DIVISION ONE
FILED: 12/22/09
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, | ) | 1 CA-CR 08-0762 |
| | ) | |
| Appellee, | ) | DEPARTMENT B |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication – Rule |
| CARLOS CARDENAS, | ) | 111, Rules of the Arizona |
| | ) | Supreme Court) |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CR-0020071114

The Honorable James B. Sult, Retired Judge
The Honorable Thomas B. Lindberg, Judge

**AFFIRMED**

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Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Jon G. Anderson, Assistant Attorney General
Attorneys for Appellee

Emily L. Danies — Tucson
Attorney for Appellant

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**N O R R I S**, Judge

**¶1** Carlos Cardenas appeals his convictions and sentences for possession of methamphetamine, possession of methamphetamine related paraphernalia, possession of methamphetamine for sale,

possession of marijuana, possession of marijuana related paraphernalia and knowingly displaying a fictitious license plate. Cardenas contends the superior court should have granted his two motions to suppress evidence found when police 1) searched his car following a stop for a fictitious license plate; and 2) subsequently searched his home with a "defective" search warrant. For the following reasons, we conclude the superior court properly denied Cardenas's motions to suppress and affirm his convictions and sentences.

**FACTS AND PROCEDURAL BACKGROUND**[1]

**¶2** Around 8:20 p.m. on July 22, 2007, Officers M. and S. stopped Cardenas while he was driving a pickup truck with fictitious license plates. Officer S. placed Cardenas under arrest, searched his truck and discovered methamphetamine, drug paraphernalia, $880 cash and packaging material consistent with illicit drug sales. The officers impounded Cardenas's truck, then searched it and inventoried recovered property.

[1]"In reviewing a trial court's decision on a motion to suppress, we view the facts in the light most favorable to upholding the trial court's ruling and consider only the evidence presented at the suppression hearing." *State v. Teagle*, 217 Ariz. 17, 20, ¶ 2, 170 P.3d 266, 269 (App. 2007). We review the superior court's factual findings on a motion to suppress evidence for abuse of discretion, but review de novo its ultimate legal determination the search complied with the requirements of the Fourth Amendment. *In re Tiffany O.*, 217 Ariz. 370, 373, ¶ 9, 174 P.3d 282, 285 (App. 2007).

**¶3** Detective P. interviewed Cardenas in the back seat of Officer S.'s patrol car at the scene of the traffic stop around 9:10 p.m. Detective P. left the scene, prepared a search warrant for Cardenas's home and a magistrate signed the warrant around 10:39 p.m. Police then searched Cardenas's home and recovered additional evidence.

**¶4** On December 31, 2007, Cardenas moved to suppress all evidence obtained from his truck and home ("first suppression motion"). Relying on *Arizona v. Gant*, __ U.S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009),[2] Cardenas contended the police impermissibly searched his truck incident to his arrest for fictitious plates. Cardenas also contended police lacked probable cause to search the truck; the inventory search was an after-the-fact effort to justify an illegal search; multiple constitutional violations negated the inevitable discovery doctrine (relying on *State v. Davolt*, 207 Ariz. 191, 84 P.3d 456 (2004)); and the search warrant contained false information and was therefore invalid.

**¶5** The superior court held an evidentiary hearing on February 12, 2008 ("first suppression hearing"), and continued

[2]The Arizona Supreme Court decided *State v. Gant*, 216 Ariz. 1, 162 P.3d 640 (2007), after Cardenas's arrest but before Cardenas's first suppression motion. The United States Supreme Court subsequently affirmed the judgment in *State v. Gant* in *Arizona v. Gant*, __ U.S. at __, 129 S. Ct. at 1714, 1723-24. For simplicity, we will refer only to *Arizona v. Gant* regardless of which *Gant* the parties argued in the superior court.

it to March 25, 2008 ("second suppression hearing"). On March 4, 2008, Officer S. filed a Notice of Lodging with the superior court correcting testimony he had given at the first suppression hearing; he explained those corrections at the second suppression hearing. After the conclusion of the second suppression hearing, the superior court denied the first suppression motion, finding, *inter alia*: 1) Officer S. had validly stopped Cardenas for a fictitious license plate; 2) under *Gant*, the police had impermissibly searched, incident to arrest, Cardenas's truck; 3) impounding Cardenas's truck for a fictitious plate was permissible; and 4) the prosecution had established, by a preponderance of the evidence, the items seized from Cardenas's truck would have inevitably been discovered through an inventory search mandated by departmental policy.

**¶6** On June 13, 2008, Cardenas moved again to suppress evidence obtained at his home ("second suppression motion"), contending police had searched his home before the magistrate had signed the search warrant. At an evidentiary hearing held on July 15, 2008 ("third suppression hearing"), the superior court resolved conflicting testimony and found the police had not searched Cardenas's home until after the magistrate had signed the search warrant. Accordingly, it denied Cardenas's second suppression motion. Cardenas timely appealed. We have

jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21 (2003), 13-4031 and -4033 (2001).

**DISCUSSION**

*I. Search of Cardenas's Truck*

**¶7** Relying on *Gant*, Cardenas first argues officers illegally searched his truck after stopping and arresting him for a fictitious license plate. The superior court found the search improper under *Gant* and on appeal the State concedes this point. The State argues, however, the superior court properly denied the first suppression motion under the inventory search exception to the warrant requirement of the Fourth Amendment. On appeal, Cardenas, through counsel, utterly ignores this exception and only argues the superior court "erred" in denying the first suppression motion under *Gant* -- a ruling the superior court never made. Because, on appeal, Cardenas has failed to develop any other argument the actual ruling made by the superior court on the first suppression motion was erroneous, he has forfeited his right to contest the validity of that ruling in this court.

