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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JUAN ALEJANDRO ORELLANO-TIZNADO, Appellant.	2 CA-CR 2012-0227 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201100067

Honorable John F. Kelliher Jr., Judge

AFFIRMED IN PART; VACATED IN PART

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V Á S Q U E Z, Presiding Judge.

¶1 Appellant Juan Orellano-Tiznado was charged with conspiracy to transport over two pounds of marijuana for sale, transportation of over two pounds of marijuana for sale, possession of over four pounds of marijuana for sale, and possession or use of

drug paraphernalia. A jury found him guilty of these charges and the trial court sentenced him to concurrent, presumptive prison terms of five years on all but the paraphernalia charge, imposing a one-year term on that offense. On appeal, Orellano-Tiznado contends the court abused its discretion when it denied his motion to suppress evidence seized from the Jeep he had been driving. He also asserts, and the state agrees, the conviction and sentence for possession of marijuana for sale must be vacated based on the prohibition against double jeopardy because that offense was a lesser-included offense of transportation of marijuana for sale. This appeal followed the trial court's grant of Orellano-Tiznado's petition for post-conviction relief and leave to file a delayed appeal.

¶2 The evidence presented at trial, viewed in the light most favorable to sustaining the convictions, *see State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008), established the following. Douglas police detectives had been conducting surveillance at a retail store parking lot based on suspected drug sales being conducted from that location. They saw Orellano-Tiznado back the red Jeep he was driving into a spot and after observing other suspicious conduct by Orellano-Tiznado and his passenger Pedro Lopez, they followed the Jeep. Detectives also saw a minivan driven by Christina Moreno following the Jeep. After observing additional suspicious behavior, including the fact that the vehicles were being driven in tandem and in excess of the speed limit, officers stopped them both. Moreno consented to the search of the minivan; in it officers found 147.6 pounds of marijuana wrapped in thirty-three bundles.

¶3 Orellano-Tiznado, Lopez and Moreno were arrested. Searching Orellano-Tiznado incident to that arrest, detectives found $1,719 in cash, two cellular telephones, and a receipt from the retail store for items found in the minivan. The Jeep and the minivan were taken to the Sierra Vista Department of Public Safety (DPS) storage lot. Officers conducted an inventory search of both vehicles. In the Jeep they found a drug ledger, which contained numbers that matched those inscribed on bundles of marijuana found in the minivan. The retail store's surveillance video recordings provided additional evidence of suspicious conduct by Orellano-Tiznado, Lopez and Moreno from earlier that afternoon, before Orellano-Tiznado left in the Jeep.

¶4 Orellano-Tiznado was charged with and convicted of the offenses described above. Before trial, he filed a motion to suppress the inventory search of the Jeep, arguing it had been unconstitutional because it "was not conducted pursuant to a valid exception" to the requirement that a search be conducted pursuant to a warrant. He asserted the search was not a permissible inventory search because it had not been conducted in accordance with "standardized criteria or established routine," as required by the Supreme Court in *Florida v. Wells*, 495 U.S. 1, 4 (1990). He argued officers had used the inventory search as a ruse for finding evidence of a crime, contrary to the restrictions on inventory searches specified in *Wells*, rather than for a legitimate governmental interest conducted pursuant to a valid law enforcement policy.

¶5 Although the trial court agreed with the state the motion had not been filed timely, it nevertheless conducted an evidentiary hearing the first day of trial. After the hearing, the court found the state had sustained its burden of establishing the inventory

search had been conducted in accordance with police procedures. In reviewing the court's ruling, "we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). To the extent the court's ruling involves a discretionary issue, we defer to the trial court, but we review constitutional and legal issues de novo. *See State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶6 Inventory searches are a well-defined exception to the Fourth Amendment's probable cause and warrant requirements. *State v. Organ*, 225 Ariz. 43, ¶ 20, 234 P.3d 611, 616 (App. 2010). "An inventory search of a vehicle is valid if two requirements are met: (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.* ¶ 21. "[A]n inventory search conducted pursuant to standard procedures is presumptively . . . conducted in good faith and therefore reasonable." *Id.*; *see also Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (same); *South Dakota v. Opperman*, 428 U.S. 364, 368-70 (1976) (warrantless inventory search of impounded vehicle appropriate if routine and not pretext for concealing investigatory motive). The primary purposes of an inventory search are "the protection of the owner's property and 'the protection of the police against claims or disputes over lost or stolen property.'" *State v. Floyd*, 120 Ariz. 358, 361, 586 P.2d 203, 206 (App. 1978), *quoting Opperman*, 428 U.S. at 369. And, as the Supreme Court observed in *Wells*, the reason an inventory search must be conducted in a manner consistent with

standardized criteria is to prevent the use of such searches as "a ruse for a general rummaging in order to discover incriminating evidence." 495 U.S. at 4.

