IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee,*

*v.*

TERRY JOHN FILBY,
*Appellant*.

No. 2 CA-CR 2015-0403
Filed April 14, 2017

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

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Appeal from the Superior Court in Pima County
No. CR20103545001
The Honorable Danelle B. Liwski, Judge

**REVERSED IN PART; VACATED IN PART AND REMANDED**

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COUNSEL

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**MEMORANDUM DECISION**

Presiding Judge Howard authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Vásquez concurred.

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H O W A R D, Presiding Judge:

**¶1** Terry Filby appeals his convictions and sentences for possession of methamphetamine for sale and possession of drug paraphernalia. Filby contends a Pima Community College (PCC) police officer violated his constitutional rights by performing an inventory search without a standardized procedure.[1] Because we conclude that the PCC Department of Public Safety's (DPS) procedure pertaining to inventory searches was not sufficient to adequately guide the officer, we reverse the trial court's suppression ruling and vacate Filby's convictions.

**Factual and Procedural Background**

**¶2** In reviewing a motion to suppress, "we consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to sustaining the . . . ruling." *State v. Driscoll*, 238 Ariz. 432, ¶ 2, 361 P.3d 961, 962 (App. 2015), *quoting State v. Gonzalez*, 235 Ariz. 212, ¶ 12, 330 P.3d 969, 970 (App. 2014) (alteration in *Driscoll*).

**¶3** While patrolling the PCC campus, a PCC DPS officer noticed a truck parked incorrectly, with "[o]ne of the front tires of the vehicle . . . actually parked into the next parking space." The officer had begun writing a parking ticket when Filby, whom the officer had seen driving the vehicle earlier, returned to the vehicle. Filby approached the officer, who explained the parking violation and asked Filby "where the driver . . . of the vehicle was at." Filby told

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[1] Because we are vacating Filby's convictions and sentences based on the inadequacy of the inventory policy, we need not address Filby's other arguments on appeal.

the officer that his friend, D., was both the owner of the vehicle and the driver, and that because D. was mad at Filby, he would not be returning. Because the officer had seen Filby driving the truck alone earlier, he asked Filby to have a seat and produce identification. At this point, Filby admitted to lying about the identity of the driver, and informed the officer that he did not have a valid driver's license.

**¶4** After the officer confirmed that Filby had a suspended license, the officer conducted a mandatory impound of the vehicle. A.R.S. § 28-3511(A)(1)(a). According to PCC DPS policy, officers were required to conduct an inventory search on all impounded vehicles as "a routine police procedure." While conducting an inventory search, the officer found a fanny pack underneath the driver's seat which contained a few small baggies and a tin which contained more baggies of a substance that appeared to the officer to be methamphetamine. As a result, the officer arrested Filby.

**¶5** Before trial, Filby moved to suppress the evidence obtained during the inventory search, arguing the officer had no reasonable suspicion for the stop, had violated Filby's *Miranda*[2] rights, had arrested and searched Filby without probable cause or warrant, and had conducted the inventory search as a pretext. The trial court conducted a hearing, where Filby additionally raised the argument that PCC DPS did not have a sufficiently defined policy regarding the scope of inventory searches, in particular that the policy provided "no clarity or any direction as to whether [an officer] can look in baggies, containers, [or] anything of that nature." The state responded to this argument by highlighting the officer's testimony that he had been trained to look in containers while performing inventory searches. The trial court denied the motion to suppress finding the inventory search was "appropriate" and "within policy."

**¶6** The case proceeded to trial, after which the jury found Filby guilty of possession of methamphetamine for sale and possession of drug paraphernalia. The trial court sentenced him to concurrent, presumptive prison terms, the longest of which was 15.75

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

years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

**Waiver**

**¶7** Preliminarily, the state argues that we need not address Filby's argument on the lack of a policy for inventory searches because Filby waived appellate review by failing to obtain a ruling on the argument below. "As a rule, an alleged error that is not objected to at trial will not be considered on appeal." *State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983). When a trial court has not expressly ruled on a motion, a defendant "has the responsibility of bringing [their arguments] to the court's attention and seeing that a record of the rulings makes its way to the reviewing court" in order to preserve appellate review. *Id.* But, if the record allows the appellate court to "be sure that the matter was 'brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived,'" then the court of appeals may consider the argument. *Id.*, *quoting State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975).