**¶8** Nevertheless, even if counsel for Cardenas had preserved Cardenas's right to challenge the superior court's decision to deny the first suppression motion based on the

inventory search exception to the warrant requirement, we agree with the State the superior court properly denied the motion.

**¶9** The State may not conduct "unreasonable searches and seizures." U.S. Const. amend. IV. Warrantless searches and seizures are per se unreasonable unless a recognized exception to the warrant requirement exists. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576 (1967). Two such exceptions are applicable here. The first exception is an administrative search of an impounded vehicle which must be routine and not a pretext concealing an investigatory police motive. *South Dakota v. Opperman*, 428 U.S. 364, 369-71, 96 S. Ct. 3092, 3097-98, 49 L. Ed. 2d 1000 (1976). As part of their "community caretaking" function, "police officers may impound vehicles that 'jeopardize public safety and the efficient movement of vehicular traffic.'" *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir. 2005) (quoting *Opperman*, 428 U.S. at 368-69). The community caretaking doctrine also includes impounding a vehicle if it is a target for vandalism or theft, if the driver is unable to operate it legally, or if it is necessary to remove it from an exposed or public location. *Miranda*, 429 F.3d at 864, 865.[3]

[3]In its April 3, 2008 minute entry, the superior court concluded an "impound of the vehicle was permissible" once police decided to place Cardenas under lawful custodial arrest,

**¶10** Here, the officers initially arrested Cardenas for displaying a fictitious license plate, a class two misdemeanor. *See* A.R.S. § 28-2531(B)(1) (2004). After the arrest, a records check by Officer S. of Cardenas's truck's vehicle identification number revealed the vehicle registration had been suspended. Officers placed Cardenas in the back of Officer S.'s patrol car and Officer S. began his search -- albeit impermissible under *Gant* -- of Cardenas's truck. While searching the truck, Officer S. also learned Cardenas's driver's license had been suspended. At the first suppression hearing, Officer S. explained why he impounded Cardenas's truck:

> Once the decision to arrest the defendant was made, the decision to impound the vehicle was also made due to the fact that it was going to be left behind with no valid plates, and to our knowledge no insurance and no driver. So we secure that vehicle so that it doesn't get broken into and it's not left -- it's not drivable by anyone, it doesn't have current registration.

Police department policy specified "whenever a vehicle is impounded, it will be thoroughly searched (including all containers therein) and an inventory of all personal property will be made on the appropriate department form." After impounding Cardenas's truck, police searched it in compliance with departmental policy. Thus, under the community caretaking

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but did not discuss the underlying community caretaker doctrine permitting seizure of the truck.

doctrine, the police permissibly impounded Cardenas's truck and searched and inventoried its contents.

**¶11** The second exception applicable here is the inevitable discovery doctrine, which "provides that illegally obtained evidence is admissible '[i]f the prosecution can establish by a preponderance of the evidence that the illegally seized items or information would have inevitably been seized by lawful means.'" *State v. Rojers*, 216 Ariz. 555, 559, ¶ 18, 169 P.3d 651, 655 (App. 2007) (quoting *State v. Jones*, 185 Ariz. 471, 481, 917 P.2d 200, 210 (1996)). Had police not searched Cardenas's truck immediately after arresting him, they inevitably would have discovered the evidence during the inventory search discussed above. Thus, the superior court properly admitted the evidence seized from Cardenas's truck under the inevitable discovery doctrine.

*II. Search of Cardenas's Home*

**¶12** Cardenas next argues the search warrant was defective because Detective P.'s attached affidavit incorrectly stated a confidential informant saw drugs in Cardenas's home. Although Detective P.'s affidavit contained an incorrect statement, we conclude the warrant was not defective.

**¶13** The Fourth Amendment requires suppression of evidence if a defendant proves a law enforcement officer knowingly and intentionally, or with reckless disregard for the truth made a

false statement to obtain a warrant *and* the false statement was necessary to a finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667 (1978). At the first and third suppression hearings, Detective P. conceded his informants had never seen any drugs in Cardenas's home, but testified he did not knowingly, intentionally or with reckless disregard for the truth make any false statement in the affidavit. We see nothing in the record, nor does Cardenas argue anything to suggest otherwise.

**¶14** Moreover, assuming arguendo Cardenas proved the "reckless disregard" prong, we agree with the State the warrant supplied ample probable cause to search Cardenas's home, even after excising the incorrect information. The warrant described with particularity Cardenas's modus operandi to acquire drugs, which included trips to Phoenix with a return stop in Granville, and that Cardenas had "re upped" with drugs on July 18, four days before the traffic stop. A "confidential reliable informant" provided this information and a "concerned citizen" independently corroborated it. The warrant noted the items seized during the traffic stop -- cash over $500 and packaging material -- suggested drug sales, as did Cardenas's statements to Detective P. at the site of the traffic stop which included, *inter alia*, that he had a methamphetamine "grinder" at his home.

We therefore conclude the police executed a valid warrant supported by probable cause.

**¶15** Finally, Cardenas argues police searched his house before the magistrate signed the warrant. The superior court rejected this argument, and its decision is supported by substantial evidence. The superior court did not find credible Cardenas's testimony he had overhead officers discuss items they had found in his house before the magistrate issued the warrant. Further, the record supports the superior court's determination officers did not enter Cardenas's home until after the magistrate had signed the warrant.

**CONCLUSION**

**¶16** For the foregoing reasons, we affirm Cardenas's convictions and sentences.

/s/
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PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
_____
SHELDON H. WEISBERG, Judge

/s/
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MARGARET H. DOWNIE, Judge