DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 11-0409
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RUDOLPH EAGLE	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-139327-001DT

The Honorable Kristin C. Hoffman, Judge
The Honorable Lisa Daniel Flores, Judge

AFFIRMED AS MODIFIED

James J. Haas, Maricopa County Public Defender — Phoenix
By Terry Reid, Deputy Public Defender
Attorneys for Appellant

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel/Capital Litigation Section
and Katia Mehu, Assistant Attorney General
Attorneys for Appellee

K E S S L E R, Judge

¶1 Rudolph Eagle ("Eagle") appeals his conviction for misconduct involving weapons claiming that the superior court erred by failing to suppress evidence of the gun police found during an inventory search of his car. Eagle asserts that without such evidence, his conviction cannot stand. Eagle also asserts that he is entitled to additional presentence incarceration credit. For the following reasons, we reject Eagle's challenge and affirm his conviction, but modify his sentence to include eleven additional days of presentence incarceration credit. We also modify the second page of the sentencing minute entry to reflect that the offense is repetitive.

FACTUAL AND PROCEDURAL HISTORY

¶2 On April 12, 2010, Buckeye Police Officer E.G. stopped Eagle for a moving violation.[1] Because Eagle was driving with a revoked driver's license, he was arrested. Officer E.G. impounded Eagle's car and conducted an inventory search. During the search, Officer E.G. moved the loose panel near the passenger-side floor board and found a gun behind the panel.[2]

[1] Eagle failed to use a turn signal.

[2] Although Officer E.G. referred to the panel as a "quarter-panel," the area he described and that is depicted in photographs in the record, is more appropriately referred to as a "kick panel."

¶3 The State indicted Eagle with misconduct involving weapons. The State also alleged historical prior convictions, aggravating factors, and that Eagle committed the offense while on release in other criminal matters. Eagle moved to suppress evidence of the gun and his later statements to police relating to the gun, arguing that the search was illegal because it exceeded the scope of a permissible inventory search. The State countered that standard Buckeye police procedure for inventory searches includes searching the "entire vehicle and all containers whether locked or otherwise." In support of this contention, the State attached a single page from a chart entitled "General Vehicle Search Procedures" from the Buckeye Police Field Manual that states the scope of an inventory search includes the "entire vehicle and all containers whether locked or otherwise."[3]

¶4 At an evidentiary hearing, Officer E.G. testified that when conducting an inventory search officers look for anything of value. He testified that he lifted the panel because "that is an area of interest" and "[p]eople install stereo equipment in those areas." He testified that the panel was "loose" and "didn't appear to be secured by any kind of screws or tabs." He

[3] Additionally, the "procedures" portion of the chart simply states "See Evidence-Vehicle Impound." There is no other written description of the scope of an inventory search in the record.

testified that the panel was attached to the door frame but that "[t]here were no screws" and it was not "mounted, so to speak, to the door frame."[4] The officer testified that he did not need to remove the panel, but he did have to move the panel to see the gun. He explained that he could "move[] [it] around just by using [his] hand." He compared the movement of the panel to a "mud flap."

¶5 Officer E.G. also testified that he searched the car in accordance to police department policy, which permits him to move items around, look in "loose flaps," trunks, hoods, under loose parts of the car, "briefcases, purses, anything locked, unlocked." Officer E.G. explained that under departmental policy he cannot deconstruct a car due to "time [and] resources" because "you'd have to be a car expert to know how to take apart every type of different car . . . ." He also testified that there is nothing in the policy that would prevent him from cutting a door in half or taking it off its hinges, but thought he would have to justify why he would do that because not only would it be unlikely personal property is stored there, but it requires tools like a door cutter that the officers normally would not have with them.

[4] Three photographs showing the panel were admitted. The same three photographs were admitted into evidence at trial. Unlike his testimony during the suppression hearing, during trial, Officer E.G. testified that there appeared to be a screw holding the panel in place as depicted in a photograph.

¶6 The State argued that the officer merely looked under the panel but did not dismantle the car or pull the panel off the car. Eagle argued that there was no likelihood of personal property being under the panel and thus, it exceeded the scope of the inventory search, and required a warrant. Eagle maintained that the circumstances would be different if during towing the panel fell off or the gun was rattling around on the floor. He argued that allowing the search of the panel here would lead to permitting searches in the future in which screws could be removed from a panel.

¶7 The superior court denied Eagle's motion to suppress, determining that Officer E.G. conducted the inventory search in good faith and lifted the loose panel to look for personal property pursuant to police department policies.

¶8 After a jury trial, Eagle was convicted of misconduct involving weapons, a class four felony, sentenced to serve 10 years' incarceration concurrently with his criminal convictions in other cases, and he was granted 152 days of presentence incarceration credit. Eagle timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

DISCUSSION

I. Vehicle inventory searches

¶9 "We review for abuse of discretion the trial court's factual findings on a motion to suppress, *State v. Peters*, 189 Ariz. 216, 218, 941 P.2d 228, 230 (1997), but review *de novo* the trial court's ultimate legal determination that the search complied with the requirements of the Fourth Amendment to the United States Constitution, *see State v. Valle*, 196 Ariz. 324, 326, ¶ 6, 996 P.2d 125, 127 (App. 2000)." *State v. Davolt*, 207 Ariz. 191, 202, ¶ 21, 84 P.3d 456, 467 (2004). We restrict our review to a consideration of the facts presented at the suppression hearing. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996).

