REL: March 12, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-19-0471

Jerold Jerone Lawson

v.

State of Alabama

Appeal from Montgomery Circuit Court
(CC-19-844)

McCOOL, Judge.

Jerold Jerone Lawson appeals his guilty-plea conviction for unlawful possession of a controlled substance. See § 13A-12-212, Ala. Code 1975.

Pursuant to the terms of the plea agreement, the circuit court sentenced Lawson to 60 months' imprisonment and split the sentence, ordering Lawson to serve 15 months in a community-corrections program, to be followed by 6 months of unsupervised probation.

Facts and Procedural History

On August 2, 2019, a Montgomery County grand jury indicted Lawson for unlawful possession of a controlled substance after cocaine was discovered during a warrantless search of Lawson's vehicle following a traffic stop. Lawson subsequently filed a motion to suppress the cocaine as the fruit of an illegal search. The circuit court held a hearing on Lawson's motion, and the evidence presented at the hearing tended to establish the following facts.

In February 2019, Deputy N. Knapp[1] of the Montgomery County Sheriff's Office initiated a traffic stop of Lawson's vehicle after observing that the vehicle "appeared to run [a] red light" and to be "speeding at approximately 70 miles per hour in a 55 mile per hour zone." (R. 5.) Dep.

[1]Dep. Knapp's first name does not appear in the record.

Knapp testified that, upon approaching Lawson's vehicle, she "noticed a [digital] scale and some baggies in the back" and that, when she "made contact with [Lawson], he seemed out of it." (R. 5.) Following those observations, Dep. Knapp "[ran] a warrant check on [Lawson]," which "showed positive that [Lawson] had a failure to appear for a traffic violation." (R. 6.) Dep. Knapp then arrested Lawson, who was the only person in the vehicle. Dep. Knapp testified that, when a person is arrested following a traffic stop and he or she is the only person in the vehicle, the policy of the Montgomery County Sheriff's Office is to "inventory everything inside of the vehicle." (R. 7.) According to Dep. Knapp, such inventory searches exist "so the Montgomery County Sheriff's Office is not held liable for any damages or lost items" and consist of a "full inventory of the vehicle from front to back, ... including trunks, passenger spaces, anywhere within a driver's reach." (R. 7.) Thus, after arresting Lawson, Dep. Knapp searched Lawson's vehicle to inventory its contents, and Dep. Knapp testified that, "[w]hile searching the front cabin portion of [Lawson's] vehicle, [she] checked the sunglass visor and found

a clear, white, plastic baggy containing suspected narcotics" (R. 7) -- specifically, a "powdery substance believed to be crack cocaine." (R. 10.)

Regarding the Montgomery County Sheriff's Office's policy for conducting inventory searches, Dep. Knapp testified that the policy is located "in Chapter 7 of our policies and procedures of the Montgomery County Sheriff's Office." (R. 15.) However, the State did not present the written policy at the hearing but, rather, elicited testimony from Dep. Knapp regarding the policy. According to Dep. Knapp, once an inventory search is completed, the inventoried items are listed on a "tow form" that "goes both to the driver and then also to the tow truck company and then also to the sheriff's office." (R. 7.) At the hearing, Dep. Knapp identified a "property evidence receipt" (R. 7), which was admitted into evidence, that she had created following the search of Lawson's vehicle. That exhibit is not included in the record on appeal, but, according to Dep. Knapp, the "property evidence receipt" reflected "the items that [she] located in the vehicle, ... including the sandwich baggies, ... nitrile-exam gloves, [a] digital scale, and the suspect narcotics." (R. 9.) In addition, Dep. Knapp testified that she "took pictures of the suspect narcotics as

well as the location of the scale in the back passenger seat with the gloves next to it and the sandwich baggies that were in the back passenger pouch." (R. 10.) On cross-examination, Dep. Knapp testified that she also discovered other items during the search of Lawson's vehicle, including "articles of clothing" (R. 15) and "a lot of change[, i.e., currency]." (R. 15-16.) It is unclear from Dep. Knapp's testimony whether those items were listed on the "property evidence receipt," but Dep. Knapp did testify that those items were listed on the "tow form" (R. 16), which was not admitted into evidence because Dep. Knapp did not have it with her at the suppression hearing.

Following the hearing, the circuit court denied Lawson's motion to suppress the cocaine found during the search of his vehicle. On January 8, 2020, Lawson pleaded guilty to unlawful possession of a controlled substance. A transcript of the guilty-plea hearing is not included in the record on appeal, but the circuit court's sentencing order indicates that Lawson reserved the "issue of suppression" (C. 38), and Lawson preserved that issue by virtue of his arguments at the suppression hearing. Lawson filed a timely notice of appeal.

Analysis

The sole issue in this case is whether the circuit court erred by denying Lawson's motion to suppress the cocaine found during the warrantless search of his vehicle.

