DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

LATONIO ROSS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D19-2061

June 18, 2021

Appeal from the Circuit Court for Charlotte County; George Richards, Judge.

Howard L. Dimmig, II, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and David Campbell, Assistant Attorney General, Tampa, for Appellee.

LUCAS, Judge.

Latonio Ross entered a plea agreement in which he pled guilty to one count of possession of cocaine with intent to sell or deliver, possession of paraphernalia, possession of a controlled substance, and driving while license suspended or revoked. All of the evidence of his drug-related offenses was obtained following the impoundment and inventory search of his car. The circuit court denied his motion to suppress, and now Mr. Ross seeks review of that order in this court.[1] Because there was no record evidence of a standard or directive governing the impoundment of Mr. Ross's vehicle, we reverse.

While driving on road patrol early one afternoon in March 2018, Charlotte County Sheriff's Deputy Matt Hauschild was "running tags" on the vehicles he happened upon. One of the cars he checked was Mr. Ross's Sunbird. Upon running the Sunbird's

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[1] The circuit court did not rule that its denial of Mr. Ross's suppression motion was dispositive; but because Mr. Ross's appeal is confined to the three drug-related counts, that is not an impediment to our review in this case. *See, e.g.*, *Sommers v. State*, 404 So. 2d 366, 369 n.2 (Fla. 2d DCA 1981) ("According to [*Brown v. State*, 376 So. 2d 382 (Fla. 1979)], orders denying the suppression of contraband in cases charging only possession will be presumptively dispositive for purposes of appeal . . . .").

information, Deputy Hauschild's computer indicated that the tag was invalid, and so Deputy Hauschild conducted a traffic stop.

Mr. Ross drove his car into a nearby public parking lot in Bayshore Live Oak Park. Deputy Hauschild followed him. It was approximately 1:41 in the afternoon. After informing Mr. Ross why he was pulled over, Mr. Ross admitted that his driver's license was not valid but stated he had "been working on trying to get his license fixed." Shortly after that, Deputy Hauschild informed Mr. Ross he was placing him under arrest for driving while his license was suspended.

It was at that point that the present controversy—whether the sheriff's deputy could lawfully seize Mr. Ross's Sunbird—arose. Mr. Ross had driven into a public park. He had locked his car. When Deputy Hauschild asked for consent to search the vehicle, Mr. Ross declined his request. The State presented no evidence that this public park was in a high-crime area or was known for vehicle theft or vandalism or even what its hours of operation were. To the contrary, when the court posed a hypothetical question of whether someone could simply leave their car parked in the lot overnight,

Deputy Hauschild replied, "That has happened on many occasions, yes."

Nevertheless, Deputy Hauschild informed Mr. Ross that his car would have to be towed for impoundment. He would later justify his decision to impound the car on his generalized concern that he or the sheriff's department might be held liable if "something" were to happen to the car. But on cross-examination, Deputy Hauschild admitted that in a prior deposition he had testified that "no matter what happened" he was going to be calling a tow truck to impound Mr. Ross's car. In response to the deputy's stated intent of towing his car, Mr. Ross asked if he could call someone to drive the car home for him. Deputy Hauschild agreed, but after fifteen or twenty minutes, when Mr. Ross was apparently unable to get anyone to help him, Deputy Hauschild proceeded to impound the vehicle. At the deputy's direction, Mr. Ross surrendered his keys. Deputy Hauschild then conducted an inventory search and discovered the contraband that gave rise to the first three counts of his prosecution.

The State maintained that the impoundment and inventory search of Mr. Ross's property was pursuant to General Order

Number 10.08 of the Charlotte County Sheriff's Office. Deputy Hauschild read the pertinent parts of that General Order into the record:

> The purpose and scope of vehicle inventories. [In] the course of duty on a day-to-day basis it is necessary for the protection of the member of the sheriff's office to inventory vehicles being towed or stored. Vehicles which are towed as a result of a crash, abandonment, seizure, incident to arrest or otherwise detained in storage and not in a possession of the owner become the responsibility of the impounding member. The member is liable for the vehicle, the parts and contents. . . .
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> Towing and impounding a vehicle following an arrest[.] [W]hen the operator of a vehicle is arrested in a vehicle or in the immediate vicinity of a vehicle and it's determined that the vehicle is to be impounded for safekeeping.

