DIVISION ONE
FILED: 10/31/2013
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. WOLFGANG WILHELM EHMKE Appellant.	)	1 CA-CR 12-0507 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-152885-001

The Honorable Edward Bassett, Judge

AFFIRMED

James J. Haas, Maricopa County Public Defender By Tennie B. Martin, Deputy Public Defender Attorneys for Appellant	Phoenix
Thomas C. Horne, Arizona Attorney General By Joseph T. Maziarz, Section Chief Counsel and Craig W. Soland, Assistant Attorney General Criminal Appeals Section Attorneys for Appellee	Phoenix

K E S S L E R, Judge

¶1 Wolfgang Wilhelm Ehmke ("Ehmke") appeals his conviction for misconduct involving weapons, arguing that the superior court erred by failing to suppress evidence of the guns police

found during a warrantless search of a vehicle he was operating on a suspended license. For the following reasons, we affirm Ehmke's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 While on duty and driving a designated police vehicle, Mesa Police Detective D.H. saw Ehmke standing in the road near a gas station. Detective D.H. called the career criminal squad to obtain more information on Ehmke. A career criminal squad detective advised Detective D.H. that Ehmke's license currently was suspended and that he had an outstanding warrant for driving on a suspended license. Alone and having previous experience with Ehmke, Detective D.H. remained in his vehicle and requested the help of additional units in taking Ehmke into custody.

¶3 While waiting for those additional units, Detective D.H. observed Ehmke get into the driver's seat of a minivan and begin to drive away. Detective D.H. followed Ehmke and saw him commit several traffic violations. Knowing that several other officers were near his location, Detective D.H. initiated a traffic stop to prevent Ehmke from entering the freeway.

¶4 Detective D.H. removed Ehmke from the minivan and detained him in handcuffs. Ehmke was arrested at the scene after the police confirmed the outstanding warrant. While looking inside the minivan to ensure that no one was in the passenger or back seats, Detective D.H. saw a large amount of

cash sitting in the open glove box. Further, Detective D.H. noticed that Ehmke's "pant pockets were pulled out like he had just pulled something out of them." Given the circumstances, Detective D.H. called for a canine unit, which arrived ten to fifteen minutes later.[1]

¶5 The drug detection dog alerted to the vehicle for illegal drugs. Detective D.H. and the other officers then searched the vehicle and discovered one handgun in a backpack and a Desert Eagle 40 caliber handgun in a laundry tub, both of which were in the passenger compartment.

¶6 The State indicted Ehmke on two counts of misconduct involving weapons. Ehmke moved to suppress evidence of the guns, arguing that the warrantless search that uncovered the guns did not fall into any recognized exception to the warrant requirement. Specifically, Ehmke argued that the search was unreasonable as a search incident to arrest under *Arizona v. Gant*, 556 U.S. 332 (2009). Alternatively, Ehmke contended that the search exceeded the scope of an inventory search because it was conducted in bad faith and executed for "investigative purposes."

¶7 The State did not seek to justify the seizure or the search on the basis of search incident to arrest. Rather, the

[1] The police did not enter the minivan at any time prior to the arrival of the canine unit and the dog alert.

State maintained that the police had probable cause to search the vehicle because of the drug dog's alert to the vehicle. Alternatively, the State argued that the evidence inevitably would have been discovered during an inventory search—which the written policies of the Mesa Police Department ("the Department") required—because the circumstances required the vehicle to be towed and impounded.[2]

¶8 At the evidentiary hearing on the motion to suppress, Detective D.H. testified that the officers found the guns while conducting a search based on probable cause, which arose from the drug dog's alert to the vehicle. He also testified that, under the circumstances, the vehicle inevitably would have been towed and impounded pursuant to Arizona Revised Statutes ("A.R.S.") section 28-3511(a)(1) (2013).[3] Thus, pursuant to the

[2] These circumstances included the car being illegally parked, A.R.S. § 28-3511(a)(1)'s requirement that an officer impound the vehicle of a person found to be driving on a suspended license, and the inability of the officers to obtain a phone number for the vehicle's registered owner.

[3] We cite to the current versions of statutes unless they have been materially amended since the relevant time period.

Department's written policies,[4] the officers would have performed an inventory search of the vehicle "no matter what." Detective D.H. testified that he and the other officers conducted the inventory search in accordance with the Department's policies.

¶9 The superior court denied Ehmke's motion to suppress, finding that the vehicle search was valid based on probable cause resulting from the drug dog's alert. Alternatively, the court concluded that, because circumstances obligated Detective D.H. to impound the vehicle, Detective D.H. had conducted a reasonable inventory search in line with the Department's policies, and had not used the inventory search as a subterfuge for investigation.

