MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jesse Dillard Clark,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 28, 2022

Court of Appeals Case No. 22A-CR-932

Appeal from the Marion Superior Court

The Honorable Clayton A. Graham, Judge

Trial Court Case No. 49D33-2110-F6-31153

Friedlander, Senior Judge.

[1] In this appeal, we are asked to examine whether there was sufficient evidence to support an officer's warrantless inventory search of the vehicle driven by Jesse Dillard Clark. The court found the inventory search to be proper and admitted evidence found during the search. Clark appeals from his conviction after a bench trial of one count of Level 6 felony possession of a narcotic drug,[1] arguing that the trial court abused its discretion by admitting evidence found after the vehicle he had driven was impounded. We affirm.

Facts and Procedural History

[2] On October 8, 2021, Speedway Police Officers Robert Dine and Raymond Tice were dispatched after receiving a call from an employee of a Speedway Gas Station on West 16th Street in Indianapolis asking for a welfare check on a person located there. When Lieutenant Dine arrived, he observed a work truck, or one that was larger than a pickup truck, stopped partially in a parking space and partially "creating a problem with traffic and thoroughfare at the establishment." Tr. Vol. 2, p. 96. As it was situated, the truck was partially blocking the flow of traffic at the gas station in an area near the gas pumps. During the suppression hearing, Officer Tice described that gas station as "a very compact location, uh, with very little room." *Id.* at 14.

[1] Ind. Code §35-48-4-6(2014).

[3] Lieutenant Dine spoke to Clark, who was seated in the driver's seat of the truck, and described Clark's condition as follows:

> Mr. Clark was very lethargic, was going in and out – I don't want to say unconsciousness, but, well, commonly referred to as a nod, where it would appear as he was falling asleep and then if you could talk to him or touch him he would wake up for a short stint, but communication was hit-or-miss depending on what state he was in.
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> Mr. Clark was in a lackadaisical state, wouldn't say that he was unconscious, but was kind of fading in and out of a state of sleepiness, I would describe, and when I spoke to him he advised that his sugar was low.

Id. at 29, 93. Based on that information obtained by Lieutenant Dine, Officer Tice went into the gas station to purchase a soft drink for Clark while Lieutenant Dine radioed for medical responders to assist him with Clark.

[4] Medical responders arrived and conducted their examination of Clark. The medics told the officers that Clark was not experiencing a medical issue and that he had declined to accept further medical treatment. They told the officers that they believed that Clark was experiencing "some kind of a narcotic issue" involving Roxicodone. *Id.* at 38. After conferring, the officers determined that Clark was in no condition to safely operate a motor vehicle. They decided to detain Clark so that he could receive medical attention.

[5] After reaching the determination to immediately detain Clark, the officers next turned to securing Clark's property. It was their "custodial responsibility to

take care of his property, as well, and that being the vehicle, so we we're[sic] going to tow it." *Id.* at 30. They had learned by checking the truck's registration that Clark was not the owner.

[6] The Speedway Police Department adopted a "general order" as to the procedure to be used by officers when taking custody of vehicles. This general order requires an inventory of the property inside a towed vehicle as "a liability stance to protect the property of the people that we've taken into custody to ensure that their personal property is cared for and maintained." *Id.* at 31. Officers Dine and Tice recorded the various tools and items of personal property in the truck and its assorted external compartments and supplemented their report with photographs of the items in the truck.

[7] While looking inside the cab of the truck during the inventory, Lieutenant Dine discovered "a small plastic bag containing a tan, powdery substance" "in a cup holder positioned on the floor between the driver and passenger seat." *Id.* at 32. From Lieutenant Dine's training and experience, he believed the bag contained heroin. He took custody of the item and saw that it was a "bindle," or plastic bag that is tied in a knot if being transported. *Id.* at 32-33, 98. This bag, however, "was opened in nature, it was not knotted or tied, so it had been opened by someone." *Id.* at 98. Forensic testing revealed that the bag contained 0.8009 grams of fentanyl.

