STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PORSHA MONIQUE TYLER,

Defendant-Appellant.

UNPUBLISHED
December 2, 2021

No. 353914
Macomb Circuit Court
LC No. 2019-001480-FH

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

SHAPIRO, J. (*dissenting*).

Defendant asserts that her trial counsel was ineffective when he failed to object to the warrantless search of her automobile that produced the sole evidence against her. The prosecution agrees that the only relevant exception to the warrant requirement is its claim that the search was an impoundment search[1] consistent with a standardized and constitutional police department policy limiting or at least guiding officers' discretion to impound. The majority concludes that counsel was not ineffective because a motion to exclude the evidence would have been futile. I disagree and so dissent. Rather than affirming, I would remand to the trial court for an evidentiary hearing to determine whether the decision to conduct an impoundment search of defendant's car was constitutional.[2] See *People v Blair*, 505 Mich 1012 (2020).[3]

[1] I use the term "impoundment search" because given the caselaw it is clear that the controlling question is not whether the police may conduct an "inventory search" of a vehicle that has been impounded. Rather the question in cases such as this is whether the decision to impound the car passes constitutional muster. As stated in *People v Krezen*, 427 Mich 681, 685; 397 NW2d 803 (1986), "[t]he true issue is whether the initial impoundment . . . was a constitutional violation."

[2] Defendant filed a timely motion for remand for this purpose and we denied that motion without prejudice.

[3] In *Blair*, the trial court held that the impoundment search was constitutional, a conclusion that this Court reversed after reviewing a video of the incident. See *People v Blair*, unpublished per

I. FACTS

Defendant Porsha Tyler and her fiancé went to a Cricket Wireless store in Warren. While there, defendant dropped her iPhone and left with a Cricket display phone to which the security tag was still attached. Cricket employees called the police. When defendant realized she did not have her iPhone she called its number, apparently in an attempt to locate it. An employee of Cricket answered the phone and told her the iPhone was at the store. Defendant said she would be returning for the phone and did, parking in the strip mall parking lot.

By the time defendant returned to the store—without the Cricket phone—the police were waiting for her and she was arrested for theft of the phone. The arrest occurred inside the store and defendant's person was properly searched at which time the keys to defendant's car was discovered. Defendant was then detained in a police car while an officer went to the parking lot looking for a car that fit the description of the one defendant had been driving. He located the car and discovered that the key fit its lock. During the search that followed the officer discovered and seized the Cricket phone;[4] he also searched defendant's jacket that was in the car and in its pocket found multiple fraudulent Pennsylvania drivers' licenses.

II. ANALYSIS

Defendant was originally charged with possessing two or more fraudulent licenses, larceny in a building and disturbing the peace. The latter two counts were dismissed by the prosecution leaving only the fraudulent license charge for trial. Absent the licenses discovered during the search of defendant's car, there would be no evidence to support the charge and the charge would have had to been dismissed. Thus, there can be no strategic reasons for counsel to have failed to move to suppress the evidence on Fourth Amendment ground. See *People v Hughes*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 338030); slip op at 4-6 ("[A] motion to suppress based on Fourth Amendment protections is one of the most common pretrial motions brought by criminal defendants," and failure to file such a motion when there is supporting authority is professional error).

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curiam opinion of the Court of Appeals, issued October 29, 2019 (Docket No. 347885). The Supreme Court, noting that the trial court had not been asked to review the videotape of the incident on which this Court relied, vacated our decision and remanded for an evidentiary hearing

> for the trial court to specifically address: (1) whether the [Deputy] who impounded the vehicle complied with the Sheriff's Department Policies and Procedures governing towing and impounding . . . , (2) whether the Deputy 'acted in bad faith or for the sole purpose of investigation,' *Colorado v Bertine*, 479 US 367; 107 S Ct 738; 93 L Ed 2d 739 (1987), and (3) if so, whether that renders the search unconstitutional under either the state or federal constitutions. [*Blair*, 505 Mich 1012.]