> "In State v. Landrum, 18 So. 3d 424 (Ala. Crim. App. 2009), this Court explained:
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> > "'"This Court reviews de novo a circuit court's decision on a motion to suppress evidence when the facts are not in dispute. See State v. Hill, 690 So. 2d 1201, 1203 (Ala. 1996); State v. Otwell, 733 So. 2d 950, 952 (Ala. Crim. App. 1999)." State v. Skaggs, 903 So. 2d 180, 181 (Ala. Crim. App. 2004). In State v. Hill, 690 So. 2d 1201 (Ala. 1996), the trial court granted a motion to suppress following a hearing at which it heard only the testimony of one police officer. Regarding the applicable standard of review, the Alabama Supreme Court stated, in pertinent part, as follows:
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> > > "'"'Where the evidence before the trial court was undisputed the ore tenus rule is inapplicable, and the Supreme Court will sit in judgment on the evidence de

> novo, indulging no presumption in favor of the trial court's application of the law to those facts.' Stiles v. Brown, 380 So. 2d 792, 794 (Ala. 1980) (citations omitted). ..."

" 'State v. Hill, 690 So. 2d at 1203-04.'

> "18 So. 3d at 426. Because the evidence presented at the suppression hearing is not in dispute, the only issue before this Court is whether the circuit court correctly applied the law to the facts presented at the suppression hearing, and we afford no presumption in favor of the circuit court's ruling."

Benson v. State, 160 So. 3d 55, 57-58 (Ala. Crim. App. 2014).

" 'The Fourth Amendment to the Constitution of the United States bans all unreasonable searches. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).' " Grantham v. City of Tuscaloosa, 111 So. 3d 174, 178 (Ala. Crim. App. 2012) (quoting Ex parte Tucker, 667 So. 2d 1339, 1343 (Ala. 1995)).

> " ' " 'This court has long held that warrantless searches are per se unreasonable, unless they fall within one of the recognized exceptions to the warrant requirement. See, e.g., Chevere v. State, 607 So. 2d 361, 368 (Ala. Cr. App. 1992). These exceptions

> are: (1) plain view; (2) consent; (3) incident to a lawful arrest; (4) hot pursuit or emergency; (5) probable cause coupled with exigent circumstances; (6) stop and frisk situations; and (7) inventory searches. Ex parte Hilley, 484 So. 2d 485, 488 (Ala. 1985); Chevere, supra, 607 So. 2d at 368.' "
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> " 'State v. Mitchell, 722 So. 2d 814 (Ala. Cr. App. 1998), quoting Rokitski v. State, 715 So. 2d 859 (Ala. Cr. App. 1997).'
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> "State v. Otwell, 733 So. 2d 950, 952 (Ala. Crim. App. 1999). Another recognized exception to the warrant requirement is the 'automobile exception,' which allows law enforcement to search an automobile based on probable cause alone. Harris v. State, 948 So. 2d 583 (Ala. Crim. App. 2006)."

Hinkle v. State, 86 So. 3d 441, 451 (Ala. Crim. App. 2011).

Relying on Boyd v. State, 542 So. 2d 1276 (Ala. 1989), and Keith v. State, 231 So. 3d 363 (Ala. Crim. App. 2017), Lawson argues that the circuit court erred by denying his motion to suppress because, he says, the State's evidence "failed to establish that the search of Lawson's vehicle was a constitutional inventory search." (Lawson's brief, at 26.) Specifically, Lawson argues that "[t]he State's evidence fails to provide this Court with the necessary record to adequately review law

enforcement's policy or that the policy was followed" and that, "in fact, there is evidence that the limited policy information provided was not followed by Dep. Knapp."[2] (Lawson's brief, at 27.)

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[2]In Boyd, the Alabama Supreme Court held that, to prove that a warrantless search is constitutional under the "inventory exception" to the warrant requirement, "the record must sufficiently reflect what that policy is, describe the policy in such a way that its reasonableness can be reviewed, and present adequate evidence of what the employed criteria were," Boyd, 542 So. 2d at 1283; "a police officer's conclusory testimony that the inventory was done in compliance with departmental regulations" is not sufficient to satisfy the Fourth Amendment. Id. at 1282.

In Keith, this Court relied on Boyd to hold that a warrantless search purportedly conducted under the "inventory exception" was unconstitutional. In support of that holding, the Court stated:

> "The record in the present case contains the same defects that rendered the search in Boyd unconstitutional. Although the State elicited testimony from Officer Elmore regarding the police department's inventory-search policy, that testimony was limited. Officer Elmore testified that it was the department's policy to inventory a vehicle before it is towed '[t]o make sure that everything that [the arrestee] says is in the vehicle is still in there.' Elmore testified that he completed the inventory and created an inventory list; however, he did not have the list with him at the hearing and it is not contained in the record before this Court. The State did not elicit any testimony regarding where a copy of the department's policy could be found, the particular criteria for conducting an inventory search contained in the policy, and whether Officer Elmore followed that criteria when he

The State disputes Lawson's claim that it failed to prove that the warrantless search of Lawson's vehicle was constitutional under the "inventory exception" to the warrant requirement but argues that, even if Lawson is correct, the search was nevertheless constitutional under the "automobile exception." Lawson did not file a reply brief and thus has not provided this Court with a response to the State's argument that the "automobile exception" provides a constitutional basis for the denial of his motion to suppress, even if the "inventory exception" does not.