¶10 The jury convicted Ehmke of both counts of misconduct involving weapons. Ehmke timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(a)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

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[4] The Mesa Police Administrative Manual states that "[i]t is the policy of the Mesa Police Department (MPD) that motor vehicles which are lawfully towed, removed, impounded or stored at the direction of a police officer, or placed in the custody of the Department shall be inspected and inventoried according" to procedures set out by the manual. These procedures require "the impounding officer [to] conduct an itemized inventory of the vehicle for personal property," including all contents of any containers, the glove compartment, and the trunk. The policy calls for any personal property of value to be placed into safekeeping. Finally, the policy states that the allowance for a warrantless vehicle inventory search does "not apply to searches conducted for the purposes of discovering evidence," but that evidence yielded by a lawful vehicle inventory search "can be used for prosecution."

DISCUSSION

¶11 Ehmke contends that the trial court erred in denying his motion to suppress because the search was neither a valid search incident to arrest under *Gant*, nor a valid inventory search. "We review for abuse of discretion the trial court's factual findings on a motion to suppress, 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." *State v. Davolt*, 207 Ariz. 191, 202, ¶ 21, 84 P.3d 456, 467 (2004) (internal citations omitted). 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). "We view that evidence in the light most favorable to upholding the trial court's ruling." *State v. Estrada*, 209 Ariz. 287, 288, ¶ 2, 100 P.3d 452, 453 (App. 2004).

I. Vehicle Inventory Searches and the Inevitable Discovery Doctrine[5]

¶12 The Fourth Amendment of the United States Constitution "does not forbid all searches and seizures," but rather, forbids "only those that are unreasonable." *State v. Organ*, 225 Ariz. 43, 46, ¶ 11, 234 P.3d 611, 614 (App. 2010). Generally, to be considered reasonable, a search "must be conducted pursuant to a warrant issued by an independent judicial officer." *State v. Reyna*, 205 Ariz. 374, 375, ¶ 5, 71 P.3d 366, 367 (App. 2003). "However, because the ultimate touchstone of the Fourth Amendment is reasonableness, [this general rule is] subject to certain exceptions." *Organ*, 225 Ariz. at 46, ¶ 11, 234 P.3d at 614 (internal quotations omitted). The State carries the burden of proving that a warrantless search is constitutionally valid under one of these exceptions. *State v. Olm*, 223 Ariz. 429, 431, ¶ 5, 224 P.3d 245, 247 (App. 2010).

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[5] Ehmke does not address whether the police had probable cause to search the vehicle based on the drug dog's alert. Thus, he has waived that issue on appeal. *See State v. Box*, 205 Ariz. 492, 495 n.2, ¶ 9, 73 P.3d 623, 626 n.2 (App. 2003); *State v. Powers*, 200 Ariz. 123, 129, ¶ 21, 23 P.3d 668, 674 (App. 2001). Independently, we conclude that the State's argument that the dog alert gave the police probable cause to search is meritorious and an independent ground on which to affirm. *See Box*, 205 Ariz. at 496, ¶ 14, 73 P.3d at 627 (explaining that a trained drug-sniffing dog's alert to a vehicle provides sufficient probable cause to search the vehicle).

Furthermore, we will not address Ehmke's argument based on *Gant* because the State did not seek to justify the search based on *Gant*.

a. Vehicle Inventory Searches

¶13 A vehicle inventory search is one well-defined exception to the warrant requirement. *Organ*, 225 Ariz. at 48, ¶ 20, 234 P.3d at 616. These searches protect an owner's property while in police custody, prevent false claims against the police regarding such property, and protect the police and public from any potential danger. *Id.* (citing *Colorado v. Bertine*, 479 U.S. 367, 372 (1987)).

¶14 To be valid, an inventory search must meet two requirements: "(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." *Id.* at ¶ 21. Thus, an inventory search conducted in bad faith or solely for the purpose of discovering evidence is invalid. *Id.*

¶15 Inventory searches "conducted pursuant to standard procedures [are] presumptively considered to have been conducted in good faith and therefore reasonable." *Id.* Evidence of such standard procedures, however, must be in the record. *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).

b. The Inevitable Discovery Doctrine

¶16 A court can admit evidence discovered through a lawful vehicle inventory search under the inevitable discovery doctrine. The doctrine permits the admission of illegally obtained items or information in cases in which the prosecution establishes by a preponderance of the evidence that such items or information would have been inevitably discovered lawfully. *State v. Ault*, 150 Ariz. 459, 465, 724 P.2d 545, 551 (1986); *Rojers*, 216 Ariz. at 559, ¶ 18, 169 P.3d at 655. This is because "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Nix v. Williams*, 467 U.S. 431, 446 (1984).