The General Order also describes what contents and which parts of the vehicle should be inventoried once a vehicle is impounded.[2] But with respect to the initial decision that precipitates an inventory search—to impound or not to impound—the State put forward no evidence of any standard or criteria which answers that question. Other than the deputy's professed apprehension that "something" could happen to a car parked in a public park's lot "in broad daylight," nothing in this record informs

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[2] Basically, everything gets searched.

us how the deputy was supposed to make the vital, initial decision to seize Mr. Ross's car.

All of which poses something of a problem.

"When reviewing a motion to suppress, the standard of review for the trial court's application of the law to its factual findings is de novo, but a reviewing court must defer to the factual findings of the trial court that are supported by competent, substantial evidence." *State v. Zachery*, 255 So. 3d 957, 960 (Fla. 2d DCA 2018) (quoting *Duke v. State*, 82 So. 3d 1155, 1157-58 (Fla. 2d DCA 2012)). Where, as here, the State has engaged in a warrantless search, the State bears the burden to show that the search was legal. *Brown v. State*, 313 So. 3d 848, 850 (Fla. 2d DCA 2021) (citing *Palmer v. State*, 753 So. 2d 679, 680 (Fla. 2d DCA 2000)).

Ordinarily, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). One such exception, the one we are called upon to consider here, is when it is necessary for a law enforcement officer to impound an

automobile and conduct an "inventory search" of its contents.[3] An inventory search, as the term implies, is simply a way of viewing and then cataloguing the items the law enforcement agency is seizing when it impounds the vehicle. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 811 n.1 (1996) ("An inventory search is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as might be kept in a towed car), and to protect against false claims of loss or damage."). As the Third District explained, "[a]n inventory search serves the needs of protection of the owner's property, protection of police against claims of lost or stolen property, and protection of police against potential danger from such things as explosives."

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[3] The Supreme Court also recognized an "automobile exception" during the Prohibition era. *See Carroll v. United States*, 267 U.S. 132, 155-56 (1925) ("The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the a[u]tomobile which he stops and seizes has contraband liquor therein which is being illegally transported."). The State does not argue that searching the interior of Mr. Ross's car was justified by any probable cause of suspected criminal activity. Nor has the State maintained that the search was justified as incident to Mr. Ross's arrest. *Accord Arizona v. Gant*, 556 U.S. 332, 339 (2009).

Rodriguez v. State, 702 So. 2d 259, 262 (Fla. 3d DCA 1997) (citing *Colorado v. Bertine*, 479 U.S. 367, 372 (1987)).

However, lest inventory searches devolve into "a subterfuge to conduct a warrantless search for incriminating evidence," *Williams v. State*, 903 So. 2d 974, 977 (Fla. 4th DCA 2005) (quoting *Caplan v. State*, 531 So. 2d 88, 90 (Fla. 1988)), the impoundment must be done in good faith and "in accordance with the governmental entity's standardized operating procedures," *id.* at 976-77 (citing *Beezley v. State*, 863 So. 2d 386 (Fla. 2d DCA 2003)); *see also South Dakota v. Opperman*, 428 U.S. 364, 374-75 (1976) (observing that the impoundment and search of an inebriated officer's car was justified in *Cady v. Dombrowski*, 413 U.S. 433, 436 (1973), because the *Cady* Court had "carefully noted that the protective search was carried out in accordance with *standard procedures* in the local police department, a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function" (citation omitted)).