To dispose of this appeal, we need not determine whether the warrantless search of Lawson's vehicle was constitutional under the "inventory exception" to the warrant requirement because we agree with the State's argument that the search was constitutional under the "automobile exception." Although the State did not raise the "automobile

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> conducted the search of Keith's vehicle. Similar to Boyd, the lack of evidence presented by the State at the suppression hearing prevents us from being able to review the reasonableness of the officer's search. Accordingly, we hold that the purported inventory search of Keith's vehicle violated the Fourth Amendment and cannot be upheld."

Keith, 231 So. 3d at 366.

exception" in the circuit court and although there is no indication that the circuit court relied upon that exception in denying Lawson's motion to suppress, it is well settled that " 'this Court will affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court.' " A.G. v. State, 989 So. 2d 1167, 1180 (Ala. Crim. App. 2007) (quoting Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003)). Indeed, in cases addressing the denial of a motion to suppress grounded upon an allegedly illegal search, federal circuit courts and state appellate courts consistently acknowledge that they may affirm a trial court's judgment on any valid legal ground supported by the record,[3] and they regularly apply that principle to affirm

[3]See United States v. Moran, 944 F.3d 1 (1st Cir. 2019); United States v. Pabon, 871 F.3d 164 (2d Cir. 2017); United States v. Green, 897 F.3d 173 (3d Cir. 2018); United States v. Brown, 701 F.3d 120 (4th Cir. 2012); United States v. Conlan, 786 F.3d 380 (5th Cir. 2015); United States v. Gilbert, 952 F.3d 759 (6th Cir. 2020); United States v. Reaves, 796 F.3d 738 (7th Cir. 2015); United States v. Perez-Trevino, 891 F.3d 359 (8th Cir. 2018); United States v. Edwards, 632 F.3d 633 (10th Cir. 2001); United States v. Folk, 754 F.3d 905 (11th Cir. 2014); People v. Compos, [Ms. 16CA2086, December 5, 2019] ___ P.3d ___ (Colo. App. 2019); State v. Malloy, 441 P.3d 756 (Utah Ct. App. 2019); City of Beatrice v. Meints,

the judgment on a legal ground different from that argued in the lower court or relied upon by the lower court. See United States v. Gilbert, 952 F.3d 759, 762-63 (6th Cir. 2020); United States v. Reaves, 796 F.3d 738, 741-42 (7th Cir. 2015); United States v. Perez-Trevino, 891 F.3d 359, 365 (8th Cir. 2018); United States v. Folk, 754 F.3d 905, 911 (11th Cir. 2014); People v. Compos, [Ms. 16CA2086, December 5, 2019] ___ P.3d ___, ___ (Colo. App. 2019); State v. Malloy, 441 P.3d 756, 759 (Utah Ct. App. 2019); City of Beatrice v. Meints, 844 N.W.2d 85, 93 (Neb. Ct. App. 2014); Wilson v. State, 966 N.E.2d 1259, 1263 (Ind. Ct. App. 2012); and Powell v. State, 776 A.2d 700, 704 (Md. Ct. Spec. App. 2001).

> "Under the 'automobile exception' to the warrant requirement, ' "[a] warrantless search of a vehicle is justified where there is probable cause to believe the vehicle contains contraband." ' Harris v. State, 948 So. 2d 583, 587 (Ala. Crim. App. 2006) (quoting Lykes v. State, 709 So. 2d 1335, 1337 (Ala. Crim. App. 1997)). ' "Probable cause to search a vehicle exists when all the facts and circumstances within the officer's knowledge are

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844 N.W.2d 85 (Neb. Ct. App. 2014); State v. Flowers, 420 S.W.3d 579 (Mo. Ct. App. 2013); Wilson v. State, 966 N.E.2d 1259 (Ind. Ct. App. 2012); Perry v. Commonwealth, 701 S.E.2d 431 (Va. 2010); Doyle v. State, 317 S.W.3d 471, 478 (Tex. Ct. App. 2010); State v. Guzman, 965 A.2d 544 (Vt. 2008); Commonwealth v. Herring, 847 N.E.2d 1119 (Mass. Ct. App. 2006); and Powell v. State, 776 A.2d 700 (Md. Ct. Spec. App. 2001).

> sufficient to warrant a person of reasonable caution to conclude that an offense has been or is being committed and the vehicle contains contraband." ' Harris, 948 So. 2d at 587 (quoting State v. Odom, 872 So. 2d 887, 891 (Ala. Crim. App. 2003)).
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> " 'The level of evidence needed for a finding of probable cause is low.' State v. Johnson, 682 So. 2d 385, 387 (Ala. 1996). 'In dealing with probable cause ... we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act ....' Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). '[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' Stone v. State, 501 So. 2d 562, 565 (Ala. Crim. App. 1986) (quoting Spinelli v. United States, 393 U.S. 410, 419, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969))."

