F.2d 1234 (the defendant voluntarily entered a police car to talk to the police, the agents did not use intimidating or coercive language during the interview, and the defendant testified that he did not feel coerced by the agents).

The one case we have found that is on the surface factually close to this one is *United States v. Crawford,* 52 F.3d 1303 (5th Cir.1995), in which the district court had concluded that the defendants were not in custody after they voluntarily entered their own electronics store during a search. Reviewing the denial of a motion to suppress under a deferential standard, the Fifth Circuit concluded that "it cannot be said that the trial court's findings are not plausible." *Id.* at 1309.

There are significant factual differences between this case and *Crawford.*[2] More ***976** importantly, however, the deferential standard of review of the district court's *denial* of the motions to suppress weighed much more heavily in favor of a finding on appeal that the defendants were not "in custody." Because we are reviewing the "in custody" determination *de novo, Crawford* is not particularly informative. *Fernandez v. Roe,* 286 F.3d 1073, (9th Cir.2002) (distinguishing precedent that "review[ed] for 'clear error,' unlike the *de novo* review applied here").[3]

To support its argument that Kim was not "in custody" for *Miranda* purposes during the search, the government relies on *Michigan v. Summers,* 452 U.S. 692, 701–02, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). *Summers* held the police's detention of an individual at his home during the execution of a search warrant did not constitute a seizure under the Fourth Amendment. The government contends that, although *Summers* did not address the issue of custodial interrogation,

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its principles support the conclusion that police officers executing a search warrant need not give *Miranda* warnings to an individual detained and questioned during a search. We disagree.

In the Fourth Amendment context, locking doors and restricting the occupants' movement are often reasonable police procedures to control access to a scene during the execution of a search warrant. *See id.* at 702–03, 101 S.Ct. 2587 ("The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."). But whether an individual detained during the execution of a search warrant has been unreasonably seized for Fourth Amendment purposes and whether that individual is "in custody" for *Miranda* purposes are two different issues.

In *Summers,* the Supreme Court found that the defendant "was not free to leave the premises while the officers were searching his home," and that his detention constituted a seizure, albeit a reasonable one under the Fourth Amendment. *Id.* at 696, 101 S.Ct. 2587. The police did not interrogate Summers during the detention. If they had asked questions going beyond a brief *Terry*-type inquiry, *see Terry v. Ohio,* 392 U.S. 1, 29, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (permitting a brief stop and inquiry that are "reasonably related in scope to the justification for their initiation"), Summers would, it appears, have been entitled to *Miranda* warnings. *See Berkemer v. McCarty,* 468 U.S. 420, 439–40, 104 S.Ct. 3138, 82 L.Ed.2d 317 (When there is a brief *Terry* detention, officers may, without giving *Miranda* warnings, ask only "a moderate number of questions to determine [a person's] identity and to try to obtain information confirming or dispelling the officer's suspicions."). Thus, while the reasonable and necessary steps ***977** that the officers took to secure Kim's store during the search may preclude a conclusion that she was unconstitutionally seized, the locked doors and restriction of Kim's movement are still relevant to whether she was entitled to *Miranda* warnings before the police questioned her. *See Booth,* 669 F.2d at 1236 (upholding the district court's determination that defendant who had been handcuffed and frisked was "in custody," while noting that "[s]trong but reasonable measures to insure the safety of the officers or the public can be taken without necessarily compelling a finding that the suspect was in custody.").

Further, isolating the defendant from the outside world—here from her husband who had tried to join her in the shop—largely neutralizes the familiarity of the location as a factor affirmatively undermining a finding of coercion. We so recognized in *Beraun–Panez,* 830 F.2d 127. In *Beraun–Panez,* the officers interrogated the defendant at the side of the road in familiar surroundings but intercepted one of Beraun–Panez's co-workers who tried to approach him. We found that "by keeping [defendant] isolated from other people, the officers contributed to the custodial nature of the interrogation," 830 F.2d at 127, noting that the coercive impact of enforced isolation is particularly strong where the defendant "may have had some difficulty in understanding English," 812 F.2d at 581.