¶7 Here, Douglas police detective Roger Rodriguez testified at the suppression hearing that he had been working as part of the State Gang Task Force when he came into contact with the Jeep Orellano-Tiznado had been driving and the minivan driven by Moreno. Rodriguez explained the two vehicles had been stopped after officers had observed the individuals engaged in suspicious behavior at a retail store parking lot in Douglas; the Jeep was stopped by Detective Paul Barco and secured by Bisbee police officers. Rodriguez testified he had arrested Moreno for possession of marijuana for sale and had reason to believe she had acted as an accomplice or coconspirator with Orellano-Tiznado and Lopez, who were arrested on the same charges. The two vehicles were taken to the DPS Office in Sierra Vista.

¶8 Rodriguez further testified he had been an employee of the Douglas police department for eleven years and on the gang task force since 2005. The prosecutor then asked him, "Do you believe you are reasonably familiar with the policies of the Department of Public Safety with regard to vehicle impounds and vehicle forfeitures?" Rodriguez responded he was. The prosecutor then asked if there were policies regarding vehicle impounds and forfeitures and Rodriguez responded there were and that these policies were combined together as one policy. When asked to summarize that policy, Rodriguez explained, the vehicle is "supposed to be cleaned out and documented—all items documented. . . . To show what was in the vehicle." The primary purpose of the search is not to look for evidence, he said, but to take an "inventory of the property inside

the vehicle." The prosecutor then asked Rodriguez, "Do you and your fellow officers always follow that policy when securing a vehicle in the impound yard?" Rodriguez answered, "Yes."

¶9 Rodriguez explained further that Barco had conducted the inventory search of the Jeep and that Rodriguez had read Barco's report and other reports regarding the case. Based on that information, he knew that a piece of paper that looked like a part of a ledger had been recovered from the vehicle; it contained "a number and certain weights, consistent with items found of contraband inside the gray mini-van." Rodriguez took photographs of that piece of paper as it appeared "inside the cubby on the driver's side of the Jeep Cherokee," and unfolded, outside the "cubby."

¶10 During cross-examination, Rodriguez stated Barco had "clean[ed] out the vehicle per policy." Although Rodriguez admitted he did not know the policies "[v]erbatim," he stated that officers "must take everything out of the vehicle before it is put into any yard authorized by the Department of Public Safety for storage." At this point, Rodriguez identified from his file a copy of a policy, which the prosecutor handed to defense counsel, explaining he had not provided counsel with a copy of the policy earlier because of the untimeliness of the motion to suppress and because Orellano-Tiznado had not requested it before the hearing. Rodriguez conceded that, until the day before, he had not read the policy since five years earlier and that he did not know whether Barco knew what the policy was. But, when asked whether he knew if officers had followed the policy, he responded, "Whether they know the policy—we do that same thing every day on every arrest we make, on every seizure." Presumably referring to his

training period, he added, "We do what we were taught back when we were on FTO, which is per policy."

¶11 Rodriguez subsequently acknowledged, however, that the policy he had reviewed and brought with him to the hearing pertained to seizures, not inventory searches. Defense counsel then asked Rodriguez to explain the correct policy. Rodriguez again stated that officers are required to remove everything from a vehicle and "document it, before any vehicle is put into an authorized yard of the Arizona Department of Public Safety." He admitted he did not know whether Barco knew and had followed the policy in conducting the inventory search. But he insisted everything removed had been documented, either in a report or the inventory sheet.

¶12 On redirect examination, Rodriguez testified he was responsible for the assignment of duties of other officers in the investigation and that Barco had told him he was going to inventory the Jeep for seizure or for impound, all of which Rodriguez confirmed in the written report he had prepared and to which he referred while testifying. The report, he said, reflected that Barco had told Rodriguez he had processed the Jeep, "clearing out the vehicle of all property in accordance with all the DPS policy related to vehicle forfeiture." Rodriguez added that he had directed Barco to do this, which was why Rodriguez had put in his report that Barco had inventoried the car consistent with DPS policy. And, Rodriguez added, if the vehicle had not been seized for forfeiture, it would have been searched in any event, whether Orellano-Tiznado had been arrested or not, if it was to be placed in the impound yard for any reason.

¶13 The trial court denied the motion to suppress after the hearing, finding the state had sustained its burden of establishing the search had been lawful and in accordance with police procedures. And, the court commented, if the motion had been filed timely, the state would have had sufficient time to respond and might have been able to produce the written policy and procedures related to inventory searches. The court made clear that, notwithstanding the absence of the written policy, the officers had acted in a manner consistent with the accepted policies and procedures.