State v. Abrams, 263 So. 3d 736, 743 (Ala. Crim. App. 2018). Whether there is probable cause to conduct a warrantless search is measured against an objective standard. Washington v. State, 922 So. 2d 145, 161 (Ala. Crim. App. 2005).

Here, Dep. Knapp testified that, as she approached Lawson's vehicle after initiating the traffic stop, she observed in plain view "a [digital] scale and some baggies in the back" and that, when she "made contact with [Lawson], he seemed out of it." Other courts have recognized that digital

scales and "baggies" are common "tools of the trade" in drug transactions and are therefore often indicia of drug activity. See United States v. Murphy, 901 F.3d 1185, 1195 (10th Cir. 2018) (noting that digital scales and "baggies" are "'tools of the trade'" in "drug-related activity"); Santiago v. O'Brien, 628 F.3d 30, 31-32 (1st Cir. 2010) (noting that a digital scale and "small plastic bags" were "tools of the trade" in drug trafficking); United States v. Mays, 466 F.3d 335, 341 (5th Cir. 2006) (noting that scales and "baggies" "qualify as 'tools of the trade' " in drug trafficking); United States v. Alexander, 714 F.3d 1085, 1092 (8th Cir. 2013) (noting that digital scales and "baggies" are "drug paraphernalia commonly used" to distribute drugs); and United States v. Rembert, 807 F. App'x 953, 957 (11th Cir. 2020) (noting that "a digital scale and empty sandwich baggies" are "items typically, though by no means always, used in drug distribution"). In this Court's opinion, such items especially tend to point to drug activity when they are found together in an automobile whose driver exhibits suspicious behavior. Thus, taken together, the presence of a digital scale and plastic "baggies" in Lawson's vehicle, i.e., the presence of "tools of the drug trade," and Dep. Knapp's observation

that Lawson "seem[ed] out of it" were sufficient to meet the low level of evidence necessary to justify a person of reasonable caution in believing that the vehicle contained drug-related contraband -- i.e., were sufficient to give rise to probable cause to search Lawson's vehicle. Abrams, supra. See State v. Carter, 696 N.W.2d 31, 38 (Iowa 2005) (holding that there was probable cause to search the defendant's vehicle based upon the defendant's suspicious behavior and the law enforcement officer's plain-view observation of "a baggie" in the vehicle and noting that "[o]ther courts have found that a plastic baggie is a commonly used container for narcotics and when seen in an unusual setting can tip the scales in favor of probable cause for a search" (emphasis added)); United States v. Hicks, 190 F. Supp. 3d 733, 744 (S.D. Ohio 2016) (holding that there was probable cause to search the defendant's vehicle where the law enforcement officer who searched the vehicle testified that "the presence of sandwich bags and a digital scale together -- not in a location such as a kitchen, but in the backseat of a vehicle -- is indicative of narcotics trafficking" (emphasis added)); Luster v. State, 578 N.E.2d 740 (Ind. Ct. App. 1991) (holding that there was probable cause to search the

defendant's vehicle based upon the defendant's suspicious behavior and the law enforcement officer's plain-view observation of scales and a paper bag in the vehicle); and United States v. Romeu, 433 F. Supp. 3d 631, 648 (M.D. Pa. 2020) (citing a case in which a court "reject[ed] an argument that officer's observation of digital scales, zip lock baggies, and razor blades did not support finding of probable cause," despite the appellant's claim that "the items are innocuous on their own, law enforcement observed no narcotics, and law enforcement had no information at the time that defendant sold drugs or that his residence was connected to drug trafficking"). Accordingly, because there was probable cause to believe Lawson's vehicle contained drug-related contraband, Dep. Knapp's warrantless search of the vehicle was constitutional under the "automobile exception" to the warrant requirement of Fourth Amendment. Abrams, supra. Thus, the circuit court did not err by denying Lawson's motion to suppress the cocaine found during the search of the vehicle.

The dissent takes issue with our decision to affirm the circuit court's judgment under the "automobile exception" to the warrant requirement because, according to the dissent, doing so violates Lawson's due-process

rights. The dissent correctly notes that this Court will affirm a judgment on any valid legal ground presented by the record unless "due-process constraints require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance." Alabama Psychiatric Servs., P.C. v. 412 South Court St., LLC, 81 So. 3d 1239, 1249 (Ala. 2011). In support of its contention that applying the "automobile exception" in this case violates Lawson's due-process rights, the dissent notes that, because the State did not raise the "automobile exception" in the circuit court, Lawson did not have the opportunity to cross-examine Dep. Knapp as to that exception. Thus, the dissent posits, Lawson had no opportunity to question Dep. Knapp to determine whether she believed the presence of "tools of the drug trade" in Lawson's vehicle and Lawson's suspicious behavior gave rise to probable cause to search the vehicle for drug-related contraband. As noted, however, whether there is probable cause to search is measured against an objective standard. Washington, supra. Therefore, Dep. Knapp's subjective belief as to probable cause is wholly irrelevant. Indeed, this Court has noted that,

> "'"[b]ecause the test for determining probable cause is an objective and not a subjective test, this court may '"find probable cause in spite of an officer's judgment that none exists."'"' Woods [v. State], 695 So. 2d [636,] 640 [(Ala. Crim. App. 1996)], quoting Hopkins v. State, 661 So. 2d 774, 779 (Ala. Cr. App. 1994); Hutcherson v. State, 677 So. 2d 1174 (Ala. Cr. App. 1994)."

