IN THE COURT OF APPEALS OF IOWA

No. 1-755 / 10-2100
Filed November 23, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DOYLE WAYNE COWAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Wayne County, Gary Kimes, Judge.

Doyle Cowan appeals from his convictions for possession of the precursor anhydrous ammonia with the intent to manufacture methamphetamine and possession of methamphetamine with the intent to deliver. **AFFIRMED AND REMANDED.**

Jeremy B.A. Feitelson of Feitelson Law, L.L.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, and Alan M. Wilson, County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

TABOR, J.

Doyle Cowan appeals from his convictions for possession of the precursor anhydrous ammonia with the intent to manufacture methamphetamine and possession of methamphetamine with the intent to deliver. Cowan challenges the district court's denial of his motion to suppress and the sufficiency of the evidence to prove the precursor count.

Because the search of Cowan's car was reasonable under the warrant exception for impound and inventory, we affirm the suppression ruling. We also find substantial evidence in the trial record supporting his conviction for possession of anhydrous ammonia with the intent to manufacture methamphetamine. Finally, we remand the case for an evidentiary hearing on the alleged error in the judgment entry and for a determination whether Cowan's sentence was illegal.

I. Background Facts and Proceedings

In response to reported anhydrous ammonia thefts, Wayne County Deputy Sheriff Lance Smith set up surveillance at the Fowler Elevator just south of Seymour. In the early morning hours of October 17, 2009, the deputy heard someone walk up to the tank and "start messing with the hoses." The suspect carried a red air tank, converted to hold anhydrous ammonia. Deputy Smith called Seymour Officer Rich Carter for backup. The deputy then turned his flashlight on the suspect and commanded: "Stop, Sheriff's Department." The suspect tried to run, but "immediately went to the ground" when the deputy deployed his taser.

Deputy Smith placed the suspect in handcuffs and identified him as Doyle Cowan. Officer Carter arrived at the time of the arrest and ushered Cowan into his squad car. The officers also discovered that Cowan had an active arrest warrant from Appanoose County. Deputy Smith recovered the red tank Cowan had been carrying near the elevator. The tank had a strong odor and bluing around the valve indicating a corrosive reaction from anhydrous ammonia.

Cowan first told the officers that he had been dropped off at the elevator, but eventually admitted that he drove himself. He showed the officers where he parked his car—about one mile away from the Fowler tanks, off a gravel road, blocking access to hay bales in a farm field. The car's location led the officers to believe that Cowan was trying to conceal it from sight.

Officer Carter knew that the rural property was owned by Seymour resident Duane Rupalo. Because of the early morning hour, the officers did not try to contact Rupalo. Instead, they informed Cowan that they planned to impound his car. Officer Carter explained at the suppression hearing:

> He was being arrested and he didn't want his vehicle left there I didn't think. He told us where to go find it and I don't know what he expected us to do with it. We told him we was going to tow it. He was fine with that. Didn't make any objections in either direction. I mean, he drove us directly to it.

The officers inventoried the contents of the vehicle before it was towed. They found a box inside a jacket in the back seat. The box contained a ten-gram scale, two Ziploc baggies filled with a white powdery substance that laboratory testing proved to be 3.3 grams of methamphetamine, and empty baggies.

On October 27, 2009, the State filed a two-count trial information charging the defendant with possession of the precursor anhydrous ammonia, in violation of Iowa Code section 124.401(4)(d) (2009), and possession of methamphetamine, in violation of section 124.401(1)(c)(7).[1] On January 20, 2010, the State filed a supplemental trial information accusing Cowan of being an habitual offender under section 902.8. The county attorney withdrew that allegation before Cowan's sentencing hearing.

Cowan filed a motion to suppress on March 9, 2010. The motion alleged the officers' search of his car—based on the impound and inventory exception to the warrant requirement—violated the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Iowa Constitution. On July 7, 2010, the State filed a notice of additional minutes, indicating Officer Carter would testify that law enforcement searched Cowan's vehicle "incident to Cowan's arrest on both the Appanoose County warrant and as a result of the current incident, and as a result of the vehicle being impounded." This filing prompted the defense to file a second motion to suppress, contending that the search of his care was not justified as incident to his arrest under *Arizona v. Gant,* 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Deputy Smith and Officer Carter testified at a suppression hearing on August 3, 2010. The district court denied the suppression motions from the bench at the end of the hearing and issued a hand-written calendar note incorporating that oral ruling.

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[1] The State later amended the trial information to reflect that the correct subsection was (c)(6) and not (c)(7).