In *Patty v. State*, 768 So. 2d 1126, 1127 (Fla. 2d DCA 2000), a City of Tampa police officer arrested a man with an outstanding warrant after the man parked a vehicle at a private residence, exited

the car, and locked it behind him. *Id.* After learning that the car was owned by someone else, he arrested the defendant, took the keys from him, and impounded the car, and a fellow officer conducted a search of the car's interior (which revealed a quantity of cocaine). *Id.* The State argued that the officers were justified impounding the car since the car did not belong to the defendant and it had been parked on private property. *Id.*

Reversing the trial court's denial of the defendant's motion to suppress, our court explained,

> Although the officers may have had good reasons to impound the vehicle, there is no evidence demonstrating that they adhered to standardized procedures when they impounded the vehicle and conducted the search. . . . [A]n impoundment and inventory search must be conducted according to standardized criteria. *See [Bertine*, 479 U.S. at 374 n.6] . . . . The State did not present evidence concerning such standardized criteria, and thus the trial court made no such finding. Based on the record before us, we are unable to determine whether the impoundment and search were consistent with standardized criteria of the Tampa Police Department. *Since these findings are crucial to determining the validity of the inventory search*, we reverse the trial court's denial of Patty's motion to suppress the cocaine, and direct the trial court to enter an order granting the motion to suppress.

Id. at 1127-28 (emphasis added).

As is clear from our case law, a law enforcement agency must show that it is operating under a standard of some sort—that is, a directive, a guidepost, a benchmark, a criteria—that informs and potentially curtails the exercise of an officer's discretion before a law enforcement officer can impound a vehicle and conduct an inventory search. And since the inventory search is a kind of warrantless search, it is the State's burden to put evidence of that standard before the court. *See Badkey v. State*, 336 So. 2d 711, 711 (Fla. 4th DCA 1976) (concluding that trial court erred in denying motion to suppress where "the State failed to meet its burden of proof in showing the constitutional validity of [the inventory] search").

In the case at bar, the State failed to present any evidence that Deputy Hauschild was acting in accordance with any established governing standard when he decided to impound Mr. Ross's car—or that such a standard even existed. And given the deputy's admission that he intended to impound Mr. Ross's car "no matter what," it cannot be said that a standardized criteria guided his

confiscation and subsequent search of Mr. Ross's property.[4] The facts of this case make the absence of a standard all the more glaring: an operable car was parked in the early afternoon in a parking space at a public park where, apparently, others had left cars overnight "all the time," and the deputy impounding the car was unable to articulate any basis for his concern that "something" (whatever it might be) could happen if the car was left in the park while Mr. Ross was booked.

The circuit court determined that there was no indication of bad faith or pretext and that the impoundment and inventory search were "due to department policy." But as in *Patty*, 768 So. 2d

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[4] The General Order's statement (as recounted by Deputy Hauschild), "when . . . it's determined that the vehicle is to be impounded for safekeeping," cannot credibly be likened to a "standardized criteria" because it begs the question: how is that determination to be made? Unless one accepts the notion that a law enforcement officer's unfettered discretion somehow constitutes a "standard," but that proposition does not align with what the Supreme Court has held the inventory search exception requires. *Accord Bertine*, 479 U.S. at 376 n.7 (recounting the Boulder Police Department's procedures and standardized criteria for impounding a vehicle and observing, "[n]ot only do *such conditions circumscribe the discretion of individual officers*, but they also protect the vehicle and its contents and minimize claims of property loss" (emphasis added)).

at 1127-28, there was no competent, substantial evidence before the court as to what that policy was. At most, we can glean broadly stated criteria from General Order 10.08 regarding what items may be searched in the course of an inventory search; but there is nothing in this record that tells us what criteria guided the deputy's initial decision to impound this vehicle.