State v. Shelton, 741 So. 2d 473, 477 (Ala. Crim. App. 1999) (emphasis added). Thus, even if Lawson had elicited testimony from Dep. Knapp that she did not believe there was probable cause to search Lawson's vehicle, that testimony would not affect our decision. In addition, we reiterate that this Court is conducting a de novo review of undisputed evidence and that, although the State did not raise the "automobile exception" below, it raised that exception on appeal, which provided Lawson an opportunity to file a reply brief challenging that exception as a basis for affirming the circuit court's judgment. However, Lawson failed to take advantage of that opportunity. For those reasons, we do not find persuasive the dissent's argument that applying the "automobile exception" in this case violates Lawson's due-process rights.[4]

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[4]The dissent also suggests that we are relieving the State of the burden of proving an exception to the warrant requirement. However, in

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum and Minor, JJ., concur. Cole, J., dissents, with opinion.

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making that argument, the dissent appears to conflate the State's failure to argue a certain exception in the circuit court with the State's failure to prove that exception. As we have already concluded, Dep. Knapp's testimony was sufficient to prove that the warrantless search of Lawson's vehicle was justified under the "automobile exception." Thus, the State carried its burden of proving an exception to the warrant requirement, regardless of whether the State argued that it had proven that exception or even recognized at that time that it had proven that exception.

COLE, Judge, dissenting.

Jerold Jerone Lawson moved the circuit court to suppress the drug evidence Deputy N. Knapp found in his car during a warrantless search because, he said, the search was unconstitutional. According to Lawson, "the State of Alabama [would] not be able to meet its burden of proving that any of the recognized exceptions [to the warrant requirement] apply." (C. 34.) The State, after a hearing on Lawson's motion, argued that the circuit court should deny Lawson's motion because, contrary to Lawson's assertion, it had proved one of the recognized exceptions to the warrant requirement -- that the search was a valid inventory search. (R. 20.) The circuit court denied Lawson's motion.

On appeal, the main opinion upholds the circuit court's denial of Lawson's motion, but it doesn't do so based on the recognized exception to the warrant requirement the State chose to argue and prove to the circuit court. Rather, this Court -- citing a principle that we often apply to the dismissal of Rule 32, Ala. R. Crim. P., petitions for postconviction relief -- affirms the circuit court's judgment based on an exception to the warrant requirement posited by the State for the first time on appeal.

In my view, by affirming the circuit court's decision to deny Lawson's motion to suppress based on an exception to the warrant requirement that was not first presented to the circuit court, this Court has improperly relieved the State of its burden of proof in cases involving warrantless searches and seizures and, in turn, has violated Lawson's right to due process by depriving him of the opportunity to cross-examine and confront the State's witness about the circumstances of this newly argued exception to the warrant requirement.

In the circuit court, the State chose to meet its burden of proving that the search of Lawson's vehicle was constitutional by presenting evidence and arguing that the search fell under the inventory-search exception to the warrant requirement. However, under Ex parte Boyd, 542 So. 2d 1276 (Ala. 1989) and Keith v. State, 231 So. 3d 363 (Ala. Crim. App. 2017), the State's evidence fell short of showing that the inventory search of Lawson's vehicle was constitutional. Thus, the circuit court erred in denying Lawson's motion to suppress on that basis. Because this Court holds otherwise, I respectfully dissent.

" ' " '[W]arrantless searches are per se unreasonable, unless they fall within one of the recognized exceptions to the warrant requirement.' " ' " Hinkle v. State, 86 So.3d 441, 451 (Ala. Crim. App. 2011) (quoting State v. Otwell, 733 So. 2d 950, 952 (Ala. Crim. App. 1999), quoting in turn other cases). Those recognized exceptions include " ' " '(1) plain view; (2) consent; (3) incident to a lawful arrest; (4) hot pursuit or emergency; (5) probable cause coupled with exigent circumstances; (6) stop and frisk situations; and (7) inventory searches.' " ' " Id. And, as the main opinion points out, " [a]nother recognized exception to the warrant requirement is the 'automobile exception,' which allows law enforcement to search an automobile based on probable cause alone." Id. (citing Harris v. State, 948 So. 2d 583 (Ala. Crim. App. 2006)). Importantly, "[w]here a search is executed without a warrant, the burden falls upon the State to show that the search falls within an exception." Ex parte Tucker, 668 So. 2d 1339, 1343 (Ala. 1995) (citing Kinard v. State, 335 So. 2d 924 (Ala. 1976)). Put differently, when law enforcement conducts a warrantless search, as it did here, that search is per se unconstitutional unless the State proves that one of the recognized exceptions to the warrant requirement applies.