[8] The State charged Clark with one count of possession of a narcotic drug, after which he filed a motion to suppress. The trial court held a hearing on Clark's

motion and then denied it. In a subsequent hearing, the court gave a more thorough explanation of its ruling denying Clark's motion to suppress. At the beginning of Clark's bench trial, Clark reasserted his motion to suppress and requested that all of his prior arguments and briefing be incorporated in the trial record. At trial, the court admitted the evidence and found Clark guilty as charged. Clark was sentenced to 365 days in the county jail with 345 days suspended and 10 days credit for time served.

Discussion and Decision

Standard of Review

[9] Clark appeals, challenging the court's evidentiary ruling. When ruling on the admission of evidence at trial following the denial of a motion to suppress evidence, the trial court must consider the foundational evidence presented at trial and evidence from the suppression hearing favorable to the defendant only to the extent it is uncontradicted at trial. *Casillas, v. State*, 190 N.E.3d 1005, 1012 (Ind. Ct. App. 2022). As the trial court is in the best position to weigh the evidence and assess witness credibility, we review its ruling for an abuse of discretion. *Id.* An abuse of discretion will be found only if a ruling is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights. *Id.* The ultimate determination of the constitutionality of a search or seizure is a question of law subject to our de novo review. *Id.*

A. Fourth Amendment

[10] We begin with Clark's argument under the Fourth Amendment and in doing so set forth some general precepts about warrantless impoundment and inventory searches of vehicles.

> Both the Fourth Amendment and Article 1, Section 11 protect "[t]he right of the people to be secure in their persons, houses, papers, and effects" against unreasonable searches and seizures. U.S. CONST. amend. IV; IND. CONST. art. 1, § 11. Automobiles are among the "effects" protected by these provisions. *Brown v. State*, 653 N.E.2d 77, 79, 81 (Ind. 1995). Thus, when police impound a vehicle and inventory its contents, they effect a search and seizure, and both measures must be reasonable—that is, executed under a valid warrant or a recognized exception to the warrant requirement. *Taylor [v. State]*, 842 N.E.2d [327, [] 330 [(Ind. 2006)].
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> Although such discretionary impounds may be permissible as part of law enforcement's community-caretaking function, they require proof of, among other things, an established departmental procedure that authorized the impoundment. *Fair v. State*, 627 N.E.2d 427, 433 (Ind. 1993).

Wilford v. State, 50 N.E.3d 371, 374 (Ind. 2016).

[11] The decision in *Fair*, which was cited in *Wilford*, set out that (1) the test of constitutionality in inventory cases is reasonableness," and (2) "[i]n determining the reasonableness of an inventory search, courts must examine all the facts and circumstances of a case." 627 N.E.2d at 431. The two-step evaluation to reach a decision on the constitutionality of particular cases

involves (1) establishing the propriety of the impoundment, as the need for the inventory derives therefrom, and (2) determining whether the scope of the inventory that follows is appropriate. *Id.*

1. Impoundment

[12] Here, the court found that the impoundment leading to the inventory search was a valid exercise of the officers' community caretaking functions. *See* Tr. Vol. 2, p. 61. "In the interests of public safety and as part of what the Court has called 'community caretaking functions,' . . . automobiles are frequently taken into police custody." *Id.* at 431-32 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)). The *Fair* decision informed us that to demonstrate that an impoundment was proper under the community caretaking function, the State must establish: (1) "that the belief that the vehicle posed some threat or harm to the community or was itself imperiled was consistent with objective standards of sound policing," and (2) "that the decision to combat that threat by impoundment was in keeping with established departmental routine or regulation." 627 N.E.2d at 433.