Our point is not that the situation here was decidedly coercive "simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Mathiason,* 429 U.S. at 495, 97 S.Ct. 711. Rather, the police in this case temporarily took over complete control of Kim's store, creating "a police-dominated atmosphere," in which the police kept Kim physically isolated from two family members who could have provided both moral support and, given her limited English, a more complete understanding of the overall situation. *See Beraun–Panez,* 830 F.2d at 127 ("The Supreme Court in *Miranda* noted that separating a subject from others, who might lend moral support to a person questioned and thereby prevent inculpatory statements, was a technique of psychological coercion.").

Additionally, this was a full-fledged interrogation, not a brief inquiry. The district court found that Kim was detained for "some time" before questioning began. Then, she was questioned for at least 30 minutes before an interpreter arrived and another 20 minutes once the interpreter joined the interrogation. The police had in an earlier encounter warned Kim of the possible criminal aspects of pseudoephedrine sales; they were in the process of searching her store; and they had earlier in the day come to her home looking for an employee. Given all those circumstances, Kim could well have assumed—especially given her limited English—that she was a criminal suspect. That the questions to Kim covered in detail her pseudoephedrine sale activities—including her sources, her customers, and where she kept the proceeds—could only have reinforced that impression. Under these circumstances, we find the overall length and manner of questioning, both before and after the interpreter arrived, to support the conclusion that Kim was "in custody."

In sum, Kim's voluntary entrance into the store and the fact that she was familiar with the location of the interview,

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considered in isolation, might weigh in favor of concluding that she was not "in custody" during the questioning. Nevertheless, under all the circumstances here, we conclude that a reasonable person would not have felt free to leave and therefore that Kim was sufficiently restrained so as to be considered "in custody." Whether or not ***978** they intended to surround Kim to make her feel that she could not leave the store, the position of the officers, the fact that they locked Kim's husband out of their store, their restriction of her communication with her son, and their orders as to what language she should speak and when and where she could sit, combined with the length and nature of the questioning, would have made a reasonable person believe that she could not have just walked away. Under these circumstances, Kim would have reasonably felt compelled to stay in the store and answer the officers' inquiries for as long as they continued to question her—which is precisely what she did.

CONCLUSION

We conclude that, under the totality of the circumstances, a reasonable person in Kim's circumstances would not have felt free to leave. We therefore hold that Kim was "in custody" when the police interrogated her without providing her with *Miranda* warnings, and AFFIRM the district court's order granting the motion to suppress Kim's statements to the police.

AFFIRMED.

O'SCANNLAIN, Circuit Judge, dissenting:
I respectfully dissent from the court's determination that Insook Kim was "in custody" for Fifth Amendment purposes when police officers questioned her. While paying lip service to the factors that properly guide our determination, the majority fails, in my view, to apply them faithfully to the facts before us.

I

As the majority correctly states, an officer's obligation to give the traditional *Miranda* warning to a suspect applies only to custodial interrogation. "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Stansbury v. Cal.,* 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (quotation marks and brackets omitted). The inquiry should focus on the *objective circumstances* of the interrogation, not the subjective views of the officers or the individual being questioned. *Id.* at 323, 114 S.Ct. 1526. "An objective standard avoids imposing upon police officers the often impossible burden of predicting whether the person they question, because of characteristics peculiar to him, believes himself to be restrained." *United States v. Beraun–Panez,* 812 F.2d 578, 581 (9th Cir.), *modified,* 830 F.2d 127 (9th Cir.1987).