Here, Lawson moved to suppress the evidence found during the search of his vehicle because, he said, law enforcement searched his vehicle without a warrant and, he argued, the State would not be able to establish that any of the recognized exceptions to the warrant requirement applied. The State, in its attempt to satisfy its burden of proving that the search was proper, called one witness to testify at Lawson's suppression hearing -- Deputy Knapp.

Deputy Knapp testified that, because she saw Lawson's vehicle "appear[ ] to run [a] red light," she decided to follow him "to catch a violation." (R. 5.) As she was following Lawson, Deputy Knapp "paced" the vehicle and surmised that it was "speeding at approximately 70 miles per hour in a 55 mile per hour zone." (R. 5.) So, Deputy Knapp initiated a traffic stop on the vehicle for speeding.

Deputy Knapp said that, when she approached Lawson's vehicle, she saw "a scale and some baggies in the back." She noticed that Lawson "seemed out of it" and that there was "an odor of alcohol coming from the vehicle." (R. 5.) Deputy Knapp did not order Lawson out of his vehicle based on anything she observed. Rather, she asked Lawson for his

"information," which he provided, and ran a "warrant check on him." (R. 6.) According to Deputy Knapp, the warrant check showed that Lawson had an outstanding warrant for "failure to appear for a traffic violation with the County." (R. 6.) Because of his active warrant, Deputy Knapp told "dispatch that [she] would be pulling [Lawson] out of the vehicle" and "would effect an arrest on him." (R. 6.)

Deputy Knapp explained that the policy of the Montgomery County Sheriff's Office (which she identified as being "Chapter 7 of our policies and procedures") was that, when someone who is the only person in a vehicle is arrested, "we inventory everything inside of the vehicle." (R. 7, 15.) Deputy Knapp summarized the inventory policy as follows:

> "The reason why we inventory vehicles is so the Montgomery County Sheriff's Office is not held liable for any damages or lost items.
>
> "A full inventory of the vehicle from front to back will be conducted including trunks, passenger spaces, anywhere within a driver's reach to be able to notate this in our tow form which goes both to the driver and then also to the tow truck company and then also to the sheriff's office."

(R. 7.)

Deputy Knapp said that when she inventoried Lawson's vehicle she found "a clear, white, plastic baggy containing suspect narcotics," as well as "the scale, baggies, and some nitrile gloves in the back seat, there were two beer cans in the passenger seat as well on the floorboard." (R. 7-8.) Deputy Knapp said that she listed these items on a "property evidence receipt." (R. 9.) Deputy Knapp conceded that the property receipt did not include other personal items that she found in Lawson's vehicle; rather, those items would be "recorded on the tow receipt." (R. 16.) But Deputy Knapp did not have a copy of the tow receipt with her.

At the close of the evidence, the State argued:

> "Judge, I mean, their motion to suppress says that under the facts of this case, the State of Alabama will not be able to meet its burden of proving that any of the recognized exceptions, the seven exceptions, to warrantless searches, number seven being inventory searches. And that's in Hinkle v. State[, 86 So. 3d 441 (Ala. Crim. App. 2011)].
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> "I think the State has properly and fully explained the reasoning being the search -- the stop, why the inventory search was done. Deputy Knapp described the policy of what happens when they arrest one person in a vehicle and what happens and then what she did in regards to the inventory search. And she cited 7.03 of the policy, Judge.

> "With that being said, I don't think there's any reason to suppress the drugs or the search. I think it was a valid search, and I think Deputy Knapp did a fine job in this instance."

(R. 20-21.)

In short, of the many recognized exceptions to the warrant requirement, the State argued that it had "properly and fully" proved that one exception applied to the search of Lawson's vehicle -- the inventory-search exception. The circuit court agreed with the State and denied Lawson's motion.

On appeal, Lawson argues that the circuit court erred when it denied his motion to suppress because, he says, "[t]he warrantless search of [his] vehicle was not justified as an inventory search." (Lawson's brief, p. 20.) The majority did not address the merits of this argument, but I agree with Lawson.

In Keith v. State, 231 So. 3d 363 (Ala. Crim. App. 2017), this Court summarized the law concerning the inventory-search exception as follows:

> "In South Dakota v. Opperman, 428 U.S. 364, 376, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976), the United States Supreme Court held that inventory searches conducted by police were not unreasonable under the Fourth Amendment and thus created an exception to the warrant requirement. The Court

stated that the inventory search was 'developed in response to three distinct needs: [1] the protection of the owner's property while it remains in police custody; [2] the protection of the police against claims or disputes over lost or stolen property; [3] and the protection of the police from potential danger.' 428 U.S. at 369. In Colorado v. Bertine, 479 U.S. 367, 376, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987), the Court held that the existence of police discretion in conducting inventory searches did not render the inventory-search exception unconstitutional '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.'

