IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ROLANDO DWAYNE PIERCE, *Appellant*.

No. 1 CA-CR 18-0110
FILED 1-15-2019

Appeal from the Superior Court in Maricopa County
No. CR2017-130514-001
The Honorable Michael J. Herrod, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Erin Bennett
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Mikel Steinfeld
Counsel for Appellant

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Kent E. Cattani joined.

M c M U R D I E, Judge:

¶1 Rolando Pierce appeals his convictions and sentences for theft of means of transportation and possession of burglary tools. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 While on routine patrol, Officer Taylor Carr received a request from dispatch to conduct a welfare check. When the officer arrived at the parking lot location, he noticed Pierce, who matched the description provided by dispatch, sitting on the ground next to a backpack and leaning against a vehicle's driver-side door. Carr approached Pierce and inquired whether he had been injured as he appeared to be in considerable pain.

¶3 As the men spoke, Carr observed that Pierce's leg and ankle were red and swollen. Pierce explained that he had hurt his leg earlier in the day and readily accepted Carr's offer to request medical assistance. Before medical personnel arrived, Carr asked Pierce whether he had used any illegal drugs or prescription medications that day. After Pierce acknowledged that he had used methamphetamine, Carr asked whether he had drug contraband in his backpack. Responding that he had a "rig," which Carr understood to refer to a small bag containing drug paraphernalia, Pierce gave the officer permission to search his backpack.

¶4 While looking through the backpack, Carr found a single syringe, but no "rig." The officer also found a pill bottle and vehicle keys. After searching the backpack, Carr noticed a small hand tool laying on top of the vehicle, which Pierce claimed was his. At that point, the officer helped

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[1] In reviewing the denial of a motion to suppress, we consider only the evidence presented at the suppression hearing and view that evidence in the light most favorable to sustaining the superior court's decision. *State v. Mendoza-Ruiz*, 225 Ariz. 473, 474, ¶ 2, n.1 (App. 2010).

Pierce move away from the vehicle because the vehicle's owner returned and drove it away. Once the car moved, Carr saw a small, zippered bag laying on the ground immediately next to where Pierce had previously been sitting. As Carr picked up the bag, he asked whether it belonged to Pierce, and Pierce acknowledged that it did.

¶5 Believing that the bag contained the drug paraphernalia, Carr searched it without asking for Pierce's consent. Inside, the officer found more keys, which he testified he thought might be "jiggle" keys—keys used to manipulate vehicle locks and ignitions. The officer also found syringes and small pieces of cotton.

¶6 Shortly thereafter, medical personnel arrived and began treating Pierce's injury. Recalling that he had seen a pill bottle during his initial search of the backpack, Carr searched it again to retrieve the bottle for medical personnel. In the process, the officer noticed a long, thin piece of metal that he recognized as a "slim jim," a tool used to unlock car doors. When he questioned Pierce regarding the slim jim and various keys, Pierce admitted that he possessed the burglary tools, but claimed he had never used them.

¶7 After medical responders evaluated Pierce's injury, they transported him to a nearby hospital. Carr placed the drug contraband and various sets of keys in property bags and followed Pierce to the hospital. Once he located Pierce's hospital room, the officer read him *Miranda*[2] warnings and again asked about his possession of the burglary tools. Contrary to his previous denial, Pierce admitted that he had used the tools to steal a vehicle and told the officer where the stolen vehicle was located.

¶8 Carr then relayed this information to another officer, who retrieved the keys that had been seized from Pierce's backpack and zippered bag, located the stolen vehicle, and used the seized jiggle keys to unlock the vehicle. The officer also unlocked the vehicle using the owner's keys, which were found in Pierce's possession. Upon learning the stolen vehicle had been located and accessed with the jiggle keys, Carr arrested Pierce.

¶9 The State charged Pierce with one count of theft of transportation (Count 1) and three counts of possession of burglary tools (Count 2—slim jim; Count 3—at least one vehicle manipulation key; and

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2 *Miranda v. Arizona*, 384 U.S. 436 (1966).

Count 4—more than one vehicle manipulation key). The State also alleged aggravating circumstances and historical prior felony convictions. A jury found Pierce guilty as charged and the superior court sentenced him to an aggregate term of 6.5 years' imprisonment. Pierce timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

¶10 Pierce contends the superior court improperly denied his motion to suppress. Asserting he did not consent to a search of his zippered bag, and that no other exception applies, Pierce argues the officer unlawfully searched it without a warrant.