We ask whether, based upon a review of all the pertinent facts, "a reasonable innocent person in such circumstances would conclude that after brief questioning [she] would not be free to leave." *United States v. Booth,* 669 F.2d 1231, 1235 (9th Cir.1981); *see also United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (plurality). Factors that we should consider in determining whether a person was in custody include: (1) the language used to summon the individual, (2) the extent to which the defendant is confronted with evidence of guilt, 8151(3) the physical surroundings of the interrogation, (4) the duration of the detention, and (5) the degree of pressure applied to detain the individual. *United States v. Hayden,* 260 F.3d 1062, 1066 (9th Cir.2001), *cert. denied,* 534 U.S. 1151, 122 S.Ct. 1117, 151 L.Ed.2d 1011 (2002).

A

As to the first factor, the police did not summon Kim; rather, she came to her ***979** store voluntarily. Indeed, the officers allowed her inside only after she knocked and shook the door. The Supreme Court has consistently found that a suspect is not in custody if she voluntarily approaches or accompanies law enforcement. *See Cal. v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (per curiam) (holding defendant was not in custody when he voluntarily accompanied police to the station for questioning and was allowed to leave after the interview); *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (holding defendant was not "clearly" in custody when he came to the station voluntarily and left "without hindrance" after a 30–minute interview); *see also Hayden,* 260 F.3d at 1066–67 (holding defendant was not in custody when she voluntarily appeared at FBI building for questioning

and was told that she was free to leave); *People v. Palomo,* 35 F.3d 368, 375 (9th Cir.1994) (holding defendant was not in custody despite "the duration of the interview and the nature of the interrogation room" when he went to the police station voluntarily and "left of his own accord"); *United States v. Hudgens,* 798 F.2d 1234, 1236–37 (9th Cir.1986) (holding defendant was not in custody when he initiated contact with police, was not physically restrained, and was questioned for 45 minutes).[1]

The majority distinguishes between a person voluntarily approaching the police with the expectation that she will be asked questions and Kim's voluntarily entering her store. *Supra* at 976–77. To the majority, the fact that she voluntarily entered her store for the purpose of checking on her son does not suggest that she voluntarily subjected herself to the possibility of a police interview. Yet, we rejected a similar distinction in *Palomo,* where the defendant went to the police station because his relatives had been taken there—not to speak to the police. We held that the defendant's "assertion that he went to the station only because his relatives had been taken there does not, without more, indicate that he did not initiate contact ***980** with the police." *Palomo,* 35 F.3d at 375. The same must be said regarding Kim.[2]

Furthermore, it seems somewhat disingenuous to say that when Kim approached her store with police cars parked in front, found the front door locked, and then had to knock and gain entrance from an officer, that she had no expectation that maybe, just maybe, she might be called upon to answer questions.[3] While her purpose for coming to her store was to check on her son, once she saw the police presence and sought access to a premise that was being searched by law enforcement, it would be utterly naive to suggest that she did not consent to an encounter with the police.

B

The second factor—the extent to which the defendant is confronted with evidence of guilt—is not implicated here. The record does not indicate that the officers confronted Kim with evidence of her guilt.

The third factor looks to the physical surroundings of the interrogation. Here, Kim was in familiar surroundings—her own store—during the interview, which stands in direct contrast to the more coercive environment of a police station. However, the Supreme Court has found that even when questioning occurs at a police station there is not custody per se. *Beheler,* 463 U.S. at 1125, 103 S.Ct. 3517 ("[W]e have explicitly recognized that *Miranda* warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.' " (quoting *Mathiason,* 429 U.S. at 495, 97 S.Ct. 711)). Here, of course, the familiar surroundings of Kim's store would be much less coercive than an interrogation room at the police station. *Cf. Michigan v. Summers,* 452 U.S. 692, 702, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (finding detention of an individual at his home during the execution of a search warrant is permissible because it is "substantially less intrusive" than an arrest and involves "neither the inconvenience nor the indignity associated with a compelled visit to the police station"); *United States v. Eide,* 875 F.2d 1429, 1437 (9th Cir.1989) (holding defendant was not in custody "[p]articularly because the FBI agents interviewed [him] at his home.").