"In Ex parte Boyd, 542 So. 2d 1276, 1281 (Ala. 1989), the Alabama Supreme Court, in addressing the issue of inventory searches, considered the following question: '[W]hat constitutes evidence that the police complied with reasonable or standardized police regulations or procedures relating to automobile inventory practices?' In Boyd, the appellant objected at trial 'to the admission of testimony concerning evidence obtained from the inventory on the ground that no testimony or other evidence established what the policies or procedures of the Anniston Police Department relating to inventory searches were.' The Court held:

> " 'Throughout the majority, concurring, and dissenting opinions of Bertine are references to and quotations from the written procedures followed by the Boulder, Colorado, police department in conducting inventories. Accompanying that evidence was the testimony of officers concerning the manner in which inventories were accomplished. Upon review of that evidence, the Supreme Court was able to conclude that "reasonable police regulations relating to inventory

> procedures administered in good faith satisfy the Fourth Amendment," Bertine, 479 U.S. at 374, 107 S. Ct. at 742, and that police procedures were satisfactory so long as conducted "according to standard criteria." Id. at 375, 107 S. Ct. at 743.
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> " 'Here, we can not determine whether the regulations of the Anniston Police Department relating to inventory searches are "reasonable," or whether the police acted in accord with "standard criteria." Sergeant Watson testified that the inventory was done "in compliance with the policies of the police department." Officer Bradley added that he "usually" took photographs of the subject automobile when a "major crime" was involved. Neither officer knew where the policy was recorded. Furthermore, there was no testimony whatsoever that provided the particulars of the policy. Without more, we can not possibly conclude that the police department's inventory policy was reasonable. Proving the reasonableness of a warrantless search is a burden borne by the State. Teat v. State, 409 So. 2d 940 (Ala. Crim. App. 1981). Without such proof, the search is constitutionally defective. In this case, the issue was properly preserved, and we conclude that the search can not be upheld as an inventory.'

"Boyd, 542 So. 2d at 1281-82."

"The Court in Boyd also held 'that a police officer's conclusory testimony that the inventory was done in compliance with departmental regulations' does not, of itself, satisfy the Fourth Amendment. 542 So. 2d at 1282. Finally, the Court noted that no inventory list was contained in the

> record on appeal. Despite testimony that a list was created, the Court held that 'the State's failure to provide evidence of the inventory list implanted one more impermissible chink in the petitioner's Fourth Amendment armor.' 542 So. 2d at 1283. In conclusion, the Court held:
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> > " 'We are not, by our holding herein, imposing new, strange, or unwarranted burdens on Alabama law enforcement agencies. Indeed, Opperman and Bertine created a narrow Fourth Amendment exception that renders admissible otherwise excludable evidence; however, for such evidence to pass constitutional muster, the record must sufficiently reflect what that policy is, describe the policy in such a way that its reasonableness can be reviewed, and present adequate evidence of what the employed criteria were.'
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> "542 So. 2d at 1283."

Keith, 231 So. 3d at 365-66 (some emphasis added).

Applying the holding of Ex parte Boyd, 542 So. 2d 1276 (Ala. 1989), to the facts in Keith, this Court noted that the record in Keith "contains the same defects that rendered the search in Boyd unconstitutional." Keith, 231 So. 3d at 366. Specifically, this Court explained:

> "Although the State elicited testimony from Officer Elmore regarding the police department's inventory-search policy, that testimony was limited. Officer Elmore testified that it was the department's policy to inventory a vehicle before it is towed '[t]o make sure that everything that [the arrestee] says is in

> the vehicle is still in there.' (R1. 8.) Elmore testified that he completed the inventory and created an inventory list; however, he did not have the list with him at the hearing and it is not contained in the record before this Court. The State did not elicit any testimony regarding where a copy of the department's policy could be found, the particular criteria for conducting an inventory search contained in the policy, and whether Officer Elmore followed that criteria when he conducted the search of Keith's vehicle. Similar to Boyd, the lack of evidence presented by the State at the suppression hearing prevents us from being able to review the reasonableness of the officer's search."

Keith, 231 So. 3d at 366. Because of the similarity between what happened in Keith and what happened in Boyd, this Court held that the "purported inventory search of Keith's vehicle violated the Fourth Amendment and cannot be upheld." Id. This case is identical to Boyd and Keith in all respects except one -- Deputy Knapp testified that she knew where a copy of the inventory-search policy could be found.

Here, as in Boyd and Keith, Deputy Knapp provided only limited testimony as to the Montgomery County Sheriff's Office's inventory-search policy. She testified that it was their policy to inventory vehicles after arresting the sole occupant of that vehicle, that the purpose of the policy was to protect the sheriff's office from liability, that she created an

inventory list of the property she found in the vehicle, and that she did not have that tow receipt with her at the time of the hearing. And, just as is in Boyd and Keith, Deputy Knapp's limited testimony does not provide this Court with the "particular criteria" for conducting an inventory search contained in the policy and does not provide this Court with any way to review whether Deputy Knapp followed that criteria when she conducted the search of Lawson's vehicle. So, just as in Boyd and in Keith, the State here failed to meet its burden of establishing that the search of Lawson's vehicle falls under the inventory-search exception to the warrant requirement.