[4] Although the majority appears to conclude that the phone was sighted before the search began, the record is far from clear on that issue. There is no testimony as to which occurred first.

The majority concludes that the search was conducted pursuant to standardized and constitutional departmental procedure. I disagree as no such procedure was described or introduced into evidence. The entirety of the testimony regarding the decision to impound was the testimony of Officer Jannette who stated that she instructed two other officers "to conduct an inventory search of the vehicle . . . [and] to tow the vehicle." She was asked by the prosecution, "Is that common practice or not?" and she answered, "Yes, it's procedure per an arrest," offering no information as to the scope of the discretion given to officers by the policy and whether this "common practice" was in fact consistent with the actual policy. The prosecution does not cite any caselaw upholding an impoundment search on the basis of a policy that required that vehicles be impounded in all cases of arrest.[5] To the contrary, in *Colorado v Bertine*, 479 US 367, 375-376; 107 S Ct 738; 93 L Ed 2d 739 (1987), the United States Supreme Court held that the police's decision to impound the vehicle must be exercised pursuant to standardized criteria:

> Nothing in [the Court's prior caselaw] 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. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it.

When "the absence of clear guidance [in the police policy] cause[s] the [impoundment] decision to be entirely delegated to the discretion of the arresting officer," the resulting search of the vehicle is unconstitutional. *United States v Skinner*, 957 F Supp 228, 233 (MD Ga, 1997).

In sum, the decision to impound and search a vehicle must be based on standardized and reasonable police policies[6] that comply with the Fourth Amendment and each case must be considered in light of its particular facts.[7] The record in this case, however, is not adequate for us to make that determination because the written policy was not submitted in evidence and the officers were not questioned in regard to the standards set forth in that policy. The entirety of the

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[5] Indeed, were that the case, there would be no need to review any decisions to impound so long as an arrest had been made. See *Krezen*, 427 Mich at 685 ("If the departmental policy is indeed that all arrests require impoundment, regardless of the surrounding factual circumstances, there may well be situations in which an impoundment would violate the Fourth Amendment as an unreasonable seizure.").

[6] "Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that '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.' " *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009), quoting *Katz v United States*, 389 US 347, 357; 88 S Ct 507, 19 L Ed 2d 576 (1967).

[7] "[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case . . . ." *Cooper v California*, 386 US 58, 59; 87 S Ct 788; 17 L Ed 2d 730 (1967).

reference to the department's policy was that it was "procedure per an arrest." But the substance of that policy, its constitutionality and the officers' compliance with it has not been determined. See *People v Swenor*, ___ Mich App ___, ___ ; ___ NW2d ___ (2021) (Docket No. 352786) (FORT HOOD, P.J.); slip op at 9 ("[I]n order to establish that an inventory search is reasonable, the prosecution must establish that an inventory-search policy existed, all police officers were required to follow the policy, the officers actually complied with the policy and the search was not conducted in bad faith."). In addition, there is evidence suggesting that the search was an attempt to obtain evidence, i.e., to find the Cricket phone, and that the characterization of the search as an impoundment search was a subterfuge. Impounding a vehicle in order to conduct a search for the purpose of a criminal investigation is unconstitutional:

> The [United States Supreme] Court placed emphasis on the inventory search not being a pretext for the police to conduct an investigative search . . . The lack of an underlying motive or bad faith by the police in conducting an inventory search is an important aspect which courts must consider in determining the validity of such a search. . . . . [T]he critical factors which the court must evaluate are whether the police acted in accordance with departmental regulations when conducting the inventory search and that it was not done for criminal investigation. [*People v Toohey*, 438 Mich 265, 276-277; 475 NW2d 16 (1991).]

For these reasons, I dissent and would remand for an evidentiary hearing and retain jurisdiction.

/s/ Douglas B. Shapiro