Cowan waived his right to a jury trial and the State presented its case to the district court on October 6, 2010. The court issued a calendar entry on that date, finding Cowan guilty on both counts. The court entered judgment and imposed sentence on December 22, 2010. Following the State's recommendation, the court ordered Cowan's sentences to run consecutively. Cowan filed a timely notice of appeal.

II. Scope and Standards of Review

We examine the suppression ruling de novo because the search of Cowan's car implicates the Fourth Amendment to the federal constitution and Article I, Section 8 of the state constitution. *State v. Allensworth*, 748 N.W.2d 789, 792 (Iowa 2008).

We review sufficiency-of-the-evidence claims for errors at law. *State v. Petitothory*, 702 N.W.2d 854, 856 (Iowa 2005). In jury-waived cases, the court's findings of fact function as a special verdict. *State v. Parkey*, 471 N.W.2d 896, 897 (Iowa Ct. App. 1991). Our court is constrained by the district court's finding of guilt unless we find a lack of substantial evidence in the record to support such a finding. *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997). In deciding if substantial evidence exists, we view the proof in the light most favorable to the State. *Id.* Substantial evidence must be able to convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In our review, we consider all of the record evidence, not just that supporting the court's finding of guilt. *Id.* In assessing witness credibility, a fact finder is guided by its common

sense and prior experience. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998).

III. Analysis

A. Did the State establish an exception to the warrant requirement?

The district court overruled Cowan's motions to suppress, finding that a "standard inventory search was conducted prior to towing for the reasons set forth in this record." On appeal, Cowan argues the search of his car was not justified under either the impound-inventory exception or the search-incident-to-arrest exception to the warrant requirement. The State counters that the officers conducted a valid impound-and-inventory search. The State does not advance an argument on appeal that the officers were entitled to search Cowan's car incident to his arrest. Instead, the State presents an alternative argument the search was reasonable under the automobile exception, citing *Allensworth*.[2]

Both the Fourth Amendment and Article I, Section 8 protect against unreasonable searches and seizures. *See State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005). A warrantless search—like that of Cowan's car—is per se unreasonable unless it falls within a recognized exception. *See id*. at 37. A search conducted in compliance with a law enforcement agency's impound-and-inventory policy is a recognized exception to the warrant requirement. *Colorado*

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[2] The State does not point out in the record where the county attorney argued this exception to the warrant requirement to the district court. *See Devoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (holding neither party may normally assert a claim on appeal they could have, but failed to, raise at trial). But because we opt to decide the suppression issue on the impound-inventory ground, we do not reach the question whether the State preserved the automobile-exception argument.

v. Bertine, 479 U.S. 367, 371, 107 S. Ct. 738, 741, 93 L. Ed. 2d 739, 745 (1987); *State Huisman*, 544 N.W.2d 433, 436 (Iowa 1996). This exception exists to address the practical problems facing officers who arrest the driver of a vehicle and then assume responsibility for the safekeeping of the vehicle and its contents; in such circumstances, officers act as caretakers rather than criminal investigators. *State v. Jackson*, 542 N.W.2d 842, 845 (Iowa 1996); *see South Dakota v. Opperman*, 428 U.S. 364, 368, 96 S. Ct. 3092, 3097, 49 L. Ed. 2d 1000, 1005 (1976). In deciding the validity of an inventory search, we must examine whether the officers were abiding by reasonable standardized criteria from their department. *Huisman*, 544 N.W.2d at 437. A standardized policy "need not be exclusively written." *Id.*

"The legality of an inventory search depends on two overlapping inquiries: the validity of the impoundment and the scope of the inventory." *Id.* at 436. If either is unreasonable, the search is illegal and any evidence discovered must be suppressed. *Jackson*, 542 N.W.2d at 845.

Both Deputy Smith and Officer Carter testified that their departments had established criteria governing impound-and-inventory searches. But the State did not offer written versions of those policies into evidence. While we recognize that such policies do not have to be exclusively written, our review in cases such as this would be aided by reference to the language of the standardized criteria. Nevertheless, Cowan does not contest the existence of standardized criteria in the Wayne County Sheriff's Office or the Seymour Police Department.

Cowan challenges only the validity of the officers' decision to impound his car under the policies they articulated at the suppression hearing. An officer's decision to impound is reasonable if it is made "according to standardized criteria and on the basis of something other than suspicion of evidence of criminal activity." *Huisman*, 544 N.W.2d at 437 (citing *Bertine*, 479 U.S. at 375, 107 S. Ct. at 743, 93 L. Ed. 2d at 748).