II. The superior court did not err by admitting evidence of the guns retrieved during the warrantless search of the vehicle.

¶17 Because we do not address his *Gant* argument, Ehmke's remaining argument on appeal is that the inventory search was unreasonable because it was conducted in bad faith and for investigatory purposes. Ehmke claims that the inventory search went beyond the caretaking function of police. To substantiate his bad faith claim, Ehmke highlights parts of Detective D.H.'s testimony, including his statement that he and the other officers would have searched the vehicle "no matter what," his alleged expectation that he would find evidence of a separate

crime during a search of the vehicle, and his failure to detain Ehmke at the gas station.[6] The State argues that the record neither supports bad faith nor that the sole purpose of the search was for investigation. We agree with the State.

¶18 The evidence shows that the circumstances required the vehicle to be towed and impounded. Consequently, the Department's written policies required the officers to conduct an inventory search prior to towing and impounding the vehicle. Such action is a well-recognized and "well-defined community caretaking exception to the probable cause and warrant requirements of the Fourth Amendment." *Organ*, 225 Ariz. at 48, ¶ 20, 234 P.3d at 616. Therefore, the inventory search here, in and of itself, did not exceed the police's caretaking function.

¶19 Further, in stating that the police were going to perform an inventory search "no matter what," Detective D.H. was explaining only that the police inevitably would have conducted an inventory search because the circumstances required that the vehicle be towed and impounded. Rather than demonstrate bad faith, Detective D.H.'s statement shows that application of the inevitable discovery doctrine is appropriate in this case.

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[6] Ehmke does not challenge the validity of the traffic stop or his arrest. Although at trial Ehmke seemed to challenged the need to impound and tow the vehicle, he does not allege that officers lacked lawful possession or custody of the vehicle on appeal.

¶20 Nor did Detective D.H.'s suspicions that he might discover evidence of a crime during the vehicle search invalidate its reasonableness. It simply is unrealistic to insist that police lack any expectation of uncovering incriminating evidence during an inventory search. *In re One 1965 Econoline*, 109 Ariz. 433, 435, 511 P.2d 168, 170 (1973). In examining whether police acted in good faith and did not utilize an inventory search solely as subterfuge for a warrantless search, the Arizona Supreme Court previously has emphasized the facts of the situation rather than the subjective motives of police. *Id.*

¶21 Detective D.H.'s alleged suspicions are not necessarily inconsistent with good faith if the facts of the situation reasonably called for an inventory search. *See Organ*, 225 Ariz. at 49, ¶ 25, 234 P.3d at 617; *see also State v. Walker*, 119 Ariz. 121, 128, 579 P.2d 1091, 1098 (1978) (holding that "[a] finding that the officer had probable cause to search the vehicle is not inconsistent with the reasonable 'inventory' search."). Because the Department's written policies required an inventory search, the search presumptively was made in good faith. *Organ*, 225 Ariz. at 48, ¶ 21, 234 P.3d at 616. The superior court found that Detective D.H. conducted a reasonable inventory search and did not use it as a subterfuge for investigation, impliedly finding that he performed the search in

good faith. Such a finding may be reversed only if it is not supported by sufficient evidence. *Id.* at 49, ¶ 26, 234 P.3d at 617.

¶22 Here, the evidence supports the superior court's finding. The facts and the Department's policies provided a valid basis for towing and impounding the minivan and, thus, for conducting an inventory search. Accordingly, we conclude that the police conducted the inventory search in good faith.

¶23 Finally, we are unconvinced that Detective D.H.'s failure to take Ehmke into custody at the gas station shows bad faith. Detective D.H. testified that he did not stop Ehmke immediately because he dealt with Ehmke previously and knew him to be involved in dangerous endeavors. Instead, Detective D.H. called for additional units as his training requires in such situations. Further, Detective D.H. testified that, although he was still alone at the time of the stop, he knew other units were approaching and he wanted to prevent Ehmke from entering the freeway. Presented with no contrary evidence, we conclude that Detective D.H.'s actions do not demonstrate bad faith or unreasonableness.

¶24 Given the evidence, we cannot say that the superior court erred in determining that a valid inventory search occurred and that police conducted the search for a purpose other than as a subterfuge for investigatory purposes. The

Department's written policies authorized an inventory search under such circumstances and Detective D.H. acted in accordance with those policies.

CONCLUSION

¶25 For the foregoing reasons, we affirm Ehmke's conviction and sentences.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
ANDREW W. GOULD, Presiding Judge

/s/
MICHAEL J. BROWN, Judge