**¶8** At the suppression hearing, Filby argued the inventory search was improper because "there have to be specific procedures, policies and guidelines in place" and such procedures, policies, and guidelines were not specifically set forth. In advancing this argument, Filby cited *State v. Rojers*, 216 Ariz. 555, 169 P.3d 651 (App. 2007), and *Florida v. Wells*, 495 U.S. 1 (1990). Filby concluded that without a sufficient policy the officer engaged in "random rummaging . . . which is exactly what's prohibited . . . [by the] Fourth Amendment." The court then expressly ruled on Filby's motion to suppress, and noted that it believed the inventory search was proper. Thus, we have before us a clear record of Filby's arguments, and an implicit rejection of those arguments by the trial court.

**¶9** But the state contends that Filby's waiver of this argument is evidenced by the fact that the trial court did not squarely rule on the propriety of the PCC DPS policy. But the state has only provided authority for waiver when the argument was not raised below, such as *State v. Estrella*, 230 Ariz. 401, ¶ 9, 286 P.3d 150, 152 (App. 2012), and *Rojers*, 216 Ariz. 555, ¶ 13, 169 P.3d at 654, or when a trial court did not rule on a defendant's motion, such as *Lujan*, 136

Ariz. at 328, 666 P.2d at 73. Filby clearly raised the argument below, and the court ruled on Filby's motion to suppress, finding the inventory search had been "perfectly within policy," thereby preserving it for appellate review. *See Lujan*, 136 Ariz. at 328, 666 P.2d at 73 ("In cases involving motions in limine properly made and ruled upon by the trial court . . . we have consistently held that the objection raised in the motion is preserved for purposes of appeal . . . ."); *see also State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 22, 154 P.3d 1046, 1053 (App. 2007) (court's proceeding to trial without ruling on motion to dismiss was implicit denial of motion); *State v. West*, 173 Ariz. 602, 611, 845 P.2d 1097, 1106 (App. 1992) (court's proceeding to trial and denial of defendant's motion for judgment of acquittal was implicit denial of state's motion to dismiss count). We are unaware of any authority requiring a party to reassert a properly presented argument in a motion when a court does not make an explicit finding on that argument in ruling on the motion. We therefore reject the state's waiver argument.

**Inventory Search**

**¶10** Filby argues on appeal that the trial court erred in denying his motion to dismiss because PCC DPS does not have sufficient procedures pertaining to inventory searches. "We review a denial of a motion to suppress for an abuse of discretion, but review constitutional issues de novo." *Driscoll*, 238 Ariz. 432, ¶ 2, 361 P.3d at 962, *quoting Gonzalez*, 235 Ariz. 212, ¶ 7, 330 P.3d at 971. We also review the court's "legal conclusions de novo." *State v. Peterson*, 228 Ariz. 405, ¶ 6, 267 P.3d 1197, 1200 (App. 2011). "The [s]tate has the burden of proving the legality of a warrantless search." *State v. Valle*, 196 Ariz. 324, ¶ 19, 996 P.2d 125, 131 (App. 2000).

**¶11** When impounding a vehicle, law enforcement officers may conduct an inventory search without first establishing probable cause or obtaining a warrant. *State v. Acosta*, 166 Ariz. 254, 259, 801 P.2d 489, 494 (App. 1990). In order for inventory searches to be valid, "they must not be a pretext for a search for evidence, . . . they must occur according to standardized procedures, and . . . evidence of these standardized procedures must be in the record." *Rojers*, 216 Ariz. 555, ¶ 20, 169 P.3d at 655. In particular, the constitution requires a law enforcement agency to have "standardized criteria" or an

"established routine" about whether an officer should open "containers found during inventory searches." *Wells*, 495 U.S. at 4.

**¶12** At the suppression hearing, the state submitted the following PCC DPS policy pertaining to inventory searches:

> Any lawfully impounded vehicle, or a vehicle removed from the street and placed in police custody shall have its contents inventoried for purposes of police management. Any evidence or contraband found during the inventory may be used to formulate probable cause for a subsequent search or arrest. The inventory will be a routine police procedure.
>
> The Supplemental Vehicle Report will be used to document all vehicle inventories.