Our dissenting colleague is untroubled by these shortcomings.[5] While insisting that the deputy must surely have been acting in accordance with General Order 10.08's standard—whatever that standard was—he acknowledges that "because the order itself is not included in the record on appeal, this court's review is limited to those portions of General Order 10.08 which Deputy Hauschild read into the record during the suppression

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[5] To the contrary, the dissent reads our opinion as having expanded the rights of defendants under the Fourth Amendment, so that an arresting officer must now "offer an arrested driver an alternative to towing and impounding the car" before taking custody of a vehicle. We can dispense with that concern succinctly: we have made no new right because we said no such thing. Our holding turns on the State's failure to proffer standardized criteria for impounding vehicles when an owner is arrested, which is what the Fourth Amendment—as interpreted under settled state and federal law—requires.

hearing."[6] There was no standard or criteria for impoundment in anything Deputy Hauschild read. Like the State, the dissent is unable to tell us what written (or, for that matter, unwritten) standardized criteria Deputy Hauschild was operating under—unless we are prepared to hold that an individuated, inarticulate, ineluctable apprehension somehow constitutes a law enforcement agency's "standard." We think the Supreme Court had something more in mind when it tethered the State's discretion to impound vehicles incident to an arrest "to standardized criteria." *Bertine*, 479 U.S. at 376; *see also Beezley*, 863 So. 2d at 388; *Patty*, 768 So. 2d at 1127-28.

Determining when the State may lawfully impound private property is every bit as important as determining how it may

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[6] The parties (if not the dissent) were apparently satisfied with the record that has been presented. The State never sought to supplement the record on appeal. Nor, for that matter, did the State suggest the record was incomplete within its briefing or that there were other provisions in General Order 10.08 that would have supplemented what Deputy Hauschild read into the record or that the issue Mr. Ross in this appeal raises was unpreserved. The dissent is bothered by this (though the parties were not), apparently out of the dissent's concern that we may be unfairly "rewarding" Mr. Ross, whose constitutional rights were violated.

inventory the property it impounds, at least for purposes of the Fourth Amendment. We therefore reverse the denial of the motion to suppress and remand this case for the court to grant Mr. Ross's motion.

Reversed and remanded with instructions.

KHOUZAM, C.J., Concurs.

STARGEL, J., Dissents with separate opinion.

STARGEL, Judge, Dissenting.

Because the record reflects that the State impounded and conducted the inventory search of Mr. Ross's vehicle in accordance with the requirements of the Fourth Amendment, that competent, substantial evidence exists to support the circuit court's factual finding that the inventory search was conducted in accordance with the standardized criteria of General Order Number 10.08 of the Charlotte County Sheriff's Office, and that the actions were not a subterfuge for a criminal, investigatory search, I respectfully dissent.

While he was on road patrol, Deputy Matt Hauschild "ran" the tag on Mr. Ross's car and determined Mr. Ross's driver license was invalid. Deputy Hauschild then conducted a traffic stop, and Mr. Ross legally parked his car in a Bayshore Park parking lot. Following a conversation with Mr. Ross in which he admitted his driver's license was invalid, Deputy Hauschild arrested Mr. Ross. The propriety of the arrest is not at issue on appeal. On direct examination, Deputy Hauschild initially testified Mr. Ross had asked if he could call someone to pick up his car following his arrest. Deputy Hauschild told him he could call someone, but it would have to be in a timely fashion. After waiting fifteen to twenty minutes, and with Mr. Ross unable to reach anyone to pick up his car, Deputy Hauschild informed Mr. Ross that he was going to have to tow and impound the car. On cross-examination, defense counsel attempted to impeach Deputy Hauschild with an excerpt from the deputy's deposition where it appeared that he had stated he was going to have the car towed no matter what. Defense counsel then handed Deputy Hauschild a copy of the deposition excerpt, and upon reviewing the text of his deposition testimony, the deputy stated, "I don't remember saying no matter what

happened, but I clearly see on here that it says this; but I read over this deposition, and it says several things that I -- I don't -- but if that's what it says, then that's what I said."