¶14 Orellano-Tiznado contends, as he did below, that the state did not sustain its burden of establishing law enforcement officers had followed specific procedures for obtaining an inventory of impounded vehicles. He insists the record is "devoid of any evidence" in this regard and asserts Rodriguez did not know what the policy was, could not say whether Barco knew what the policy was, and could not say whether Barco had followed the policy. He also contends the trial court applied the wrong standard in ruling on the motion based on its comment that the officers had believed they were following the correct policy for inventory searches. This, he asserts, is not the standard. Instead, he argues the state was required to show what the policy consisted of, with specificity, and that it had been followed here.

¶15 At the outset, we reject Orellano-Tiznado's suggestion that a trial court may not consider officers' subjective beliefs that they were following required policy as part of the inquiry here and that the court in this case applied the wrong standard by considering these beliefs. We agree with Orellano-Tiznado that, in general, "the inquiry is whether the inventory search was reasonable under objective standards" and officers'

"subjective motives" need not be "'simplistically pure,'" *Organ*, 225 Ariz. 43, ¶ 25, 234 P.3d at 617, *quoting In re 1965 Econoline*, 109 Ariz. 433, 435, 511 P.2d 168, 170 (1973). But, that does not mean that, in deciding whether an inventory search was used as a subterfuge for conducting a search without a warrant, a court may never consider an officer's subjective, good-faith belief that an inventory search had complied with policy requirements. *See id*. Whether officers subjectively believed they were following required protocol can be relevant to the question whether the search was conducted in good faith and was reasonable. If officers do, in fact, conduct a search consistent with specified policies, the search is one presumptively undertaken in good faith and therefore reasonable. *Id.* ¶ 21. We disagree with Orellano-Tiznado that the court's comment that the officers thought they were proceeding in a manner consistent with DPS policies reflected a misunderstanding of the proper inquiry. Not only was that consideration proper, the court's other comments establish it was aware of and applied the appropriate standard. Indeed, the court stated it had reviewed another superior court's decision that defense counsel had provided to the court because it "outlines the law very well."

¶16 As Orellano-Tiznado conceded at the hearing, he did not dispute that officers had lawful possession of the vehicle, the first part of the test for a constitutional inventory search. *Organ*, 225 Ariz. 43, ¶ 21, 234 P.3d at 616. And the trial court found the state had sustained its burden of establishing a policy existed for taking an inventory of property in vehicles impounded on a DPS lot, whether for impound or forfeiture, and that the officers had followed that policy here, noting these were experienced officers who "did what they were supposed to do . . . ." The court added, "I don't have any

inclination, anything that tells me Detective Barco, Detective Rodriguez were on a fishing expedition to dig up more." These findings related to the second part of the test: that the search had been conducted in good faith and not as a subterfuge for a warrantless search. *Id*.

¶17 The trial court's findings were supported by the testimony of an experienced officer, trained in the policies for conducting an inventory of property in a car impounded for forfeiture or otherwise secured on a DPS impound lot. Rodriguez articulated that policy, albeit not verbatim and without the benefit of the correct written policy, explaining officers were to clear the vehicle of all items and make a record of what those items were. His testimony established that he supervised Barco and directed him to conduct an inventory search of the Jeep consistent with DPS policies and that Barco had reported having done just that. And his testimony was confirmed by his report. Although not all of the items seized, including the ledger, were included on the inventory sheet, as is appropriate for items to be used as evidence, they were photographed and documented in Rodriguez's reports. As the state correctly points out, the fact the ledger was not included on the inventory sheet did not render the search unconstitutional. *Organ*, 225 Ariz. 43, ¶ 24, 234 P.3d at 616.

¶18 The record supports the trial court's finding that the search had not been conducted as a ruse for finding evidence. Indeed, Rodriguez testified to the contrary, stating the purpose of the inventory search was not to find evidence of a crime but to remove all items from the vehicle, documenting and securing them. Based on the record

before us, we cannot say the court abused its discretion by denying the motion to suppress evidence.

¶19 Orellano-Tiznado also contends his conviction and sentence for possession of marijuana for sale must be vacated because it is a lesser-included offense of transportation of marijuana for sale. The state concedes this was fundamental, prejudicial error and was not waived by Orellano-Tiznado's failure to object below. *See State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002); *see also State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). We agree. *See State v. Cheramie*, 218 Ariz. 447, ¶¶ 9-11, 189 P.3d 374, 375-76 (2008); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 21, 965 P.2d 94, 99 (App. 1998).

¶20 We vacate Orellano-Tiznado's conviction for possession of marijuana for sale and the sentence imposed, but affirm his remaining convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.