¶10 The Fourth Amendment to the United States Constitution and Article 2, Section 8 of the Arizona Constitution prohibit unreasonable searches and seizures. *State v. Allen*, 216 Ariz. 320, 323, ¶ 9, 166 P.3d 111, 114 (App. 2007). Inventory searches are a well-defined exception to the probable cause and warrant requirements of the Fourth Amendment. *State v. Organ*, 225 Ariz. 43, 48, ¶ 20, 234 P.3d 611, 616 (App. 2010) (citing *Colorado v. Bertine*, 479 U.S. 367, 371 (1987) and *South Dakota v. Opperman*, 428 U.S. 364, 370-72 (1976)). The generally recognized purposes of an inventory search are to: protect an owner's property while it is in police custody from theft, loss,

and damage; prevent false claims of stolen, lost, or damaged property; and guard police and the public from danger. *Id*. (citing *Bertine*, 479 U.S. at 372); *see also Opperman*, 428 U.S. at 369.

¶11 It is the State's burden to prove a warrantless search was lawful. *Valle*, 196 Ariz. at 330, ¶ 19, 996 P.2d at 131. "An inventory search of a vehicle is valid if two requirements are met: (1) law enforcement officials must have lawful possession or custody of the vehicle, and (2) the inventory search must have been conducted in good faith and not used as a subterfuge for a warrantless search." *Organ*, 225 Ariz. at 48, ¶ 21, 234 P.3d at 616; *see In re One 1965 Econoline, I.D. No. E16JH702043*, 109 Ariz. 433, 435, 511 P.2d 168, 170 (1973)*; see also Florida v. Wells*, 495 U.S. 1, 4 (1990) ("[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."). We have previously characterized an inventory search that is conducted pursuant to standard procedures as "presumptively . . . conducted in good faith and therefore reasonable." *Organ*, 225 Ariz. at 48, ¶ 21, 234 P.3d at 616 (citing *Bertine*, 479 U.S. at 372, and *Opperman*, 428 U.S. at 372).

¶12 There must be evidence in the record that establishes standardized departmental policy and procedures. *State v. Rojers*, 216 Ariz. 555, 559, ¶¶ 20-21, 169 P.3d 651, 655 (App.

2007); *State v. Acosta*, 166 Ariz. 254, 259, 801 P.2d 489, 494 (App. 1990); *see also* 3 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 7.4(a), at 645 n. 71 (4th ed. 2004) (the standard practice of a particular officer is insufficient to establish standardized departmental policy).

II. The superior court did not err by permitting evidence of the gun retrieved during the inventory search of Eagle's car.

¶13 Eagle argues that the search violated his Fourth Amendment rights and his rights under Article 2, Section 8 of the Arizona Constitution because the search was not conducted in good faith in accordance with standardized police policies and exceeded the scope of a permissible inventory search.[5]

¶14 The State argues that looking behind the loose panel was within the scope of a permissible inventory search because the cavity behind the loose panel "exhibited all the indicia of a closed container" and its search was therefore authorized by Buckeye Police Department's standardized polices for an inventory search.

¶15 Here, the evidence of Buckeye Police procedures for an inventory search included a one-page chart that states only that officers are required to search the "entire vehicle" and all "containers." The written policy does not define the term

[5] Eagle does not challenge the validity of the traffic stop, his arrest, or the need to impound and tow the car and conduct an inventory search.

"container." Officer E.G. testified that the panel was an "area of interest" because "[p]eople install stereo equipment in those areas," and stated that he did not search anything that "stood outside of Buckeye's policies" or that was "beyond the scope of how you do searches." However, he did not explicitly testify that the panel area is considered a "container" under Buckeye's standardized policy. His testimony is sufficient to define the standardized policy.[6] *See United States v. Hawkins*, 279 F.3d 83, 86 (1st Cir. 2002) (noting written policy not required and accepting officers' testimony as proof of contours of policy); *United States v. Thompson*, 29 F.3d 62, 65 (2d Cir. 1994) (inventory procedures need not be in writing and testimony of an agency's standard practices is sufficient to establish their existence).