On redirect, the State referenced another part of Deputy Hauschild's deposition where he was asked whether "anyone called to come retrieve the car for [Mr. Ross] or was the decision just made immediately you're going to tow the vehicle?" The deputy responded Mr. Ross told him that he did not have anyone to pick up the car. Deputy Hauschild then explained that during his deposition he backtracked on the statement that he was going to have the car towed no matter what by stating, "I retracted that, and I -- I believe I said -- at first I did ask him if he had anybody who could pick the vehicle up, and he said no. Said there was no one that could pick the vehicle up." Deputy Hauschild also testified during the suppression hearing that if Mr. Ross's car had been vandalized while left in the parking lot instead of being impounded, then the sheriff's office would be responsible for any damage to the car. Therefore, he impounded the car for safekeeping and conducted the inventory search. Both of these actions were conducted in accordance with department policy, General Order Number 10.08 of

the Charlotte County Sheriff's Office, which was entered into evidence.[7]

Notwithstanding the assertions by Mr. Ross and the majority, an arresting officer does not have to offer an arrested driver an alternative to towing and impounding the car, such as allowing Mr. Ross's car to remain in the Bayshore Park parking lot overnight. *See State v. Townsend*, 40 So. 3d 103, 105 (Fla. 2d DCA 2010) ("[A]n officer is not required to offer an arrested driver an alternative to impoundment, provided the officer is acting in good faith."). The majority question the deputy's professional apprehension that something could happen to a car parked in a public park's lot "in broad daylight" as though it would obviously be removed before dark or that there was no possibility that the car could remain there for days making it an obvious target for thieves or vandals. Furthermore, it is constitutionally permissible for department policy

[7] General Order 10.08 was admitted into evidence without objection. In fact, Mr. Ross did not raise any issue with the inventory search not being conducted pursuant to a standardized criteria during the hearing on his motion to suppress. During the hearing, Mr. Ross only argued the impounding was inappropriate because Deputy Hauschild should have allowed his legally parked car to remain in the parking lot following Mr. Ross's arrest.

to empower arresting officers with the discretion to either leave an arrestee's car in a public place or to impound the car and conduct the resulting inventory search. *Colorado v. Bertine*, 479 U.S. 367, 375 (1987) ("Nothing in *Opperman* or [*Illinois v.*] *Lafayette*[, 462 U.S. 640 (1983),] prohibits the exercise of police discretion 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."). This court is bound by the interpretations of the United States Supreme Court regarding search and seizure issues and cannot expand the rights of criminal defendants beyond those interpretations. Art. I, § 12, Fla. Const.; *Bernie v. State*, 524 So. 2d 988, 990-91 (Fla. 1988).

The safekeeping of an arrested individual's property is the traditional justification for allowing warrantless inventory searches. *Opperman*, 428 U.S. at 369-76. "The test is solely one of 'reasonableness.' The reasonableness of a purported inventory search is dependent upon it being a true good-faith inventory search and not a subterfuge for a criminal, investigatory search." *Rolling v. State*, 695 So. 2d 278, 294 (Fla. 1997). While the majority correctly note that inventory searches must be conducted in

accordance with a standardized procedure, this requirement has even been interpreted to allow the search to be conducted pursuant to an unwritten policy. *See State v. Reeves*, 587 So. 2d 649, 651 (Fla. 5th DCA 1991) (finding nothing in United States Supreme Court precedent that "requires that a standardized policy must be written").

The record contains competent, substantial evidence to support the circuit court's conclusion that the inventory search of Mr. Ross's car was not a subterfuge for a criminal, investigatory search. Deputy Hauschild testified that he acted in accordance with a standardized department policy, General Order 10.08.[8]