Deputy Smith testified the policy of the Wayne County Sheriff's Office provided that when the driver of a vehicle was arrested, the vehicle would be towed and its contents inventoried. In response to cross-examination questions, the deputy was unsure if the policy provided for vehicles to be towed whenever they were parked on private property not belonging to the driver. But he testified that doing so was his past practice. Like the situation in *Huisman*, this police custom limited opportunities for the exercise of police discretion regarding impoundment of vehicles, and thus did not increase the risk of arbitrary searches of an arrested person's automobile. *See id.* at 438.

Officer Carter described the Seymour police impound policy as follows:

> If the person is arrested and the vehicle is left on somebody's property or in the road or whatever, it gets towed. That is just policy, I mean. Unless there is someone there to take control of the vehicle and take it to their house or whatever, we always tow the vehicle.

Accordingly, even if the deputy did not strictly follow the Wayne County impoundment policy, the Seymour police policy dictated the same result.

Cowan argues on appeal that the impoundment of his car was not reasonable because his arrest was "independent and unrelated to his vehicle or

the location of his vehicle." This argument may be a valid attack on a search incident to arrest, but does not apply to the impound-and-inventory exception. An impoundment decision can be valid even if the reason for the driver's arrest lacks any connection to the vehicle. In fact, peace officers are not supposed to impound a vehicle and conduct an inventory search as a means to look for evidence of a crime. *Id.* at 439 (explaining that "an impound is unconstitutional if it is done to investigate suspected criminal activity").

Contrary to Cowan's contentions, we conclude his car was parked in a location warranting impoundment under the peace officers' policies. He left the car on private property in a spot that could have been a nuisance to the property owner in accessing hay bales and moving equipment into a farm field. *See id.* at 440 (upholding the administrative reason for impoundment where the defendant's "vehicle could have become a nuisance" if left in the motel parking lot). The impoundment also protected Cowan's car from the possibility of theft or vandalism at the secluded location. *See United States v. Ramos-Morales*, 981 F.2d 625, 626 (1st Cir. 1992) (noting many precedents finding police impoundment to protect a car from theft or vandalism to be reasonable).

On appeal, Cowan makes much of the officers' failure to check with the property owner to see if Cowan had permission to park his car at that location. Significantly, Cowan did not tell the officers he had permission to park there and did not object to his car being towed. Moreover, the officers could reasonably infer Cowan did not have permission to leave his car there, given the remote venue and the late-night timing of his mission to steal anhydrous ammonia from

the Fowler elevator. Finally, it is not a constitutional requirement that police pursue a less intrusive alternative to impoundment. *Huisman*, 544 N.W.2d at 439.

The officers' impoundment of Cowan's car followed the standardized criteria established by their departments. The inventory search they conducted before the tow truck arrived was reasonable in its scope. Accordingly, the district court properly denied the motion to suppress the methamphetamine found in the back seat.

B. Did the State present substantial evidence showing that Cowan possessed anhydrous ammonia with the intent to manufacture methamphetamine?

In his second assignment of error, Cowan challenges the sufficiency of the evidence to prove he violated Iowa Code section 124.401(4)(d). That offense is described in the code as follows:

> A person who possesses any product containing any of the following commits a class "D" felony, if the person possesses with the intent that the product be used to manufacture any controlled substance: . . . Anhydrous ammonia.

Iowa Code § 124.401(4)(d).

Cowan contends the State's witnesses fell short of showing, first that he possessed anhydrous ammonia, and second that he did so with the intent to manufacture methamphetamine. On the possession element, Cowan does not dispute Deputy Smith saw him in actual possession of a portable air tank converted to hold anhydrous ammonia. Cowan instead claims the State did not prove the portable tank actually held anhydrous ammonia on the night he was

arrested. The defense argues the State's evidence that the portable tank smelled of ammonia and its valve had a blue ring showing the presence of anhydrous ammonia amounted to only speculation "that at some point in time there may have been some form of ammonia, whether household or anhydrous, and/or a corrosive agent in Mr. Cowan's red air tank."