¶11 Before trial, Pierce moved to suppress the jiggle keys and the vehicle keys underlying Counts 1, 3, and 4. At an evidentiary hearing on the motion, Carr testified that he found the jiggle keys in Pierce's backpack. In contravention of this account, another officer who had been at the scene testified that Carr found the jiggle keys inside the zippered bag. Because the State does not argue the jiggle keys were actually found in the backpack and therefore the result of a valid consensual search, we address whether the superior court erred by denying Pierce's motion to suppress.

¶12 After taking the matter under advisement and reviewing the officers' body camera videos, the superior court denied the motion to suppress, finding in relevant part: (1) Pierce consented to a search of his backpack; (2) Carr searched the zippered bag without verbal consent from Pierce; (3) the stolen vehicle's keys were found in the backpack, not the zippered bag; (4) at the scene, Pierce denied stealing cars but admitted that "he was thinking about stealing cars"; (5) the search of the zippered bag was "incident to the welfare check" and necessary to (a) ensure safety of the officers and medical personnel, and (b) determine what substances Pierce may have ingested or consumed; and (6) the discovery of all the items was inevitable.

¶13 We review the denial of a motion to suppress evidence for an abuse of discretion, *Brown v. McClennen*, 239 Ariz. 521, 524, ¶ 10 (2016), but review *de novo* the superior court's ultimate legal conclusion that a search "complied with the dictates of the Fourth Amendment," *State v. Valle*, 196 Ariz. 324, 326, ¶ 6 (App. 2000). In doing so, we defer to the superior court's determination of witnesses' credibility, *State v. Mendoza-Ruiz*, 225 Ariz. 473, 475, ¶ 6 (App. 2010), and uphold the court's ruling if it is legally correct for any reason, *State v. Huez*, 240 Ariz. 406, 412, ¶ 19 (App. 2016).

¶14 The federal and state constitutions protect individuals against unreasonable searches and seizures, U.S. Const. amend. IV; Ariz. Const. art. 2, § 8, and "any evidence collected in violation" of these provisions "is generally inadmissible in a subsequent criminal trial," *State v. Valenzuela*, 239 Ariz. 299, 302, ¶ 10 (2016). "'[S]ubject only to a few specifically established and well-delineated exceptions,' a search is presumed to be unreasonable under the Fourth Amendment if it is not supported by probable cause and conducted pursuant to a valid search warrant." *State v. Gant*, 216 Ariz. 1, 3, ¶ 8 (2007) (alteration in original) (quoting *Katz v. United States*, 389 U.S. 347, 358 (1967)). The State "carries the burden of proving that a warrantless search is constitutionally valid under an exception to the warrant requirement." *State v. Ontiveros-Loya*, 237 Ariz. 472, 476, ¶ 10 (App. 2015).

¶15 As a preliminary matter, Pierce does not contest Carr's seizure of the zippered bag, only his search of it. Without deciding whether the officer lawfully seized the bag, we note that once seized, the bag posed no threat to officer safety and there was no possibility that Pierce could destroy any evidence contained therein, particularly given Pierce's inability to stand upright, much less ambulate without assistance. Therefore, neither the officer safety nor evidence preservation exceptions justify the search at issue. *See State v. Snyder*, 240 Ariz. 551, 559, ¶ 31 (App. 2016) (explaining that when "property has already been seized, the justifications of immediate officer safety and evidence preservation no longer apply"). Nonetheless, the State contends the officer's warrantless search was justified under the "inevitable discovery" doctrine.[3]

¶16 The inevitable discovery doctrine provides a "limitation[] to the fruit of the poisonous tree doctrine," which would otherwise require exclusion. *State v. Washington*, 120 Ariz. 229, 231 (App. 1978). Under the inevitable discovery doctrine, "illegally obtained evidence is admissible '[i]f the prosecution can establish by a preponderance of the evidence that the illegally seized items . . . would have inevitably been seized by lawful means.'" *State v. Jones*, 185 Ariz. 471, 481 (1996) (alteration in original) (quoting *State v. Ault*, 150 Ariz. 459, 465 (1986)). Stated differently, "evidence obtained as a result of an unlawful search need not be suppressed when, in the normal course of police investigation and conduct,