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[8] The majority asserts that the statement of "when . . . it's determined that the vehicle is to be impounded for safekeeping" as contained in General Order 10.08 effectively eviscerates the standardized nature of the order. However, this language just as easily could be accounting for circumstances contained in Provision C of the order which relates to when an arrestee calls someone to pick up the car which would result in a decision not to impound the car. The trial court had the benefit of reviewing the entire text of General Order 10.08, which includes Provision C, as the order was admitted into evidence. For some reason, General Order 10.08 was not included in the record on appeal for this court's review. The majority further asserts that "at most we can glean broadly stated criteria from General Order 10.08 regarding what items may be searched in the course of an inventory search" and that "there is nothing in this record that tells us what criteria guided the deputy's initial decision to impound the vehicle." However, because the

Unlike in *Patty*, the State introduced evidence of a standardized policy. The circuit court found that Deputy Hauschild had told Mr. Ross that his car would be impounded if no one could come and pick up the car and, most importantly, found that the inventory search had been conducted in accordance with department policy once Mr. Ross was unable to find someone to pick up his car.[9] Had

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order itself is not included in the record on appeal, this court's review is limited to those portions of General Order 10.08 which Deputy Hauschild read into the record during the suppression hearing. Thus, as it relates to the question of whether General Order 10.08 meets the constitutional requirements, this court should defer to the findings of the trial court, which had the benefit of reviewing the order in its entirety.

[9] Additionally, it is unclear what additional actions the State and circuit court could have undertaken to comply with this court's case law regarding investigatory searches. As opposed to the prosecution in *Patty v. State*, 768 So. 2d 1126 (Fla. 2d DCA 2000), and *Brown v. State*, 313 So. 3d 848 (Fla. 2d DCA 2021), the State did introduce evidence of a policy governing impounding and inventory searches, General Order 10.08. The circuit court then found the decisions to impound Mr. Ross's car and resulting inventory search were conducted in accordance with this policy. Mr. Ross did not attempt to argue during the hearing on his motion to suppress that General Order 10.08 was not a standardized policy or criteria for conducting a warrantless inventory search and, instead, focused on the propriety of impounding his car while it was legally parked in a public parking lot. By reversing the trial court, the majority appears to be rewarding Mr. Ross for his failure to ensure the record on appeal was accurately prepared and transmitted to include General Order 10.08. *See* Fla. R. App. P. 9.200(e); *Harrison v. Harrison*, 909 So. 2d 318, 319 (Fla. 2d DCA

Deputy Hauschild intended, from the outset, for the inventory search to be a subterfuge for an investigatory search then he would not have allowed Mr. Ross to attempt to procure someone to pick up the vehicle.

Furthermore, the decision to impound the car was reasonable under the circumstances. The circuit court also determined there was no showing of bad faith by Deputy Hauschild and the inventory search was not conducted as a pretext to conduct an exploratory search. The record does not support an assertion the circuit court erred in this factual finding. Deputy Hauschild was an experienced deputy who was able to judge the potential risk to Mr. Ross's car, and the sheriff's department was potentially liable for any damage to Mr. Ross's car had it remained in the parking lot following his

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2004) ("It is an elementary principle of appellate review that an appellate court must presume that a trial court's decision is correct unless the appellant provides the appellate court with a record that is sufficient to evaluate the appellant's contentions of error."). As such, the majority appear to be deciding the appeal based on an incomplete record. *See* Fla. R. App. P. 9.200(f)(2) ("No proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given."). At a minimum, I would order the record to be supplemented with the policy upon which the trial court based its decision prior to this court deciding the case on the merits.

arrest. The United States Supreme Court has made clear it is permissible for officers to have discretion in deciding whether to impound a car. Deputy Hauschild determined that Mr. Ross's car should be impounded for safekeeping and to protect the department from potential claims by Mr. Ross should any of his property be damaged or missing. There is nothing in the record to overcome the presumption that the circuit court's denial of Mr. Ross's motion to suppress was correct given that we are to interpret the evidence and reasonable inferences in a light most favorable to sustaining that ruling. *See Pilieci v. State*, 991 So. 2d 883, 893-94 (Fla. 2008).

Accordingly, I would affirm the circuit court's denial of Mr. Ross's motion to suppress.

Opinion subject to revision prior to official publication.