We disagree that the evidence was too speculative to show Cowan's possession of anhydrous ammonia. Deputy Smith saw Cowan grab the hose attached to the larger anhydrous ammonia tank at the elevator facility and try to fill the portable tank. Officers recovered the portable tank after Cowan fled the scene. Because of the highly volatile nature of anhydrous ammonia, officers from the division of narcotics enforcement do not test tanks for the presence of the precursor. But Deputy Smith and Officer Carter both testified to the distinctive and strong odor of anhydrous ammonia coming from the portable tank. Narcotics Agent John Hurley testified photographs of the portable tank showed a "blue valve" that indicated the presence of anhydrous ammonia. This testimony sufficed to show Cowan's possession of anhydrous ammonia.[3]

In finding sufficient evidence that Cowan possessed this precursor, we follow the lead of courts from other jurisdictions that have relied on officers' testimony they smelled the distinctive odor of anhydrous ammonia and noted a blue/green discoloration on tank fittings to uphold convictions for possession of anhydrous ammonia. *See, e.g., Boggs v. State*, 928 N.E.2d 855, 866 (Ind. Ct. App. 2010); *Varble v. Commonwealth,* 125 S.W.3d 246, 254 (Ky. 2004); *see also*

[3] We note Cowan does not argue section 124.401(4)(d) requires proof that a defendant possessed any certain amount of anhydrous ammonia.

United States v. Morrison, 207 F.3d 962, 966 (7th Cir. 2000) (finding evidence of anhydrous ammonia odor in methamphetamine manufacturing prosecution was "especially probative because its scent is easily recognizable (and in fact is often deadly if inhaled)").

On the element of intent, Cowan argues that "there was no evidence presented at trial to indicate [he] had any intent to manufacture a controlled substance." Of course, since the legislature amended Iowa Code section 124.401(4) in 2004, the State can prove a defendant's guilt by establishing she possessed a precursor "with the intent that someone, *not necessarily herself,* would manufacture methamphetamine." *See State v. Milom*, 744 N.W.2d 117, 122 (Iowa Ct. App. 2007).

The State offered Agent Hurley's testimony that the collection of items seized from the defendant's car—including two types of methamphetamine, scales, and extra baggies—suggested Cowan was "the type of person that would be dealing narcotics." The agent also extrapolated from the color and consistency of the methamphetamine found in one of the baggies in Cowan's car that the substance had been produced by the lithium reduction method, which requires the use of anhydrous ammonia. Cowan's possession of the portable tank retrofitted to hold anhydrous ammonia and reeking of the substance must be viewed in light of the other evidence pointing to his involvement in the drug trade.

In addition, Cowan's criminal intent can be inferred from testimony that he was sneaking around the Fowler elevator in the middle of the night, carrying a converted air tank that smelled of strongly of anhydrous ammonia, grabbed a

hose connected to a storage tank at the facility, and ran when confronted by Officer Smith. *See State v. Heuser*, 661 N.W.2d 157, 166 (Iowa 2003) (finding Heuser's conduct aimed at avoiding suspicion suggested his intent to use the precursors to manufacture methamphetamine). The district court was entitled to conclude from the State's evidence Cowan possessed anhydrous ammonia with the intent that it be used to manufacture methamphetamine. We affirm on the substantial evidence question.

C. Did the judgment entry contain a clerical error? And did Cowan receive an illegally lenient sentence on the possession of methamphetamine count?

As a final matter, we address assertions in the State's brief that the December 22, 2010 written judgment entry contains a "clerical error" in its citation to Iowa Code section 124.401(5), a class "D" felony, and that Cowan's sentence "appears to be illegal." The State points out count II of the trial information charged the defendant with a violation Iowa Code section 124.401(1)(c)(7), which the county attorney amended before trial to section 124.401(1)(c)(6).[4] The county attorney stated:

> I have one minor housekeeping detail. On the Trial Information in Count II, the body of that count alleges the Defendant unlawfully possessed five grams or less of methamphetamine with the intent to manufacture or deliver. The portion above that does not contain the specific language with the intent to manufacture or deliver. That charge is a class D rather than class C. So my housekeeping would simply show in the bold print of Count II that the possession

[4] We note the trial information contained in the trial court papers includes in the margin, the following handwritten notation: "Intent to mfg or deliver D fel 124.401(c)(6)." The copy of the trial information included in the appendix lacks that notation, but has the "C" in count II crossed out.

> is with the intent to manufacture or deliver which matches up with the actual language describing the date and time the events occurred.

Upon the assumption that the offense was a class "D" felony, the defendant did not object to the amendment.

At the close of the trial, the defense moved for judgment of acquittal, arguing that on count II, Cowan was "charged under the wrong subsection of the Iowa Code." Defense counsel argued:

> The county attorney's office has filed a charge against 124.401(c)(7) which is the crime of possession—of possessing amphetamines, not methamphetamine, which all of the testimony was in regards to here today. Possession of methamphetamine is 124.401(c)(6).[5] And based on the fact that they have charged the Defendant under the wrong section of the Iowa Code, we believe that—and the fact that all of the evidence today or none of the evidence today conforms with the charge of amphetamines, the Defendant should be acquitted of that charge as well, your Honor.