[13] Here, Lieutenant Dine and Officer Tice concluded that the vehicle should be impounded or towed because it was their duty to do so to protect Clark's possessions as he was being immediately detained, and also because it is police policy "when a vehicle is parked in a hazardous way" "to remove the vehicle from that location." Tr. Vol. 2, p. 15. The officers' testimony established that Clark was a permissive driver of the vehicle stopped on gas station property and that the owner of the vehicle was not present. They further testified that the car

was not properly parked in a parking space at the gas station. The truck "was parked in a hazardous way" and was "creating a problem with traffic and thoroughfare at the establishment, the Speedway gas station." *Id.* at 15, 96. The officers also testified about their duty "to protect the property of the people we've taken into custody[2] to insure[sic] that their personal property is cared for and maintained." *Id.* at 31.

[14] Unlike the vehicle subject to an inventory search in *Taylor v. State*, 842 N.E.2d 327, 331 (Ind. 2006), where the impoundment was invalidated because "there is no evidence it poses a safety hazard or nuisance," in this case, the record establishes a safety hazard and a nuisance. Clark had no control over the gas station property, and Clark's immediate detention in the absence of the owner of the vehicle would have left the truck on private property where the public was invited, subjecting it to an unacceptable risk of theft or vandalism. *See Fair*, 627 N.E.2d at 434. We conclude that the impoundment was proper.

2. Established Departmental Routine or Regulation

[15] Clark says that the police "did not adhere to department or city regulations when impounding Clark's vehicle, which was parked on private property (a gas station)," and that "The State and its witnesses cited no specific ordinance

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[2] Clark was not arrested at that point, but was immediately detained. The detention and his physical condition at that time rendered him unable to protect his property. Though detention and custody are two different levels of contact with law enforcement requiring different levels of constitutional protections, here, Clark's detention presented the officers with the similar need to protect Clark's property and that of the truck's owner.

implicated by Clark's poor parking on a private property." Appellant's Br. pp. 9-10.

[16] At the hearing on Clark's motion to suppress, the State offered State's Exhibit 1, which was admitted in evidence without objection. State's Exhibit 1 is Speedway Police Department General Order Number 61.4.3, the pertinent part of which says the following:

> *Removal/Towing from Public/Private Property:*
> * * * *
> I. Any vehicle located on private property that is in violation of a Town of Speedway Ordinance may be removed by an officer. If a private property owner requests a vehicle be towed from their property, and the vehicle is not in violation of any Town of Speedway ordinance, state statute nor does it meet IC 9-22-1-18, the officer will advise the property owner that the Department will not remove the vehicles from the private property.

Exhibit Vol. I, p. 7, State's Exhibit 1.

[17] During Clark's argument in the hearing on the motion to suppress, he said, when arguing against the justification for the inventory search of the truck, that the officers did not "read the police procedures." Tr. Vol. 2, p. 51. Clark's counsel proceeded to argue as follows:

> Letter I, which is the one where it applies to private property. Now, I think this gas station would be private property. It's not a road, it's a parking lot. And Item I says, "*any vehicle located on private property that is in violation of a town of Speedway ordinance—" I'll get the—**that it violated [an] ordinance, I'll give 'em that,** maybe not parked right.* "—may be removed by an officer if a private

> property owner requests the vehicle to be towed from their property." So, they had to ask the property owner if they could tow it for it to be a proper community caretaking function reason to tow the car. And then, as Your Honor mentioned, the immediate detention would be another exception to probable cause required to arrest the client. Immediate detention has been written in the statutes in Indiana, it is Indiana Code 12-26-4-1, "a law enforcement officer having reasonable grounds to believe that an individual has a mental illness, is either dangerous or greatly disabled, and is in immediate need of hospitalization and treatment, may do the following," so, the State clearly has not met that (unintelligible) that the statute requires.

Id. at 52 (emphasis added).

[18] Additionally, in Clark's brief in support of his motion to suppress, with respect to Section I., Clark wrote, "subsection I of the second section of the towing policy indicates that police officer would have needed the tow to have been requested by the owner of the gas station before it could have been towed." Appellant's App. Vol. II, p. 68. The language of the General Order, however, limits an officer's ability to tow a vehicle at the request of a private property owner to only those instances where a vehicle is in violation of "any Town of Speedway Ordinance, state statute, or . . .IC 9-22-1-18." Exhibit Vol. I, p. 7, State's Exhibit 1.