¶16 We need not decide whether the flap is considered a "container" within Buckeye's standardized policy, because there is evidence in the record that the search of the kick panel area

[6] Eagle seems to assert that the State did not produce evidence of Buckeye's written policy for an inventory search because the written policy was not admitted as an exhibit at the suppression hearing. This overlooks the fact that the State attached the policy to its response to Eagle's motion to suppress and Eagle did not object in a reply brief or at the suppression hearing to the court's consideration of the attachment.

was part of the policy.[7] Officer E.G. testified that departmental policy permitted him to look under "loose flaps" and loose parts of the car. During the suppression hearing Eagle did not assert that the kick panel in his car was not the kind of "loose flap" or loose part of the car that the Buckeye policy was designed to inventory. Because Officer E.G.'s testimony established that searching under loose flaps and parts of the car is standardized policy, and that he acted in accordance with that policy, his search of the kick panel area was presumptively in good faith, and thus, reasonable.[8] *See Organ*, 225 Ariz. at 48, ¶ 21, 234 P.3d at 616.

¶17 Our conclusion that the search in this case was reasonable is not to say that simply standardizing an inventory

[7] Some cases have restricted what is a "container" for purposes of inventory searches based on the lack of evidence to establish that such items were containers under standardized police policy. *See United States v. Kennedy*, 427 F.3d 1136, 1144-45 (8th Cir. 2005) (determining government failed to prove compliance with department search procedures in absence of evidence that "searching officer would construe 'boxes, briefcases, and containers' [pursuant to department inventory search policy] to include the area beneath a stereo speaker."); *Commonwealth v. Baptiste*, 841 N.E.2d 734, 740 (Mass. App. Ct. 2006) (assuming for purposes of decision that when officer looked under a cup holder that could be released by pushing a button, after an unsuccessful attempt to release it from the console, officer exceeded scope of valid inventory search where policy allowed search of "all closed but unlocked containers").

[8] Eagle argues that Officer E.G.'s testimony establishes that the Buckeye policy for inventory searches is "limitless" because he testified that the policy does not prevent cutting open car doors. We need not reach this factually distinguishable issue because here the car was not dismantled.

search practice makes a search lawful or immunizes an otherwise unconstitutional search. *See id.* at 49, ¶ 25, 234 P.3d at 617 (citing *One 1965 Econoline*, 109 Ariz. at 435, 511 P.2d at 170 for the proposition that a search must be reasonable under objective standards); *State v. Jewell*, 338 So.2d 633, 640 (La. 1976) ("Unconstitutional searches cannot be constitutionalized by standardizing them as a part of normal police practice."). Buckeye's policy to search under loose flaps is within the purposes underlying an inventory search, so the superior court had a basis for finding that the search was conducted in good faith and was objectively reasonable. In addition, there is nothing about the characteristics of Officer E.G.'s search of this particular loose kick panel that suggests it was a pretext for gathering evidence. The kick panel was not secured to the car and Officer E.G. was able to easily lift the panel without intrusive efforts. The integrity of the car was not compromised by lifting the kick panel, and the car did not have to be disassembled in any way to look behind the kick panel. The area behind the kick panel where the gun was found was easily accessible to anyone inside the vehicle, and it was large enough to store personal items such as the gun.

¶18 Given the ease of accessibility, we cannot say that the superior court erred in determining that personal items may be reasonably stored in this unsecured area in Eagle's car.

Searching the kick panel was in accordance with Buckeye's standardized policy to search under "loose flaps," and there is nothing to suggest that the policy itself or Officer E.G.'s search pursuant to that policy was pretextual. *See Organ*, 225 Ariz. at 49, ¶ 26, 234 P.3d at 617 ("By concluding that the search was a valid inventory search, the trial court implicitly found the officer's testimony credible.").

II. Eagle is entitled to eleven additional days of presentence incarceration credit for a total of 163 days.

¶19 The parties agree that the superior court erred in calculating presentence incarceration credit and that Eagle is entitled to eleven additional days. Thus, we award Eagle eleven additional days of presentence incarceration credit for a total of 163 days. *See* A.R.S. § 13-4037(A) (2010); Ariz. R. Crim. P. 31.17(b); *see also State v. Stevens*, 173 Ariz. 494, 495-96, 844 P.2d 661, 662-63 (App. 1992).

III. The sentencing minute entry is modified to reflect that the offense is repetitive.

¶20 While testifying at trial, Eagle admitted that he was previously convicted of two felonies in Arizona. Under A.R.S. § 13-703(C) (Supp. 2011), "a person shall be sentenced as a category three repetitive offender if the person . . . stands convicted of a felony and has two or more historical prior felony convictions." Eagle's conviction for misconduct involving weapons is a class four felony. The presumptive

sentence for a category three repetitive offender who commits a class four felony is ten years. A.R.S. § 13-703(J). Although the superior court's minute entry indicates that the court imposed a presumptive ten-year sentence, it also states that the crime was "non-repetitive." Thus, we modify the sentencing minute entry to correct the typographical error that states the offense is "non-repetitive" to reflect that the offense is repetitive.

CONCLUSION

¶21 Under the facts of this case, we cannot say that the superior court erred by denying Eagle's motion to suppress. Thus, we affirm Eagle's conviction, but modify his sentence to reflect eleven additional days of presentence incarceration credit. We also modify the second page of the sentencing minute entry to reflect that the offense is repetitive.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
ANN A. SCOTT TIMMER, Presiding Judge

/S/
PATRICIA K. NORRIS, Judge