Although the main opinion recognizes Lawson's argument, cites Boyd and Keith, and recognizes that the State maintains on appeal that the search of Lawson's car was justified under the inventory-search exception, this Court does not express any opinion as to Lawson's inventory-search argument. Instead, the main opinion explains that it "need not determine whether the warrantless search of Lawson's vehicle was constitutional under the 'inventory exception' to the warrant requirement because we agree with the State's argument [on appeal] that

the search was constitutional under the 'automobile exception.' " ___ So. 3d at ___. Although the State's argument was not raised in the circuit court, this Court nevertheless affirms the circuit court's judgment based on the principle that this Court may affirm a circuit court's judgment " ' "on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the [circuit] court." ' " ___ So. 3d at ___ (quoting A.G. v. State, 989 So. 2d 1167, 1180 (Ala. Crim. App. 2007), quoting in turn, Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003)).

I recognize that this Court has applied the affirm-for-any-reason rule to a circuit court's ruling on a motion to suppress, see, e.g., Washington v. State, 922 So. 2d 145, 169 n.15 (Ala. Crim. App. 2005) ("If a trial court's ruling on a motion to suppress is correct for any reason, it will be affirmed by this Court. See, e.g., Bradley v. State, 494 So. 2d 750, 761 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 772 (Ala. 1986)."), and State v. Cheatwood, 267 So. 3d 882 (Ala. Crim. App. 2018) (same). The affirm-for-any-reason rule, however, is not limitless. Rather, that rule is limited to only those

reasons that do not offend due process. Under the facts of this case, I am concerned that justifying the search of Lawson's vehicle under the automobile exception to the warrant requirement when that argument was not raised until the State filed its brief on appeal violates Lawson's right to due process.

To start, as noted above, when law enforcement conducts a warrantless search, the search is per se unreasonable -- and, thus, per se unconstitutional -- unless the State can prove that the search falls within one of the recognized exceptions to the warrant requirement. In other words, when a defendant challenges the circumstances of a warrantless search, the State bears the burden of proving the existence of some fact that justifies the warrantless search. The State is not limited to proving that a warrantless search was justified by a single exception to the warrant requirement; rather, the State may prove that multiple exceptions apply.

When the State chooses to limit its justification of a warrantless search in the circuit court by pointing to only one of the recognized exceptions to the warrant requirement, as it did here, the State puts the

defendant on notice that he or she must defend against only that one exception. And by waiting until it files a brief on appeal to argue that a different exception to the warrant requirement justifies the warrantless search, the State has deprived the defendant of the opportunity of presenting any argument regarding that exception to the circuit court and the opportunity to present an argument concerning that issue in his or her opening brief on appeal to this Court. See, e.g., A.G. v. State, 989 So. 2d at 1179-80 (recognizing that, in the Rule 32 context, when the State seeks to assert a ground of preclusion under Rule 32.2, Ala. R. Crim. P., "due process requires that a petitioner be given notice of that preclusion ground"). And, even more problematic, the State's delay in asserting its new justification for the warrantless search deprives the defendant of the opportunity to question the State's witnesses about that specific exception to the warrant requirement. This case provides a prime example of why such delay harms the defendant.

Here, this Court's automobile-exception analysis turns on two items: (1) Deputy Knapp's observation of a scale and sandwich baggies in the backseat of Lawson's vehicle and (2) her testimony that Lawson "seemed

out of it" at the time of his arrest. This Court reasons that the presence of a scale and sandwich baggies in the backseat of a vehicle "tend to point to drug activity when they are found together in an automobile whose driver exhibits suspicious behavior." ___ So. 3d at ___. This Court does not divine that conclusion from anything in the record or from Deputy Knapp's testimony at the suppression hearing. Rather, this Court simply notes that "[o]ther courts have recognized that digital scales and 'baggies' are common 'tools of the trade' in drug transactions and are therefore often indicia of drug activity." ___ So. 3d at ___. And, because other courts have found such items to be used in the "drug trade," it stands to reason that Lawson's vehicle could contain "drug-related contraband." ___ So. 3d at ___. While it may be true that a scale and sandwich baggies could be used by people in the drug trade, it does not necessarily follow that Deputy Knapp believed that the presence of those items in Lawson's vehicle meant that he was involved in the drug trade. Knapp arrested Lawson for the outstanding warrant, not based on the purported "drug-related contraband" that she saw. At minimum, Lawson should have the opportunity to cross-examine Deputy Knapp on why those items establish

probable cause to search his vehicle and allow the trial court, not an appellate court, to make a determination on the issue of probable cause. This is especially true when Deputy Knapp's testimony at the suppression hearing was that the only basis for the search of Lawson's vehicle was the inventory policy of the Montgomery County Sheriff's Office -- not because she believed that she had probable cause to search the vehicle for drug-related contraband.

In short, the State failed to establish sufficient evidence that the inventory exception to the warrant requirement was applicable in this case. Even though this Court has previously used the affirm-for-any-reason rule in the context of a motion to suppress, I do not think we can apply that rule under the circumstances of this case. Because the State did not raise the automobile exception to the warrant requirement in the circuit court, I would not affirm the circuit court's judgment based upon that exception.

Accordingly, I respectfully dissent.