[19] At trial before witnesses were sworn or evidence was heard, Clark's counsel renewed the argument against the admissibility of the fentanyl evidence saying, "I would just like to, um reiterate my suppression motion. . . I would ask that all of my arguments and the brief and at the hearing be incorporated into this

record of this trial. . . and I will be making continuing objections throughout." *Id.* at 75. On appeal, Clark argues in part that "[t]he State offered no evidence that Mr. Clark's vehicle, which was parked on private property, violated any ordinance." Appellant's Br. p. 7.

[20] We have observed that "incorporating by reference evidence presented in an earlier hearing" is allowable "when doing so would prevent redundancy. That is, courts allow it when it will minimize needless and time-consuming duplication of effort that results in nothing more than the presentation of evidence that is identical to or cumulative of evidence previously placed before the court in the same case." *Arms v. Arms*, 803 N.E.2d 1201, 1209-10 (Ind. Ct. App. 2004) (citing *Smith v. State*, 713 N.E.2d 338, 342 (Ind. Ct. App. 1999) (allowing incorporation by reference, at a bench trial, statements made at an earlier suppression hearing)), *trans. denied*. When doing so, however, Clark also reaped the benefit of the bad with the good.

[21] During the argument in the suppression hearing, Clark conceded that Clark's vehicle that was "not parked right" violated a Town of Speedway ordinance. Tr. Vol. 2, p. 52. He doubled down on that position by reiterating it through incorporation at trial. *See id.* at 75. We are presented with a situation where the State introduced evidence that the work truck was parked in such a way that it posed a hazard and there was no one there to secure it or drive it away given Clark's condition. Clark conceded that the way the truck was parked violated a town ordinance. Better practice would have called for the State to produce evidence of the specific ordinance violation. In this particular case, we find no

error in the State's failure to establish the ordinance violation in light of Clark's concession and incorporation of that argument at trial.

[22] Unlike in *Wilford*, where there was a "passing reference to 'our procedures in that situation,'" here, we have a written exhibit outlining the procedure for towing vehicles in the Town of Speedway, and the officers' testimony about the practices and procedures for towing vehicles that fall into their care. 50 N.E.3d at 377.[3]

[23] We find no violation of the Fourth Amendment in the impoundment and inventory of the vehicle Clark had driven. As a result, the court did not abuse its discretion in the admission of the evidence found during the inventory.

B. Article I, Section 11

[24] Clark argues that the State has waived any argument under the Indiana Constitution by failing to present a separate argument in its brief. *See* Reply Br. p. 10. There is, however, a marked judicial preference for deciding disputes on their merits and giving parties their day in court. *See Standard Lumber Co. of St. John, Inc v. Josevski*, 706 N.E.2d 1092, 1095 (Ind. Ct. App. 1999) (discussing default judgment). The State argues in its brief that the officers' decision to impound the vehicle was reasonable under both the Fourth Amendment and Article 1, Section 11, citing *Wilford*. *See* Appellee's Br. p. 16. Our Supreme

[3] We observe that there is no argument regarding the scope of the inventory search, so we need not address it.

Court concluded in *Wilford*, that though Article 1, Section 11 involves a separate constitutional analysis, that analysis similarly requires an examination of whether the impoundment and inventory are reasonable under the totality of the circumstances. 50 N.E.3d at 378. The *Wilford* Court found the outcome of their analyses under both constitutions was the same. *See id*.

[25] Likewise, we find that our separate analyses lead to the same conclusion. The officers' impoundment and inventory search of the truck were reasonable under the totality of the circumstances of this case. The court did not abuse its discretion by admitting the evidence discovered during the impoundment and inventory of the truck, as the impoundment and inventory were constitutionally proper.

Conclusion

[26] Based on the foregoing, we affirm the trial court's judgment.

[27] Judgment affirmed

Robb, J., and Brown, J., concur.