The county attorney responded that Cowan was charged with "unlawfully possessing five grams or less of methamphetamine with the intent to manufacture or deliver." The district court overruled the defense motion.

In a handwritten calendar entry on October 6, 2010, the district court found Cowan guilty of "Count I and Count II as amended (both class D felonies)." The calendar entry did not include any code citations. At the December 22, 2010 sentencing hearing, the parties and the court continued to assume both offenses were class "D" felonies, but again did not cite to any particular code sections on the record. The court imposed consecutive sentences on the two counts.

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[5] We presume defense counsel was referring to sections 124.401(1)(c)(6) and 124.401(1)(c)(7).

In the judgment entry file stamped on December 22, 2010, the court recited that Cowan was convicted of "Possession of the Schedule I Controlled Substance, Methamphetamine, Third Offense in violation of Iowa Code Sections 124.401(5), a Class 'D' felony." We are unable to find any previous reference to section 124.401(5) in the proceedings. We also do not see any record of district court proceedings where the State proved or Cowan admitted having two previous methamphetamine convictions.

While flagging the "clerical error" in the judgment entry, the State does not ask us to take any action to correct the situation. The State also contends Cowan's indeterminate five-year sentence is apparently illegal—given that violation of the correct code section is a class "C" felony. Without any citation to authority, the State goes on to assert "this court need not address the issue in this appeal because any illegality benefits Cowan and should be addressed in the first instance in the district court."

For his part, Cowan did not file a reply brief to address the question of the erroneous judgment entry or the allegedly illegal sentence. In his appellant's brief, Cowan claims to be appealing his conviction under "Iowa Code section 124.401(5)." He also erroneously asserts the trial information charged him under that code section.

Despite the absence of a request by the parties to take action, we do not see ignoring the apparent irregularities in the judgment and sentence to be a viable option. *See State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998) ("[W]e

cannot permit a void sentence to stand even when a party does not raise the issue.").

We turn first to the alleged clerical error in the judgment entry. Generally, an error in the judgment entry stems from a discrepancy between the oral pronouncement of sentence and the written judgment and commitment. *See, e.g.*, *State v. Hess*, 533 N.W.2d 525, 528 (Iowa 1995); *State v. Suchanek*, 326 N.W.2d 263, 265 (Iowa 1982); *State v. Harbour*, 240 Iowa 705, 709, 37 N.W.2d 290, 292 (1949). Such a discrepancy is not obvious in this case because the oral pronouncement of sentence did not refer to the Iowa Code. The court stated only: "[A]s to each count, Count I and II, I am going to sentence the Defendant to an indeterminate term not to exceed five years in the men's prison system of the State of Iowa." Any discrepancy can only be detected by tracing the counts back to the October 6, 2010 calendar entry finding the defendant guilty—but which also did not include code citations—and to the original and amended trial information.

Under our rules, a court may correct clerical mistakes in judgments and errors in the record arising from oversight or omission at any time. Iowa R. Crim. P. 2.23(3)(*g*). We consider an error to be clerical in nature if it is "not the product of judicial reasoning and determination." *Hess*, 533 N.W.2d at 527. But when judicial intent is unclear, the better course is to remand for an evidentiary hearing for the district court to determine the proper method of correcting a defective written sentence. *Id*. We find the judicial intent in this case to be unclear. While the record before us does not support entry of judgment on section 124.401(5),

we opt to remand for an evidentiary hearing to allow the parties and the district court the opportunity to address the apparent discrepancy between the amended trial information and the judgment entry.

Our determination of what to do about the alleged clerical error is complicated in this case by the related concern that Cowan was actually convicted of a class "C" felony, but sentenced for a class "D" felony. From the beginning of the trial, the parties and the district court all wrongly assumed that possession of less than five grams of methamphetamine with intent to manufacture or deliver, a violation of section 124.401(1)(c)(6), was a class "D" felony. Section 124.401(1)(c) plainly states the offense is a class "C" felony. The collective misunderstanding does not excuse an illegally lenient sentence. "[W]hen a sentencing court departs—upward or downward—from the legislatively authorized sentence for a given offense, the pronounced sentence is a nullity subject to correction, on direct appeal or later." *State v. Draper,* 457 N.W.2d 600, 605 (Iowa 1990). If, as we suspect, the district court should have entered judgment under section 124.401(1)(c)(6), the court must resentence Cowan as required by the applicable statutes. We do not retain jurisdiction.

AFFIRMED AND CASE REMANDED.