***981** D

The fourth factor we consider is the duration of the detention. The district court found that she was questioned for approximately 45–50 minutes, but had been detained for "some time" before the interview began. The government states that the entire detention lasted about 90 minutes, which admittedly seems on the high end of our precedent.

E

Finally, we must consider the degree of pressure applied to detain the individual. Here, Kim was neither handcuffed nor 8155 told that she was under arrest. It also appears that, at least until the interpreter arrived, Kim had a clear path of egress during the interview. While the front door was locked, it is a reasonable police procedure to control access to a scene during the execution of a search warrant. *See Booth,* 669 F.2d at 1236 ("Strong but reasonable measures to insure the safety of the officers or the public can be taken without necessarily compelling a finding that the suspect was in custody.");[4] *see also Summers,* 452 U.S. at 702–03, 101 S.Ct. 2587 ("The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.").

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Furthermore, the presence of many officers conducting a search cannot alone establish a custodial situation:

> Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." *Any interview of one suspected of a crime by a police officer will have coercive aspects to it,* simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime.

Mathiason, 429 U.S. at 495, 97 S.Ct. 711 (emphasis added). Other than the mere presence of officers, there was no pressure applied to detain Kim, even taking as true the district court's determination that no officer told her that she was free to leave.

Finally, it is significant that when the officers finished searching the store, they left without arresting Kim or her son. *See Palomo,* 35 F.3d at 375 (weighing as an important factor that the defendant "left of his own accord").

II

I recognize that Kim was justifiably concerned about her son and worried about the presence of officers in her store. However, under the five *Hayden* factors that guide our analysis, I cannot agree that there was a "restraint on [Kim's] freedom of movement of the degree associated with a formal arrest." *Stansbury,* 511 U.S. at 322, 114 S.Ct. 1526. While the interview lasted about 90 minutes, the police did not summon Kim, she was not confronted with evidence of her guilt, she was in familiar surroundings, and the degree of pressure applied to detain her was minimal. *See Palomo,* 35 F.3d at 375 ("Although the duration of the interview and the nature of the interrogation room support Palomo's position, the remaining factors strongly support the government's contention that Palomo was not in custody."). Because I would conclude that Kim ***982** was not in custody during her presence at her store, I respectfully dissent.

All Citations

292 F.3d 969, 02 Cal. Daily Op. Serv. 4922, 2002 Daily Journal D.A.R. 6277

Footnotes

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App P. 34(a)(2).

1 In its response to the motion to suppress, the government stated that DEA Investigator Roger Beltz conducted the interview, but at the suppression hearing, Detective Lilley testified that he interviewed Kim himself. The government's Opening Brief indicates that both Beltz and Lilley were present during the interview but leaves unclear what role each of them played.

2 The district court in *Crawford* had found that the testimony of one of the defendants "did not indicate that he was coerced into making a statement," and that both defendants "were more worried about their electronic equipment, not having their shop disrupted than they were about being held in custody." *Id.* at 1308. Moreover, the police in *Crawford* allowed one of the defendants to telephone the other, rather than, as here, restricting communication among family members—including locking the defendant's husband out of his own store. *Id.* at 1307. Also, one of the defendants in *Crawford* testified that "[n]o one ever told him to sit in a certain place, but he had the impression that he should sit down," *id.* at 1308, while here the officers issued peremptory orders as to where Kim and her son could sit and whether they could speak to each other.