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[3] Because we conclude the superior court did not err by denying the motion to suppress based on the inevitable discovery doctrine, we need not address whether any other exceptions justify the warrantless search. *See State v. Simmons*, 238 Ariz. 503, 506, ¶ 10, n.6 (App. 2015).

and absent the illicit conduct, the evidence would have been discovered inevitably or ultimately." *State v. Acosta*, 166 Ariz. 254, 258 (App. 1990). Although evidence "obtained in violation of a constitutional right should be excluded to deter unlawful police conduct, it serves no purpose to put the government in a worse position than it would have been in had no police misconduct occurred." *State v. Rojers*, 216 Ariz. 555, 559, ¶ 19 (App. 2007). Nonetheless, the exception applies only "if the evidence would have been lawfully discovered despite the unlawful behavior and independent of it." *Brown*, 239 Ariz. at 525, ¶ 14.

¶17 The State argued below and on appeal the syringe and slim jim found inside Pierce's backpack, combined with the tool found atop the vehicle, provided sufficient grounds to arrest Pierce and that the officers "would have inevitably" discovered the jiggle keys inside the zippered bag during the booking process after his arrest. The superior court agreed with the State, finding that Pierce's zippered bag inevitably would have been searched as part of an inventory search once Pierce was arrested and transported to jail. The inventory search is a "well-defined exception to the warrant requirement" but applies only if it was inevitable that the defendant would have been arrested. *See Snyder*, 240 Ariz. at 558, ¶¶ 26–27 (internal quotation omitted); *see also State v. Calabrese*, 157 Ariz. 189, 191 (App. 1998) ("If we were to allow all warrantless searches to be justified by the argument that any evidence would ultimately have been discovered on booking at the jail, police officers would have a license to immediately and thoroughly search the person and effects of any individual arrested without a warrant for any minor but bookable offense in the hope of discovering evidence of a more serious crime.").

¶18 Nothing in the record suggests that the State would have arrested Pierce based on the syringe found in his backpack or the tool laying on top of the vehicle. Indeed, the State did not charge Pierce with any drug-related crimes or possession of burglary tools based on the tool laying on top of the vehicle. *See Snyder*, 240 Ariz. at 559, ¶ 29 (superior court erroneously denied motion to suppress, reasoning defendant "was never charged with, cited or arrested for" any misconduct that preceded the warrantless search, but rather he "was charged with offenses related solely to items found" during the warrantless search). The question, then, is whether the State proved, by a preponderance of the evidence, that Carr would have arrested Pierce based on his possession of a slim jim. *See State v. Paxton*, 186 Ariz. 580, 585 (App. 1996) ("concerns about booking [an] arrestee on greater charges after the discovery of evidence of an unrelated crime" during a warrantless search not present where "the evidence

discovered . . . was related to the same crime for which [the defendant] was being arrested"). We conclude the State met its burden.

¶19 As proscribed by A.R.S. § 13-1505(A)(1), a person commits possession of burglary tools by: (1) possessing any tool commonly used for committing burglary, and (2) intending to use the item in a commission of a burglary. Carr recognized the slim jim as a burglary tool, and questioned Pierce at the scene about the tools found. Pierce claimed that he did not know how to use a slim jim but acknowledged that he possessed it and admitted that he had thought about stealing cars. Although Pierce arguably would not have made such admissions had the officer not found the jiggle keys, on this record, the State presented sufficient evidence that Pierce inevitably would have been arrested for possession of burglary tools based on the slim jim. And Carr testified that had the zippered bag not been searched at the scene it would have been searched during the booking process, as was standard procedure. Thus, the superior court did not abuse its discretion by denying Pierce's motion to suppress based on the inevitable discovery exception to the warrant requirement.[4]

CONCLUSION

¶20 For the foregoing reasons, we affirm the convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: AA

[4] To the extent Pierce argues that article 2, section 8 of the Arizona Constitution affords him greater protection against warrantless searches than the Fourth Amendment, we note that our supreme court has consistently held that Arizona's constitutional protections are "coextensive with Fourth Amendment analysis," except that Arizona has "more expansive protections . . . concerning officers' warrantless physical entry into a home." *State v. Hernandez*, 244 Ariz. 1, 6, ¶ 23 (2018); *see also State v. Hummons*, 227 Ariz. 78, 82, ¶ 16 (2011). Because the search at issue occurred in a public parking lot, the exclusionary rule applies no more broadly under the state constitution than the federal constitution in this case.