A "Supplemental Vehicle Report" form does not appear in the record on appeal, but the officer did create a written inventory, in the form of a "Basic Case – Property Report." The officer admitted there was no express written PCC DPS policy pertaining to the opening of containers. Thus, the PCC DPS inventory search policy, on its own, is constitutionally deficient in guiding officer conduct "with respect to the opening of closed containers encountered during an inventory search." *Wells*, 495 U.S. at 4-5.

**¶13** The state argues in response that the officer's training constituted a constitutionally sufficient "established routine." *See Wells*, 495 U.S. at 4. The officer in this case did clarify that he had been trained to search inside containers while conducting an inventory search, specifically explaining that he had been trained to "search for valuables, to search inside a container, to search for any items of value inside the container" which would include "backpacks and tins." The state sought clarification that this training had been provided during "field training or in the academy or anything," and the officer acknowledged he had received training, but did not clarify where he had received such training.

**¶14** The state cites *State v. West*, 176 Ariz. 432, 862 P.2d 192 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 64 n.7, 961 P.2d 1006, 1012 n.7 (1998), to support its argument that the officer's testimony in this case was sufficient to demonstrate an established routine. In *West*, our supreme court considered whether the state had met its burden to "show that Hodgkins[, Illinois] police policy was to inventory the contents of closed containers." *Id.* at 200, 892 P.2d at 440. The court found that West had waived this argument because he asserted it for the first time on appeal, but the court also considered the merits of the argument, finding that the testifying officer had provided sufficient evidence of a constitutional container search policy. *Id.* at 200-01, 892 P.2d at 440-41. Specifically, the officer testified, "All property that comes into our possession from any vehicles that we are going to take and separate from the driver or owner has to be inventoried, *the contents therein have to be listed*, and any pre-existing damage to the car noted on the towing." *Id.* at 201, 892 P.2d at 441 (emphasis in *West*). The supreme court expressly found that, because the officer had testified that Hodgkins' police policy was to list all property removed from a vehicle, and then list the contents found within that property, the state met its burden under *Wells*. *Id.*

**¶15** *West* is distinguishable from this case. Although the officer here noted he had received training, he did not testify explicitly about PCC DPS policy or any established routine among PCC DPS officers about inventorying closed containers, other than to concede that the written policy did not mention closed containers. The officer in *West* testified about his understanding of his "department's policy for inventory searches," *id.*, while here, the officer testified about his personal practice to look inside closed containers, and how he had been trained by unknown sources. Throughout his testimony, the officer here testified in the first person about his training, his experience, and his established practice.

**¶16** The state further asserts that the officer's training "necessarily involved other officers" and that "[a]cademy training would evince formal instruction on a standard practice among numerous law enforcement agencies" which therefore "would evince a standard practice among his fellow officers at [PCC DPS]." But the

only testimony as to how the training was provided, or whether it constituted a standard policy, was that the officer had received the training in the "field," in the "academy," "or anything." The record does not indicate what the officer's "field training" was or whether it was consistent with departmental policy. And "or anything" could denote an unlimited number of sources outside standard PCC DPS policy. Neither indicates whether the officer's training either applied to other PCC DPS officers or whether it sufficiently restricted his discretion to prevent "inventory searches [from being] turned into 'a purposeful and general means of discovering evidence of crime.'" *Wells*, 495 U.S. at 4, *quoting Colorado v. Bertine*, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring).

**¶17** As we noted in *Rojers*, an inventory search is constitutional not only when it is based on a standardized procedure, but also when that procedure is adequately presented in the record. 216 Ariz. 555, ¶ 20, 169 P.3d at 655. We cannot say that the state met its burden to show that the officer's training constituted a "standardized criteria" or "established routine." *Wells*, 495 U.S. at 4; *Valle*, 196 Ariz. 324, ¶ 19, 996 P.2d at 131. Therefore, the trial court erred by not suppressing the evidence.

**Disposition**

**¶18** We reverse the trial court's ruling on the motion to suppress, vacate Filby's convictions and sentences, and remand the case for proceedings consistent with this decision.