3 In addition to disputing our characterization of *Crawford,* the dissent also argues that *Palomo,* 35 F.3d at 375, rejected a distinction between voluntarily approaching the police expecting to be questioned and voluntarily entering one's own store to check on family members. We disagree. *Palomo* concluded only that "[the defendant's] assertion that he went to the station only because his relatives had been taken there does not, *without more,* indicate that he did not initiate contact with the police." *Id.* at 375 (emphasis added). In support of his contention that he was "in custody," Palomo argued only that he was a suspect before the interview, that he appeared only because the police had taken his relatives to the station, and that an officer confronted him with evidence of guilt. *Id.* The opinion refers to no other allegations or evidence of coercive circumstances at the station. *See id.* Moreover, like *Crawford, Palomo* was reviewing the district court's *denial*

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of a motion to suppress under the former clear error standard. *Id.* ("Where no findings of fact were made, this court will uphold the denial of the motion to suppress if there is a reasonable view of the evidence that will sustain it.").

1 The majority's characterization of *United States v. Crawford,* 52 F.3d 1303 (5th Cir.1995), as having "significant factual differences" from this case is, with respect, inaccurate. *See supra* at 977. In *Crawford,* the Fifth Circuit held that defendants were not in custody when they made incriminating statements during the execution of a search warrant at their electronics store. *Id.* at 1309. There, officers did not tell defendants that they were or were not free to leave, the defendants (who are husband and wife) could not move around the store without being accompanied by an agent and could not be in each other's presence, and one defendant came to the shop voluntarily after the search was underway, but was then "sandwiched between two men at all times." *Id.* at 1307–09. Like Kim, who was probably more worried about her son and having her store disrupted than about being questioned, the *Crawford* defendants were "more worried about their electronic equipment [and] not having their store disrupted than about being held in custody." *Id.* at 1308. Furthermore, the defendants knew that the officers had found a small quantity of marijuana—evidence of their guilt—during the search. *Id.* at 1308. Thus, *Crawford's* "factual differences" from this case actually make the situation there more coercive. Despite *Crawford's* coercive aspects, however, the Fifth Circuit held that they did not constitute a custodial situation for *Miranda* purposes.

The majority attempts to distinguish *Crawford* primarily by relying on the standard of review exercised by the Fifth Circuit. First, it is not entirely clear what standard of review *Crawford* employed, as the court simply stated "[w]e review the district court's finding that the Appellants were not in custody at the time of the statements." *Id.* at 1307. Second, assuming *Crawford* did review for clear error, the more deferential standard of review did not appear to be the decisive factor in the court's decision, *i.e.,* the court was not torn between two equally meritorious arguments as the majority makes it seem. *Id.* at 1308–09.

2 The majority again attempts to distinguish a case that undermines its analysis—this time, *Palomo*—based on the fact that in *Palomo* we reviewed the district court's "in custody" determination for clear error. *Supra* at 976 n. 3. Again, to respond: the more deferential standard of review did not appear to be the decisive factor in our decision. *Palomo,* 35 F.3d at 375. Reliance on the standard of review in this situation is nothing more than a makeweight.

Furthermore, nothing in the majority's characterization of *Palomo* undermines our clear rejection of the distinction between voluntarily subjecting oneself to be interviewed and voluntarily subjecting oneself for some other reason. The "without more" language in *Palomo,* 35 F.3d at 375, does not refer to other coercive elements that make a situation custodial, as the majority seems to suggest. Rather, *Palomo* simply rejected the defendant's argument that because he went to the police station to visit relatives—not to subject himself to an interview—he did not initiate contact with the police. Or, in other words, it takes more than approaching the police for a purpose other than speaking to them to make one's encounter with the police involuntary.

3 This is all the more demonstrated by the fact that months prior to the search she had received an explicit warning from DEA officers, in Korean, about the connection between sales of large quantities of pseudoephedrine and methamphetamine production. Thus, she should have had some idea as to why the police were there and that they might be interested in talking to her. Kim's status as a suspect, of course, is irrelevant to whether she was in custody. *Palomo,* 35 F.3d at 375.

4 I note that the *Booth* court found this factor important in determining whether defendant was in custody for *Fifth* Amendment purposes. Thus, the majority cannot simply relegate reasonable police measures designed to insure safety to the Fourth Amendment context. *Supra* at 978.

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